

SENATE FINANCE COMMITTEE

April 25, 2022

1:04 p.m.

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CALL TO ORDER

Co-Chair Stedman called the Senate Finance Committee meeting to order at 1:04 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  
Senator David Wilson

MEMBERS ABSENT

None

ALSO PRESENT

Neil Steininger, Director, Office of Management and Budget, Office of the Governor; Alexei Painter, Director, Legislative Finance Division; Megan Wallace, Director, Legislative Legal Services, Alaska State Legislature; Kris Curtis, Legislative Auditor, Alaska Division of Legislative Audit.

SUMMARY

^CONSTITUTIONAL BUDGET RESERVE SWEEP/REVERSE SWEEP

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Co-Chair Stedman commented that the committee would have a discussion on the Constitutional Budget Reserve (CBR), which would also involve discussion of the reverse sweep. He reminded that the CBR was the state's main savings account and required a three-quarter vote of both bodies to access. He recounted that at the end of every fiscal year, the account balances were removed from a long list of

accounts and went into the CBR, after which there was a reversal on the first day of the fiscal year.

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NEIL STEININGER, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, OFFICE OF THE GOVERNOR, discussed the presentation "Constitutional Budget Reserve Sweep - Senate Finance Committee - April 25, 2022" (copy on file). He turned to slide 2, "Sweep Guidelines":

The Constitutional Budget Reserve Fund and its repayment "sweep" provision

The CBRF was established by constitutional amendment in 1990 in article IX, section 17 of the Alaska Constitution. There are four subsections to this constitutional amendment:

(a) Revenue into the CBRF - money received from the termination of administrative and judicial proceedings involving mineral revenues is deposited into the CBRF;

(b) Expenditures from the CBRF by majority vote only if - "the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year" and the appropriation is limited to the amount necessary to make total appropriations equal to the amount appropriated in the prior year;

(c) Expenditures from the CBRF by a three-fourths vote of the members of each house - the Legislature can appropriate from the fund for any public purpose if a supermajority vote is obtained;

(d) Repayment requirement - "If an appropriation is made from the [CBRF], until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the [CBRF]. The legislature shall implement this subsection by law."

Mr. Steininger highlighted that the repayment requirement listed in item (d) on the slide was the primary reason that the discussion was taking place. He explained that the

repayment requirement effectively said that should the state spend funds from the CBR, so long as there was debt to the CBR there was an obligation to pay back the funds. The way the amendment enforced the obligation was by creating a repayment provision that required that until the state repaid the debt, any amount of money in the General Fund that was available for appropriation at the end of each fiscal year shall be deposited in to the CBR. The amendment said the section shall be implemented by law. He asserted that one reason for the hearing was that there was nothing in law defining the subsection and the repayment provision beyond the words highlighted in the presentation.

Co-Chair Stedman asked Mr. Steininger to highlight the payment plan that would be required to repay the CBR, including the interest rate.

Mr. Steininger recalled that the state had withdrawn well over \$12 billion from the CBR, but there was not an established payment plan to payback the CBR nor were there interest requirements on the payments. Because of Section B and Section C, which defined how money was spent out of the CBR, there was a three-quarters vote requirement to make any payments out. When the repayment provisions were triggered on an annual basis, in order to avoid the emptying of the available-for-appropriation monies in the General Fund from being moved into the CBR, it required a three-quarters vote of the legislature to reverse the action. He summarized that the repayment provision was what was commonly known as "the sweep," and the three-quarter vote to reverse the action was commonly called "the reverse sweep."

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Mr. Steininger advanced to slide 3, "Test 1 - In the General Fund":

- The first test of Section 17(d) requires 'swept' money to be "in the general fund"
- "General fund" is not defined in the constitution or statute
- Prior to 2019 -No specific definition, determinations based on accounting structure not law.
- 2019 -Attorney General opinion addresses definition. General Fund is any fund populated by unrestricted revenue outside a constitutionally dedicated fund.

- 2021 -Superior Court opinion narrows definition. Statute can define a fund as outside the general fund.

Mr. Steininger explained that the term "General Fund" had been up to interpretation by the Division of Finance in its recording of the state's Comprehensive Annual Financial Report (CAFR). He mentioned that the attorney general opinion listed on the slide had somewhat expanded the view of what the General Fund was beyond just accounting structure and looked at how the fund could be defined.

Mr. Steininger noted that the Alaska Superior Court opinion had specifically considered the Power Cost Equalization (PCE) Fund, which was established outside the General Fund, but also had implications for other funds that the state managed and were statutorily defined as outside the General Fund. Based on the court's opinion, as it applied test 1, the Office of Management and Budget (OMB) looked at how a fund was established in statute. He noted that the court's opinion was not binding for further legal action, and the opinion could change over time.

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Mr. Steininger showed slide 4, "Test 2 - Available for Appropriation -2019":

- The second test of Section 17(d) requires 'swept' money to be "available for appropriation"
- Unassigned or unobligated funds that may be appropriated by the legislature for any purpose
- Funds available for appropriation include:
  - Funds for which the legislature has retained the power to appropriate and that are not available to pay expenditures without further legislative appropriation
  - Funds with statutory designation on use but require an appropriation for expenditure
- Funds not available for appropriation include
  - Money in a fund that is already validly appropriated to a particular purpose
  - Federal or trust funds such that can only be used for a specific stated purpose, constitutionally permissible dedicated funds and pension funds
  - Donations for a specific purpose

- Funds that do not require appropriation for expenditure

Mr. Steininger mentioned that there were a couple of funds that did not require appropriation for expenditure. He used the example of the Disaster Relief Fund, which the Department of Military and Veterans Affairs could use to spend for disasters at any time.

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Senator Wilson asked about the example of funds appropriated for a particular purpose.

Mr. Steininger used the example of a capital project and mentioned there were General Fund dollars that provided a state match for highway programs. The projects generally took several years to complete, and once the money had been appropriated, it was considered "obligated" or "assigned" in the state accounting system. Since the funds were spent for a purpose, it was not considered available for appropriation for the purpose of the CBR sweep.

Senator Wilson asked about reappropriations and mentioned funds that were leftover and requests for reappropriation.

Mr. Steininger explained that effectively a reappropriation was reducing a prior year appropriation and creating a new appropriation in a future year in the same amount. The money was validly appropriated and could be spent by the administration in execution of the appropriation. While the legislature could always reduce an appropriation, it did not make the appropriation less valid until the action happened.

Senator Hoffman mentioned the administration's sweep of the PCE Fund. He shared that he had always considered the fund unsweepable and reminded that he had been chair of the House Finance Committee when the resolution establishing the fund was written. He asked if the 5 percent earnings from the PCE Fund (that was distributed for a specific purpose in state law) was sweepable.

Mr. Steininger stated that per the superior court decision, the entire balance of the PCE Fund would not be subject to the sweep. The monies that went to the PCE Program or any of the other energy programs and community assistance that

flowed out of the fund would not be subject to the issue of the sweep.

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Mr. Steininger referenced slide 5, "Sweep Balances and Timeline":

- Unobligated balance at midnight on June 30th
- Cash balance less:
  - Continuing appropriations -capital projects
  - Unavailable balances -donations, federal funds, obligated balances
  - Obligated balances can include assigned balances, recently referred to as the "scoop"
    - GASB 54 "An appropriation of existing fund balance to eliminate a projected budgetary deficit in the subsequent year's budget in an amount no greater than the projected excess of expected expenditures over expected revenues satisfies the criteria to be classified as an assignment of fund balance."
- Sweep transactions held until end of following fiscal year

Mr. Steininger described that the slide was a description of how the state mechanically implemented the two tests described in previous slides. He discussed working with the Division of Finance to determine fund balances, closing accounting statements over two months, and completion of the CAFR before it moved to the Division of Legislative Audit for review. He noted that generally speaking the audit was completed around March, and while the sweep took place on June 30, there were no audited balances until the CAFR audit was complete. He recounted that the administration was waiting until June to allow for remedy prior to transferring dollars. There were active proposals in the legislature and other considerations before actually liquidating investments and transferring the funds in the sweep.

Mr. Steininger noted that there were additional factors considered when looking at the balance to be swept. He listed looking at capital projects, unavailable balances,

and assignment of balances that had been validly appropriated prior to June 30. He cited the Governmental Accounting Standards Board (GASB) Rule 54, which spoke to determination of the balance of a fund, which allowed for looking at valid appropriations signed into law while requiring a certain fund balance. He summarized that when the appropriation bill was signed into law prior to June 30 of the previous year, the administration was able to count the appropriations as valid assignments against funds, which avoided negative operational impacts as a result of the sweep, however at the close of the fiscal year (barring legislative action) only projected revenues would be available in the funds.

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Co-Chair Stedman thought Mr. Steininger had mentioned "remedies," and asked him to elaborate.

Mr. Steininger explained that the governor's budget released on December 15 had not addressed the sweep itself. Rather, OMB had changed fund sources for sweep-impacted programs to spend from UGF. Several budget amendments in both bodies would alter things and move money into some of the funds. There were a couple of bills that would address the sweepability of some of the funds that funded a considerable number of programs. Because there was current policy discussion in the legislature regarding specific funds, the administration felt it was prudent to delay transferring money into the CBR until seeing if there was a remedy from the legislature with a three-quarters vote to move the monies out of the CBR.

Mr. Steininger continued that on paper the dollars were currently in the CBR. He mentioned that there was a "due-to/due-from list" in the CAFR which showed funds that were due to the CBR from the individual funds. From a treasury/cash management perspective, the administration had yet to liquidate the investments were waiting to see the outcome of the legislative session.

Co-Chair Stedman summarized that in FY 22, there was not a successful vote of the legislature to reverse the sweep, so the legislature could take action to have reverse sweep language in the appropriation bill before the close of business on June 30.

Mr. Steininger agreed.

Co-Chair Stedman asked if the governor had put forth a reverse sweep in the appropriation language for FY 22.

Mr. Steininger answered in the negative and explained that the programs were funded with UGF to avoid programmatic impacts from the sweep.

Co-Chair Stedman asked if Mr. Steininger would say that not doing the reverse sweep would get messy. He asked about the purpose of the delay.

Mr. Steininger explained that the purpose of the delay was to make the financial transaction, which required the CAFR to be completed and finalized through an audit in order to know the actual balances available to be swept, which had not happened until March of the current year. Because there were live proposals in the legislature that would undo the action, the executive branch felt it was prudent not to liquidate investments if it did not have to. If there was nothing to reverse the sweep and the governor's budget was enacted as written, at the close of the fiscal year the administration would have to liquidate the investments, and transfer the monies into the CBR to be managed based on the CBR's asset allocation. He reiterated that the governor's office was waiting to see what happened in the legislature.

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Co-Chair Stedman recalled from conversation the previous year that there was an opportunity cost of \$30 million to \$40 million per year.

Mr. Steininger affirmed that there was some opportunity cost in the different management between some of the funds, which was a big part of the reason that OMB had held on liquidating the assets. If there was material action on any of the funds from any existing legislative proposals, the administration did not want to have taken an unnecessary loss on investments by hastily executing the sweep.

Senator Hoffman asked if Mr. Steininger could list the disruptions to programs that were a result of not having the reverse sweep take place. He referenced a 2-page document entitled "Sweepable Funds" (copy on file). He

thought there were 40 or 50 programs, and he asked about the disruption to the citizens of the state.

Mr. Steininger relayed that that uncertainty was created as a result of discussions around the sweep. The assignment of appropriated balances allowed for payment of scholarship programs without a material disruption to people of the state. He cited longer term impacts of having to evaluate how the revenue in some of the funds interacted with the programs, and that there would be impacts from a financial management perspective. He summarized that the administration was seeking to avoid the operational impacts that would impact Alaskans, and that the impacts were more on the side of accounting and budget management.

Senator Hoffman commented that since 1990 until the previous year, the reverse sweep had been automatic. He felt one of the big issues had been the administration's determination that the PCE Fund was sweepable. He thought the determination was the biggest factor in not getting the reverse sweep. He thought the court case was strong in saying the PCE Fund should not be swept. He thought future legislatures needed to look back to the original purpose of the sweep, and revert to an automatic reverse sweep.

Senator Hoffman continued his comments. He emphasized that there was a reason for the reverse sweep and thought the reasoning for the recent lack of reverse sweep was not in line with the original intent.

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Senator Wilson asked if the executive branch had worked with the Department of Law to analyze any potential legal issues regarding use of tracking of funds for their intended purposes.

Mr. Steininger relayed that the governor's office had structured its budget to ensure that the intent of the programs could be executed using General Funds. He continued that in determining the balance to be swept, the office reviewed to ensure that a fund did not include donations or monies that did not have a restriction. He thought the administration had done its due diligence to ensure that there were not legal issues being created.

Senator Wilson used the example of using funds from the Cruise Ship Head Tax. He asked if there was a way to track some of the separate funds that had special uses.

Mr. Steininger used the Tobacco Tax as an example, which flowed into a DGF fund. The revenues would still flow into a designated fund, which would be tracked in the budget. The difference was that the amount in the budget would only be the amount that was projected to be collected in the following year. For items such as the Tobacco Tax, the governor's office had to adjust the budget in December to only utilize the fund only up the amount it expected to collect in FY 23. In order to ensure the program was not harmed by the accounting issue, the budget used UGF for the remainder to fund the programs.

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Senator Wilson mentioned that there was a position or two in the Department of Administration that would be utilized for managing some of the funds discussed by Mr. Steininger. He asked if the administration would be submitting a supplemental and if the positions would be eliminated in the case that there was no sweep.

Mr. Steininger affirmed the administration had accounted for the use of the funds in the Department of Revenue (DOR) as it put together the projection of the revenues that would become available for the next year. He affirmed that it should not take any supplementals for the positions.

Senator Wilson clarified that he was not referencing the use of the fund, but rather the management of the funds. He noted that the Higher Education Fund was managed by DOR. He asked if investment officers would still be needed if the funds were swept.

Mr. Steininger noted that the investment managers also invested the CBR, and there were still assets under management at the Treasury. He did not see the sweep action having a material impact on a workload such that it would reduce the need for staff. He pointed out that investment managers would still be managing the cash whether it was in the CBR or in the Higher Education Fund.

Senator Hoffman raised the subject of what was validly appropriated. He asked if funds that were encumbered for a

particular purpose were not subject to the sweep. He considered funds that were encumbered to be appropriated.

Mr. Steininger noted that the term "encumbrance" could have a very specific meaning within accounting. He relayed that obligated balances were money that had been appropriated, while an encumbrance would be an assignment of an appropriated balance.

Senator Hoffman asked under what scenario did the administration classify encumbrances as a valid appropriation and not subject to the sweep.

Mr. Steininger relayed that for a department to load a valid encumbrance in the accounting system, it needed to have an appropriation which to encumber against. Such an item would be a valid appropriation that would not be considered a sweepable portion of the fund.

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Co-Chair Stedman interpreted that Mr. Steininger was indicating that with the delay after the financial statements had come to conclusion, it would be a mess to liquidate the assets and move them to the CBR, and the administration would prefer not to do the move unless it was required, hoping that the legislature would implement a reverse sweep in the FY 22 supplemental budget.

Mr. Steininger did not think the administration had a strong position on the matter. He asserted that it was most concerned about ensuring that the underlying programs were funded and continued. He affirmed that the administration was holding and waiting to see the action of the legislature.

Co-Chair Stedman reminded that Mr. Steininger's predecessor at OMB had advocated not to do a reverse sweep, and to then transfer the PCE Fund and the Higher Education Trust Fund over to the CBR, which he thought had started the large number of issues being considered currently. He mentioned that other testifiers, including the directors of the Legislative Finance Division and Legislative Legal Services, as well as the legislative auditor might have a different opinion as to how the transactions should have taken place the previous June.

Senator Wilson asked if the administration was supportive or not supportive of a sweep.

Mr. Steininger asserted that the administration did not have a strong position on the matter. He highlighted that there were negative consequences to liquidating the assets, such as investment earning losses. He asserted that the administration wanted to ensure and had been working to ensure that the programs themselves were funded and continued, which had taken a considerable amount of review over the previous summer. He reiterated that the administration did not have a strong stance on the matter but saw it as an issue for the legislature to decide on the structure of funds and how they were appropriated in the budget.

Co-Chair Stedman used the analogy of starting a house fire and not caring whether the fire department was called.

Senator Wilson asked if the administration would like to lean towards enacting the new policies or if it would like to go back to the failure of a sweep. He thought it was peculiar that the administration did not have a strong position on the issue, when there were millions of dollars in lost opportunity and the situation was an accounting nightmare.

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Co-Chair Bishop commented that the current situation was a result of putting monetary policy in the constitution and then not having necessary votes. He mentioned lost opportunity costs, and the cost of obtaining a three-quarters vote.

Mr. Steininger wanted to add more specificity to his comments regarding support for the sweep versus the reverse sweep. He added that the administration had a bill to address the Alaska Marine Highway System (AMHS) Fund, in order to structure it in a way that would make it not subject to the sweep. He asserted that the administration considered the operations of state government, and what was required to make it successful.

Mr. Steininger emphasized that the administration looked at each individual fund to determine in which programs does the inherent operation of the program depend on a fund that

would not get swept. After consideration, the administration had put forward the bill to remove the AMHS Fund from being subject to the sweep, since the operation of AMHS and its stability was intertwined. Some of the other funds were not necessarily tied to the operation of the program itself, and could be funded with General Funds, or in a combination of current year revenue collections and General Funds. He thought the matter was not a one-size-fits-all question. He emphasized looking at the matter on a program-by-program basis.

Co-Chair Stedman thought every fall the administration put a budget together, before which it scrubbed accounts to take out excess liquidity. Then the legislature spent time going over the accounts and looking for balances that could be moved to the General Fund. He emphasized that the funds did not have excessive cash cushions. He thought the accounts had been reviewed every year that he could recall. He thought there was some misconception that there was excess liquidity in the accounts, which was not the case.

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ALEXEI PAINTER, DIRECTOR, LEGISLATIVE FINANCE DIVISION, discussed a presentation, "CBR Sweep in FY23 Budget" (copy on file). He relayed that he would speak about the CBR sweep in the FY 23 budget in the governor's version and the versions passed by the other body as well as the version currently in the Senate Finance Committee.

He turned to slide 2, "Budget Changes in FY23 in Response to Failure of FY22 Reverse Sweep":

- Governor's budget included \$33.6 million of fund changes from sweepable funds to UGF to reduce the impact of the sweep.
  - The largest of these is the \$21.8 million of fund changes from the Higher Education Fund.
  - The House and Senate Finance budgets adopt all of these fund changes, except that the House did not accept the fund change from the Higher Education Fund.
- House and Senate Finance budgets also shift the timing of deposits into Oil and Hazardous Release funds to avoid sweep.

Mr. Painter summarized that the change to the Higher Education Fund removed all funds and replaced them with General Funds. Other funds with ongoing sources of revenue just removed the amounts in excess of projected revenue in FY 23 and replaced it with UGF. He noted that the budget in front of the committee contained a number of fund source changes to mitigate the impact of the sweep. He summarized that the combined items, the actual impact of not having a reverse sweep in the current year's budget would be minimal, although there were some funds that could still be affected.

Mr. Painter referenced slide 3, "House Budget's Handling of Swept Funds":

- The House budget recapitalizes all swept funds in FY22 from the general fund (not the CBR).
- However, only the Higher Education Fund is used in FY23 in the House budget, so for the most part the House budget does not rely on the sweep.
- The reverse sweep vote in the House failed, so as it stands now, all those funds would again be swept to the CBR.
- Based on the "scoop" or assignment interpretation, the Higher Education Fund appropriations would still flow out in FY23 but the remainder of the funds would be swept.

Mr. Painter commented that the other body had approached the swept funds in a very different way than had the Senate or the administration.

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Mr. Painter advanced to slide 4, "Other Funds that Could Be Impacted by the FY22 Sweep":

- Alaska Marine Highway System Fund - not used in the FY22 budget in an effort to save up a balance for the future. Absent any changes, the FY22 revenue into the fund will be swept.
- Alaska Capital Income Fund - revenue to the fund is volatile because it is based on earnings of the Permanent Fund. Possible that a balance will sweep in FY22 because the Permanent Fund's realized income is currently trending above the forecast.

- The fund changes proposed by the Governor are based on projected revenue. If revenue to these funds falls short of projections, supplemental appropriations may be needed. If revenue exceeds projections, balances may sweep.

Mr. Painter used the example of the Capital Income Fund (CIF) as a fund with a volatile balance. He explained that the CIF came from realized earnings of the Permanent Fund on the Amerada-Hess deposit, after which the funds were designated for deferred maintenance. Currently the Permanent Fund was a little ahead in projections for realizing income, and if materialized there would be more revenue in the CIF than in the budget and would result in fund sweeping at the end of FY 22. He summarized that in the post-sweep world, if the legislature wanted to keep using DGF, it would create issues in the budget.

Mr. Painter continued his remarks. He thought it was possible that the Permanent Fund would realize more money, and some would be swept into the CBR, or the fund could underperform expectations and the appropriations could be partially hollow. He noted that there could be greater impacts to certain funds over others. He suggested that the governor had fund changes that in theory balanced the funds, but there was variability in designated tax collections that could result in a sweep or a supplemental budget item. He used the example of the Technical Vocational Education Program (TVEP) Fund to illustrate a situation which had ongoing supplemental requests each year to adjust the fund output for programs. The matter caused confusion in the budget process and resulted in uncertainty for the fund recipients.

Mr. Painter continued his remarks. He qualified that if the state was not relying on fund balances, there was much uncertainty relying on year-to-year revenue through the designated funds. He thought the constitutional language might be envisioning putting all the revenue into the General Fund and spending out of one big pot, but pointed out that was not how the state budgeted. He thought if the state did not have the ability to carry forward funds from one year to another, it created some budgetary tension and difficulty as was being seen currently.

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Co-Chair Stedman asked for Mr. Painter to discuss the timing of a reverse sweep and three-quarters vote needed to access the CBR. He thought some years there were several votes. He asked when the vote might be critical and when it might be just an exercise.

Mr. Painter explained that when there was CBR language in the bill, such as in the House operating budget, the House would vote on it and even if the vote failed, the Conference Committee could add the CBR section back into the bill. If the Conference Committee budget came forward with a CBR vote, the version was critical and the CBR portion could not be put back if the vote failed. He summarized that the votes taken before Conference Committee did not really have a large practical application, as the provision would have to be voted on in Conference Committee.

Co-Chair Stedman considered if the Senate failed to vote on a CBR provision before bringing the provision up for a vote for the Conference Committee.

Mr. Painter answered in the affirmative. He thought the Legislative Legal Division could better address adding a CBR section in the Conference Committee that had not been included in either body.

Co-Chair Stedman thought the addition had been made many times.

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MEGAN WALLACE, DIRECTOR, LEGISLATIVE LEGAL SERVICES, ALASKA STATE LEGISLATURE, relayed that she would discuss the legal background of the sweep and delve into a couple of recent court cases that touched on the issues and how the cases influenced the interpretation of the timing of the sweep and what was sweepable.

Ms. Wallace explained that there was a two-part test to determine if a fund was sweepable as mentioned by Mr. Painter. The test was to determine if the money in a fund was in the General Fund and whether or not it was available for appropriation. She explained that up until the current year, there was only one court case that touched on the CBR, which was Hickel v. Cowper [a 1994 Alaska Supreme

Court case which had addressed the meaning of "available for appropriation."]. The case interpreted what "available for appropriation" meant in the context of the statute that allowed the legislature to withdraw monies from the CBR with a simple majority vote.

Ms. Wallace continued to address the *Hickel v. Cowper* case. She relayed that the court went through the analysis for the first time to determine what funds were available for appropriation as the term was used in the constitution. The court held that funds that may be used for state expenditures without further legislative appropriation were not available for appropriation. Therefore, if the funds were not available for appropriation, they were not subject to the sweep.

Ms. Wallace continued her comments. She cited that the Alaska Supreme Court said that funds that require future appropriation to be expended were considered available for appropriation and thus were subject to the sweep. There were two cases in the previous year that related to sweep issues. She mentioned the case involving the PCE Fund that was referenced by Mr. Steininger [*AFN v. Dunleavy*], which was decided in August of 2021 by the Alaska Superior Court and was not appealed by the administration. The second case involved the Higher Education Investment Fund [*Short v. Dunleavy*]. The Alaska Superior Court handed down a decision in February 2022, and the case was currently under active appeal in the Alaska Supreme Court.

Ms. Wallace explained that the first case, *AFN v. Dunleavy*, focused on the first part of the sweepability test, which was whether or not the PCE Endowment Fund was in the General Fund. The court had held that the fund was available for appropriation, but that the fund was not in the General Fund. The court held that the department was permanently enjoined from sweeping the PCE Endowment Fund. Since the ruling was not appealed, the fund would not be swept.

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Ms. Wallace continued to discuss the cases. The court, in issuing the *AFN v. Dunleavy* decision, had a lengthy discussion on the legislature's power to establish separate funds outside the General Fund. The court noted that the legislature had done so in a number of other cases and had

indeed created separate funds that were outside the General Fund. She referenced Footnote 77 of the AFN v. Dunleavy case, in which the Superior Court of Alaska noted that the legislature had the power to establish funds outside the General Fund and specifically noted examples where it had been done. One of the funds noted by the court was the Statutory Budget Reserve (SBR) Fund, which was established as a separate fund in the state treasury. Based on the analysis in the Superior Court decision, the Legislative Legal Division had previously advised that the SBR would likely be considered outside the General Fund and not subject to the sweep.

Ms. Wallace concurred with Mr. Steininger that reliance on the AFN v. Dunleavy opinion for funds other than the PCE Endowment Fund was subject to change or further challenge, as the case holding was only specific to the PCE Fund. Based on the analysis in the opinion and the fact that the case was not appealed, it was persuasive to the position of Legislative Legal in advising the legislature as to what decisions would come from other courts if the issue was further litigated.

Ms. Wallace addressed the mechanics of the sweep, and how and when the sweep took place. She recounted that it had historically been the advice of her office that funds subject to the sweep were swept on June 30 as a matter of law and a matter of operation of the constitution. Because appropriations for the upcoming fiscal year did not take effect until July 1, any balance of a sweepable fund as of June 30 was swept. She continued that appropriations that were to take effect on July 1, if swept, would essentially be left "hollow" or without funding.

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Ms. Wallace referenced an Attorney General's opinion the previous year took a different position than the Legislative Legal Division. She explained that the opinion that relied on a sentence from the Hickel v. Cowper case that stated that "monies which had already been committed by the legislature to some purpose should not be counted as available." The attorney general had advised in a written opinion that it was legally defensible to not sweep the upcoming FY 22 funds appropriated in the budget that had passed but had not yet taken effect. The governor had relied on the opinion and ordered that the FY 22

appropriations not be swept. The appropriations for the upcoming fiscal year were expended even though the sweep occurred on June 30, and the appropriations had not yet taken effect.

Ms. Wallace highlighted that the attorney's interpretation of *Hickel v. Cowper* was a new interpretation and one that had not been previously taken by prior administrations or legal departments, as well as LFD or the audit division. She mentioned the *Short v. Dunleavy* case, which related to the Higher Education Investment Fund, and had originated because the administration had deemed the fund to be sweepable. While the FY 22 appropriations from the fund were allowed to go forward and be expended so that the program was not impacted, the balance of the fund was due to be swept at the end of June. There was a legal challenge to the position by the administration by a group of plaintiffs that had argued to the court that the fund should not be sweepable. There had been a Superior Court decision in February of 2022 that held that the Higher Education Investment Fund was sweepable. In the case, the court also said that while the fund was available for appropriation and subject to the sweep, the FY 22 appropriations made out of the fund should not be swept because the money was no longer available for appropriation because it could be expended without further legislative action. The decision in the Superior Court was appealed immediately by the plaintiffs on an expedited basis and was actively before the Alaska Supreme Court on an expedited briefing schedule. The case had been briefed and was due for oral argument by May 3.

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Ms. Wallace recounted that the parties in the case had requested a decision by May 4, but the court did not commit to providing a decision by the requested date. The Superior Court touched on the issue of whether or not it was ok to "scoop" or payout an upcoming appropriation whether or not they had taken effect. She noted that the court had not specifically adopted the "validly committed" argument. The court had taken a different analysis and said that essentially once the legislature passed the budget and the appropriations were enacted, even without taking effect the monies could eventually be spent without further legislative action. She questioned whether the Supreme Court would address the issue, and whether it would agree.

She shared that part of the uncertainty would involve whatever the Alaska Supreme Court ruled on the issue.

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Senator von Imhof thanked Ms. Wallace for her narrative. She asked for something in writing.

Ms. Wallace agreed to provide the information.

Senator von Imhof recalled Ms. Wallace mentioning funds expended and passed by the legislature from a sweepable fund, such as the Higher Education Endowment Fund. She asked Ms. Wallace to reiterate the information about an opinion.

Ms. Wallace shared that she had referred to an opinion authored by the attorney general (copy on file). On August 25, 2021, Attorney General Treg Taylor had issued an opinion to the governor that indicated based on the Hickel v. Cowper case, once the legislature had validly committed funds, it would be legally defensible to pay out the appropriations for the FY 22 budget and sweep the balance of the fund afterward. After the opinion was issued, there were letters signed by the governor that indicated that in reliance of the opinion, he would direct OMB and the department to pay out the FY 22 appropriations and sweep the balance of the funds.

Senator von Imhof thought Ms. Wallace had indicated that the attorney general's opinion was a diversion from previous opinions.

Ms. Wallace stated that to her knowledge, the opinion was the first time the attorney general or the administration had taken the position or reached the interpretation. She noted that FY 22 was the first time in a very long time that the legislature failed to enact the reverse sweep. She thought of the reason that there may not have been much legal analysis on the issue was because the topic had not been at the forefront of the budget discussion in prior years.

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Senator Wielechowski asked if there was anything in the legislative history of the 1990 legislature that

demonstrated a knowledge of a distinction among funds in the General Fund versus not in the General Fund. He wondered if there was discussion of the topic when the constitutional amendment was being proposed.

Ms. Wallace did not recall whether there was specific discussion on the issue. With respect to the sweep and the provision in Article IX, Section 17 (d), it was her recollection that the legislative history was not as robust as that of other provisions.

Senator Wielechowski was trying to determine the intent when the amendment was created, and whether it was as simple as the legislature choosing which funds it wanted swept and which funds it did not. He thought that the Superior Court had indicated so. He asked Ms. Wallace to opine.

Ms. Wallace noted that the constitutional provision specifically stated that the legislature shall provide some guidelines on how to carry out the provision. When *Hickel v. Cowper* was decided in the 1990s, the court touched on the issue in saying that while the legislature had some discretion to set policy and create rules, it had to do so within the framework of the provision. She acknowledged that her answer was vague and suggested it was dependent upon how far the legislature went in terms of defining what was and was not sweepable.

Senator Wielechowski recalled that the previous year the governor had an interpretation about funds being validly committed (pre-midnight June 30), and the funds could be shielded from being swept. He asked if Ms. Wallace had a position on whether the governor's interpretation was accurate.

Ms. Wallace reiterated that her office had held the opinion that the sweep occurs on June 30 at midnight, and that any monies remaining in the funds would be swept at midnight. Further, that the appropriations that took effect on July 1 (even though others might argue the monies were validly committed) should be swept. The Superior Court (regarding the Higher Education Investment Fund) concurred with the administration to the extent that it agreed that the FY 22 appropriations could be paid out. The court did not adopt the "validly committed" argument, and she did not think it appeared to be a settled issue.

Senator Wielechowski thought it appeared that there were several capital projects that had not been validly appropriated because the funds had been swept. He asked if Ms. Wallace was familiar with the projects or the issue he referred to.

Ms. Wallace thought Senator Wielechowski had referenced some capital appropriations that were funded out of funds that would have been swept if there was not a reverse sweep passed. She did not specifically recall the fund sources and deferred to the LFD director.

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Senator von Imhof referenced the list from LFD of sweepable and non-sweepable funds. She found it interesting that the SBR was listed in the list of non-sweepable funds. She thought Ms. Wallace had mentioned that it was possible to change statute or institute laws within the framework of the constitution to make more of the funds non-sweepable. She asked if there had been a study that examined sweepable and non-sweepable funds that determined the specific characteristics that put them on each list. She asked if there was a path identified for steps the legislature could take to make (within the framework of the constitution) as many funds as possible non-sweepable.

Ms. Wallace did not think there was currently a document that went one step further to explain reasoning for why funds were listed as sweepable or not. She thought an analysis could be done on why a fund was sweepable and whether there was a legislative option to change the designation of a fund. She continued that there were several pieces of pending legislation that attempted to do so in certain instances. She emphasized that while the *AFN v. Dunleavy* Superior Court decision was lengthy and detailed, and analyzed why the legislature had the power to create separate funds outside the General Fund, it was not an issue that had been taken to the Alaska Supreme Court. While there were legislative options, she could not guarantee that such changes would not be subject to later challenge.

Senator Wielechowski referenced the funds that the Supreme Court said were already appropriated in *Hickel v. Cowper*. He asked when the governor's veto authority expired on the funds.

Ms. Wallace stated that the governor's veto authority expired either within the time frame that the governor had to exercise his line-item power. The timeline would be dependent upon when the legislature transmitted the bill, but the time frame was finite.

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KRIS CURTIS, LEGISLATIVE AUDITOR, ALASKA DIVISION OF LEGISLATIVE AUDIT, stated that her role in testifying was to present how the sweep and reverse sweep (or "scoop") was presented in the state's financial statements for FY 21.

Co-Chair Stedman asked Ms. Curtis to discuss her background.

Ms. Curtis explained that she was the legislative auditor, which was a constitutional position, and statute gave the position the authority to carry out the post-audit function of conducting the state's financial statement audit and the state federal compliance audit. The Legislative Audit Division (LAD) also conducted special audits at the request of the Legislative Budget and Audit Committee. Each year, the division received a draft set of financial statements from the Division of Finance and began the audit. She continued that at the end of the audit, the auditor would produce an opinion as to whether the financial statements were free of material misstatement.

Ms. Curtis relayed that because of the guidance by the attorney general, it was determined that there were fund balances that were appropriated for FY 22, effective July 1, 2021, that were funded by sub-funds of the General Fund that were going to be swept because the reverse sweep did not occur. The appropriations were potentially hollow and would not be funded. Based on the guidance of the attorney general, it was determined that because the operating bill was signed (she thought on June 30) the appropriations were validly committed and the funds would not be swept. She cited that the draft financial statements had \$108.6 million of funds assigned for 20 sub funds.

Ms. Curtis continued that based on guidance from the Legislative Legal Department, LAD had thought it was more persuasive to conclude that because the effective date was July 1, the funds would not be available to assign because

the funds would be swept. She cited AS 01.10.070 (f) (3) of the statutes that defined the effective date, which addressed when the bill was applicable. The division had produced an audit adjustment, which it provided to the Division of Finance, and the audit was not posted. She summarized that LAD believed there was a misstatement in the financial statements, mainly related to the General Fund balance sheet. The balance sheet showed \$108.6 million was considered assigned, while LAD considered the funds should be unassigned and swept.

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Co-Chair Stedman asked about the significance of accurate financial statements.

Ms. Curtis explained that she had issued a qualified opinion and did not believe the financial statements were free of material misstatement. Rather, she believed that there was a \$108.6 million misstatement.

Senator von Imhof asked if it could mean greater interest rates if outside entities such as creditors realized the state had a material misstatement.

Ms. Curtis informed that the state had qualifications since FY 18 or FY 19. She thought it was hard to tell how the qualification affected the state's debt rating, since there were so many other factors affecting the rating. She argued that it was prudent to have clean financial statements and was sure the executive branch would argue that there was not a misstatement. She described the situation as an impasse.

Co-Chair Bishop asked if the difference of opinion jeopardized federal funding coming into the state.

Ms. Curtis did not think the difference of opinion would have any effect on federal funding.

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Senator Wilson asked how Ms. Curtis recommended fixing the impasse.

Ms. Curtis thought the biggest material misstatement related to Federal Energy Regulatory Commission (FERC)

decisions and additional revenue to the state, and whether the revenue was deposited to the CBR or the General Fund. It had been discussed at previous Legislative Budget and Audit meetings that there was a different constitutional interpretation based on behalf of the Legislative Legal Division and the attorney general. She thought the disagreement would have to be resolved by the courts.

Senator Wielechowski asked if there were any capital projects that should have been swept on June 30 (under Ms. Curtis' interpretation) that were subsequently funded.

Ms. Curtis answered in the affirmative, and stated that as of June 30, \$108.6 million in funds were carved out and not swept. She could not comment on what appropriations were funded with the monies.

Senator von Imhof thought Ms. Curtis had mentioned that the governor had signed the previous year's budget on June 30, which was the eve of the sweep. She referenced the attorney general's opinion and asked what would have happened if the governor had signed the budget on July 3 or July 4.

Ms. Curtis thought that based on her understanding of the logic, the funds would have swept as of June 30, since the budget was not signed and enacted.

Senator von Imhof asked if the governor had signed the budget on June 30 the previous year, on the eve of the sweep.

Ms. Curtis answered "yes," and continued that in the governor's view, the funds were validly committed or assigned before the sweep. If the budget would have been signed on July 4, she thought the sweep would already have taken place.

Senator von Imhof commented on the convenience of the timing.

Co-Chair Stedman thought it was clear that not having a reverse sweep was a mess if the matter was not rectified.

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AT EASE

[2:39:26 PM](#)

RECONVENED

Co-Chair Stedman asked for Mr. Steininger to come back to the table.

Co-Chair Stedman asked Mr. Steininger about the hypothetical question of whether the budget legislation being signed on July 3 or July 4 would affect the mechanics of the sweep.

Mr. Steininger answered in the affirmative. He referenced the Governmental Accounting Standards Board (GASB) rule of thumb that defined what could be considered to be assigned, and required the bill be signed into law as a validly enacted appropriation prior to the close of the fiscal year. He continued that had the budget been signed on July 4 or July 5 after the start of the fiscal year, there would have been several budgetary complications that had arisen. He continued that if the administration had signed the budget after the start of the fiscal year, there would have been a period without a validly enacted budget. He contended that the governor and OMB ensured the budget was signed prior to the start of the fiscal year to ensure that government operations could continue in addition to resolving the assigned balance issue.

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Senator Wielechowski recalled that the previous year there had been a failed three-quarter vote which had included the Higher Education Fund. He asked if his recollection was correct.

Mr. Steininger answered "yes," that the Higher Education Fund was included.

Senator Wielechowski asked if it was the administration's position was that because there was no valid three-quarter vote, the funds should be swept.

Mr. Steininger mentioned that the advice from the Department of Law was that the Higher Education Fund was subject to the sweep.

Co-Chair Stedman asked if there was anything else that was funded with the failed three-quarter vote.

Mr. Steininger recalled that there were a number of appropriations from Alcohol Tax revenue, Tobacco Tax revenue, and other state programs where current year revenues would not have been sufficient to meet obligations. He referenced the PCE Fund, and the previous belief that it was subject to the sweep.

Senator Wielechowski thought there were a couple of projects that the governor had added to fund capital projects in the Matanuska-Susitna Valley, which he thought were funded by the three-quarter vote.

Mr. Steininger affirmed that there were a number of capital projects funded by the SBR. He noted that the issue of the assignment of balances did not relate to why the projects were able to be executed upon.

Senator Wielechowski asked if Mr. Steininger was referencing the CBR.

Mr. Steininger affirmed that he was referencing the SBR in relation to the funds. He continued that CBR funds would not have gone forward without a three-quarter vote, and he was discussing appropriation of funds subject to the sweep. He added that the capital projects he thought Senator Wielechowski was referencing were funded by the SBR. He referenced the AFN v. Dunleavy case, which determined the SBR was not sweepable because it was created outside of the General Fund.

Senator Wielechowski asked if Mr. Steininger was indicating that there were no projects funded through the CBR the previous year.

Mr. Steininger wanted to check the records but affirmed that the administration had not executed any appropriations directly from the CBR, because it had not had the legal authority to do so.

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Senator Wielechowski asked if there were capital projects funded through the CBR, if the projects would have been invalidated since the funding had been swept on July 1.

Mr. Steininger stated that if a project was funded directly from the CBR, it would not be an issue related to the sweep

but rather would be an issue related to the access provisions of the CBR that required a three-quarters vote for the appropriation to be valid. He added that the CBR was not itself a sweepable fund, but rather was a fund into which funds were swept.

Co-Chair Stedman noted that the committee would relay the meeting's conversation on to the Legislative Budget and Audit Committee, most likely for further action to clarify what was sweepable and what was legally defensible.

Co-Chair Stedman discussed the agenda for the following day.

#

ADJOURNMENT

2:46:27 PM

The meeting was adjourned at 2:46 p.m.