

ALASKA STATE LEGISLATURE
SENATE TRANSPORTATION STANDING COMMITTEE

March 15, 2022

1:33 p.m.

MEMBERS PRESENT

Senator Robert Myers, Chair
Senator Peter Micciche
Senator Jesse Kiehl

MEMBERS ABSENT

Senator Mike Shower, Vice Chair
Senator Click Bishop

COMMITTEE CALENDAR

SENATE BILL NO. 226

"An Act relating to the Alaska marine highway system fund and the Alaska marine highway system vessel replacement fund; establishing the Alaska marine highway system fund and the Alaska marine highway system vessel replacement fund outside the general fund; authorizing the commissioner of transportation and public facilities to expend money from the Alaska marine highway system fund and the Alaska marine highway system vessel replacement fund; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 226

SHORT TITLE: FUNDS: AK MARINE HWY SYSTEM

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

03/09/22	(S)	READ THE FIRST TIME - REFERRALS
03/09/22	(S)	TRA, FIN
03/15/22	(S)	TRA AT 1:30 PM BELTZ 105 (TSBldg)

WITNESS REGISTER

ANDY MILLS, Legislative Liaison
Office of the Commissioner
Department of Transportation and Public Facilities (DOTPF)

Juneau, Alaska

POSITION STATEMENT: Co-presented SB 226 on behalf of the Department of Transportation and Public Facilities (DOTPF).

CAROLINE SCHULTZ, Policy Analyst

Office of Management and Budget

Office of the Governor

Juneau, Alaska

POSITION STATEMENT: Co-presented SB 226 on behalf of the administration.

CORI MILLS, Deputy Attorney General

Civil Division

Department of Law

Juneau, Alaska

POSITION STATEMENT: Answered legal questions during the discussion of SB 226.

ACTION NARRATIVE

[1:33:50 PM](#)

CHAIR ROBERT MYERS called the Senate Transportation Standing Committee meeting to order at 1:33 p.m. Present at the call to order were Senators Kiehl, Micciche, and Chair Myers.

SB 226-FUNDS: AK MARINE HWY SYSTEM

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CHAIR MYERS announced the consideration of SENATE BILL NO. 226 "An Act relating to the Alaska marine highway system fund and the Alaska marine highway system vessel replacement fund; establishing the Alaska marine highway system fund and the Alaska marine highway system vessel replacement fund outside the general fund; authorizing the commissioner of transportation and public facilities to expend money from the Alaska marine highway system fund and the Alaska marine highway system vessel replacement fund; and providing for an effective date."

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ANDY MILLS, Legislative Liaison, Office of the Commissioner, Department of Transportation and Public Facilities (DOTPF), Juneau, Alaska, presented SB 226 on behalf of the administration. He stated that this bill seeks to insulate the Alaska Marine Highway System Fund (AMHS Fund) and Alaska Marine Highway System Vessel Replacement Fund (AMHS VRF) from a potential reverse sweep. The department hopes to provide

regular, reliable, stable service to people using the AMHS system. He said the forward-funding mechanism would help provide added stability to the system. The bill also addresses the mechanics of the sweep and appropriations.

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CAROLINE SCHULTZ, Policy Analyst, Office of Management and Budget, Office of the Governor, Juneau, Alaska, reviewed the sectional analysis for SB 226, which read:

[Original punctuation provided.]

Sec. 1: Amends AS 19.65.060(a) to removed the Alaska Marine Highway System from the general fund and authorize the Commissioner of the Department of Transportation and Public Facilities (DOTPF) to spend money from the fund without further legislative appropriation. The section further authorizes the fund to receive appropriations of AMHS gross revenue, money from the general fund and designated federal receipts.

Sec. 2: Adds a new section to AS 19.65 that authorizes and describes the manner in which the Commissioner of DOTPF may make lawful expenditures subject to the program review and financial plan provisions of the Executive Budget Act from the AMHS fund to include:

- Effectuate the goals of the legislature for the efficient, predictable and stable operations of the marine highway system (system) established in AS 19.65.050(b) and (c);
- Fund and support the operations of the system;
- Pay costs incurred through the operation of the system, excluding capital improvements;
- Acquire, hold, lease, sell, or dispose of property that is necessary to the administrative functioning of the system;
- Fund contracts or agreements with federal, local, or foreign governments; and
- Award and administer grants authorized by the legislature.

Sec. 3: Amends AS 19.65.100(1) to change the definition of "annual operating cycle" from the fiscal year to the calendar year, consistent with current budgeting practices.

Sec. 4: Amends AS 37.05.550(a) to remove the AMHS Vessel Replacement fund

Sec. 5: Repeals AS 19.65.080 regarding appropriations from the AMHS fund.

Sec. 6: Effective date of January 1, 2023.

MS. SCHULTZ stated that SB 226 is the administration's attempt to address the matter of the AMHS Fund and AMHS VRF sweepability since the funds are currently sweepable as constructed. This bill would retool the way the two funds are set up in law so they are not sweepable. As a primer, the Alaska Constitution requires that all subfunds of the general fund be swept into the Constitutional Budget Reserve (CBR) at the end of the fiscal year if there isn't a three-quarter vote to reverse that action. In FY 2021, the state did not have a reverse sweep, so these funds were functionally swept into the CBR. She explained that the passage of SB 226 will correct that matter going forward. She referenced Hickel v. Cowper as the main policy driver on what creates a sweepable or non-sweepable fund. This Alaska Supreme Court decision established a two-part test for sweepability. First, if the funds are in the general fund or some subfunds of the general fund, the funds are sweepable. The second test is whether the funds are available for appropriation. She highlighted that this bill would address both items.

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MS. SCHULTZ stated that SB 226 specifies that the AMHS Fund is outside the general fund. Further, it would establish the AMHS Fund as a capitalized fund. This means that the funds, once appropriated into the fund, are no longer available for appropriation per the test established in Hickel v. Cowper.

MS. SCHULTZ explained that there are two types of funds. In one type of fund, the money flows into the fund automatically, and the legislature appropriates out of the fund. This is currently how the Alaska Marine Highway Fund operates. The AMHS receipts go into the fund, and the legislature appropriates AMHS receipts to fund the operations of the system year by year. SB 226 would change the process so the legislature will appropriate AMHS receipts into the fund, and the Department of Transportation and Public Facilities commissioner can spend from the fund without further appropriation. It is functionally a terminal appropriation since it is appropriated when it goes into the

fund, not as it leaves the fund. This structure provides extra security so the fund won't be sweepable.

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SENATOR MICCICHE related that the Power Cost Equalization (PCE) issue provided the test because it was clearly outside the general fund. It is also why the state had an issue with the Higher Education Fund. He related his understanding that all funds remain available for appropriation regardless of whether they reside outside the general fund. He asked why it would not be considered a dedicated fund.

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MS. SCHULTZ responded that it is not a dedicated fund because the legislature must appropriate into the fund. Once the funds are appropriated to the fund, the legislature can appropriate them elsewhere. Thus, it is not like the Alaska Permanent Fund (APF) or the CBR, which are constitutionally-protected funds from which the legislature cannot make usual appropriations. No appropriations can be made from the APF, and the CBR requires three-quarter vote access. She listed similar funds, the Permanent Fund Dividend Fund (PFD Fund), which funds the PFD and the operation of the Permanent Fund Dividend Division. The fund is statutorily constructed, allowing the administrative costs to come from the appropriations. She stated that every year the legislature makes an appropriation into the PFD Fund to pay dividends. Still, some are spun off in the operating budget as duplicated funds. Thus, it still shows up in the annual budget detailing the Position Control Numbers (PCN). For example, one budget item this year is for conducting additional identity verification, which would be funded with duplicated funds since the funds were functionally appropriated by the legislature once before.

MS. SCHULTZ stated that's how the administration envisioned this fund would operate from a technical and functional perspective.

The legislature would appropriate into the AMHS Fund. Their operations will still show up in the budget, but as a duplicated fund, not a Designated General Fund (DGF), which is how it is currently reflected.

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SENATOR MICCICHE asked if removing the language, "the legislature may appropriate money from the fund" [on page 2, line 18] doesn't matter because the legislature can appropriate

from the fund. Thus, it isn't necessary to add the language to every section in the bill.

MS. SCHULTZ answered yes.

MS. SCHULTZ turned to the recent Superior Court Power Cost Equalization case. The court ruled that the Power Cost Equalization Fund is not subject to a sweep since it is outside the general fund. She explained that this ruling only applied to PCE Fund. The administration took this approach because the Superior Court ruling on PCE might not be interpreted as broadly as the administration would like. The simple fact of whether a fund is inside or outside the general fund isn't enough to prevent funds from being sweepable. Further, PCE is managed by the Alaska Energy Authority, a quasi-corporation outside the normal state function. It's a stronger interpretation of "outside the general fund" than stating the AMHS Fund is outside the general fund since it runs within the state system. This bill would provide a more robust and durable fix to the problem.

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SENATOR KIEHL commented that he was concerned about what the Alaska Supreme Court might rule. However, since the state does not have an Alaska Marine Highway Corporation yet, it strikes him as a good step forward. He suggested that the closest comparison he could think of is the Public Education Fund, which has been used several times to prefund education. He pointed out that the difference was that the state has an education funding formula, so it knows the exact amount of the funding. He asked what the DOTPF commissioner could do with the funds without further appropriation.

MR. MILLS responded that Section 2 of the bill allows for permissible expenditures. He explained the process such that the initial appropriation would be made to these funds, so no further appropriation is necessary. He stated that Section 2 adds sideboards, authorizes and describes how the DOTPF commissioner may make expenditures from the AMHS Fund.

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CHAIR MYERS expressed concern about Section 2. He stated that when the AMHS Fund was created, the court ruled in Sonneman v. Hickel that the legislature couldn't put into statute how the funds could be spent. He wondered if the combination of court cases and legislative actions in the last 15 years would accomplish the goal of stabilizing the system.

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MS. SCHULTZ responded that since the legislature will appropriate into the fund as a terminal appropriation, and expenditures can be made from the fund, subject to the statutory constraints, it would be binding. However, this statute doesn't bind how the legislature can appropriate. Since the appropriation was made, it will limit the commissioner to spend within some fairly hard guidelines. In some ways, this statute provides stronger constraint on expenditures than a regular appropriation. She said she did not want to give the impression that the executive branch can execute on the appropriations as it pleases, but in some ways, it can. Every year, the legislature appropriates so the department can functionally operate AMHS. Beyond that appropriation, the legislature has little control over how DOTPF manages and operates AMHS, which comes up from time to time. She characterized this as a different kind of appropriation with sideboards guiding the department on how to execute the appropriation. Still, it's not that much different than the normal appropriations the legislature makes every year to the basic functioning of every executive branch department.

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SENATOR MICCICHE noted the fiscal note was \$5 million. He asked for the operational reason that AMHS needs a separate fund and a fund balance, especially given the strong support in the legislature for AMHS.

MS. SCHULTZ answered that the AMHS fund was constructed to allow the gross receipts from AMHS. That fund has been spent down, and until recently, AMHS was spending the receipts in the same year collected, along with a general fund subsidy to keep the system operational. Two things changed: the sweep is not consistently being reversed. Second, the state will receive an influx of federal funds from the Infrastructure Investment Jobs Act (IIJA) supporting AMHS. Since the state can functionally replace UGF and gross receipts of the system, it can save those receipts in a fund. It could use the federal funds to replace them and create an endowment or nest egg to fund AMHS. At the same time, the administration could consider more significant policy implications of AMHS as a whole.

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MR. MILLS answered that few funds have an operating system relying on them. He highlighted that the department's goal is to insulate the operational fund from volatility. The department must consider the timing of AMHS's contracts on the Capital

Improvement Program (CIP) and the potential necessity of obtaining vessel replacement funds between legislative sessions. As previously mentioned, AMHS has broad support within the legislature, so the legislature would likely take the necessary actions. However, the reverse sweep requires legislative action, but it has not been successful previously. The department wanted to ensure that the legislature could say this fund has operations that rely on it, so it will not be subject to that type of volatility. He highlighted that this two-prong approach should provide durability or lasting power if PCE is appealed to the Alaska Supreme Court and the ruling goes differently.

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SENATOR MICCICHE related a scenario such that SB 226 passed with a \$5 million fund balance that grew over time. He asked whether the system could continue operating with its savings if the legislature did not adopt a budget in FY 2025 by July 1 since the department is authorized to spend out of the fund.

MS. SCHULTZ answered that she was hesitant to give a firm answer given the complexity of executing a government shutdown. She agreed that AMHS would be able to make expenditures, but the rest of DOTPF would not have a budget. It would be challenging. She stated that she would like the Department of Law to weigh in

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SENATOR MICCICHE understood that the purpose of the bill was to plan and preserve UGF and maximize federal funds, but if the government suffered a shutdown, maintaining the continuity of the system is unknown.

MS. SCHULTZ answered that is correct. However, she was unsure that the bill would protect against an actual government shutdown.

MS. SCHULTZ reviewed the fiscal notes. Fiscal note 1 for \$5 million, reflects a technical fund change. If SB 226 passed, what is listed as designated general funds (DGF) would change to a new fund code. She reported that AMHS only has \$5 million this year since the department used federal funds for the rest of the funding. However, some costs were unallowable for federal reimbursement, so the \$5 million provides a plugin for the budget. It would go from DGF to other duplicated funds.

MS. SCHULTZ stated that the two other fiscal notes relate to funding capitalization, which reflects the appropriations into the two fund, the terminal appropriations to the AMHS Fund for

\$53 million in receipts that reflect a supplemental appropriation, and an appropriation for FY 2023. The fiscal note is indeterminate in future years due to a lack of revenue projections. There is one other supplemental fund capitalization for the AMHS Vessel Replacement Fund, which replaces the amount that was swept in FY 2021.

SENATOR MICCICHE asked whether that was for \$18.4 million.

MS. SCHULTZ answered that is correct.

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CHAIR MYERS asked for clarification of the other two fiscal notes. He related his understanding that the \$53 million would be for this year's operational revenue from fare boxes.

MS. SCHULTZ answered yes. She said the department projections are for \$53 million.

CHAIR MYERS related his understanding that the fund has already been swept. He asked whether the \$18 million was coming from UGF.

MS. SCHULTZ answered yes, the \$18 million was the amount that was swept into the CBR, and this fiscal note appropriates general funds to replenish that amount.

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SENATOR KIEHL related his understanding that without an operating fund that cannot be swept, there is not any possibility to run AMHS with its calendar year budgeting if there is a government shutdown on July 1, 2022.

MS. SCHULTZ asked if he was speaking to a potential government shutdown.

SENATOR KIEHL answered that is correct. He stated that part of the reason that AMHS went to a calendar year budgeting was due to recent run-ins with that deadline.

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MR. MILLS said the struggle is that if the legislature does not pass a budget by July 1, 2022, it would arguably call life, health, and safety into question. He acknowledged that many things in the department would need to wait for the legislature to pass a budget. He suggested that AMHS falls in the gray area. The department had an interpretation that life, health, and

safety may allow AMHS to continue to run. He said he was unprepared to analyze that and provide a clear answer today. Still, those are the things that would need to be examined to agree that the system would be able to continue under this structure versus the larger question of the government shutdown. He offered to research and report to the committee.

MS. SCHULTZ stated the intent is to make the fund sweep proof, not shutdown proof. As Mr. Mills said, a potential government shutdown was not something that was factored into the drafting considerations.

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SENATOR MICCICHE said he would like to have the government shutdown considered since his common-sense approach is with calendar year budgeting with an authorized fund. He emphasized that the AMHS is a critical service, so he surmises that this service could continue with the AMHS Fund. However, he is not an attorney, so he was interested in the legal viewpoint. He offered his view that it is different than fiscal year appropriations. If the funds are not appropriated, there is no money. If funding doesn't arrive for DOTPF, the department would have money that it is authorized to spend under the bill.

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MR. MILLS offered to have someone from the Department of Law respond.

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At ease

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CHAIR MYERS reconvened the meeting.

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SENATOR MICCICHE stated that the Alaska Marine Highway System Fund was swept. He wondered if the legislature passed SB 226 with the fund outside the general fund, whether it would be protected from a sweep. The department would have adequate funds for continuous operation on the calendar year with a fund balance and authority to spend in Section 2 of SB 226. He offered his view that AMHS could continue operating if the system had available funds in the AMHS Fund.

CORI MILLS, Deputy Attorney General, Civil Division, Department of Law, Juneau, Alaska, answered yes. She explained that the bill has no further need for appropriation since DOTPF could

spend the funds. Although AMHS operates on the calendar year, it has a fund available to use the fund source. In the past, when considering potential shutdown scenarios, if anything had a source of funding that continues and didn't need further authority to spend, that was a funding source that could be spent.

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SENATOR MICCICHE noted that there might be other impacts on DOTPF's senior leadership. However, leadership and expenditures associated with the fund could continue. He was unsure how the rest of the department would be shut down. He surmised that commissioners would eventually be paid. He related his understanding that this bill would keep the critical service of AMHS operating if the legislature did not pass a budget by July 1.

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MS. MILLS answered that from a funding perspective that is correct. However, she said she could not answer the personnel aspect since several collective bargaining agreements would be affected. She agreed that there would be funding to pay for AMHS operations.

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CHAIR MYERS held SB 226 in committee.

[2:09:08 PM](#)

There being no further business to come before the committee, Chair Myers adjourned the Senate Transportation Standing Committee meeting at 2:09 p.m.