

HOUSE FINANCE COMMITTEE  
March 15, 2023  
1:35 p.m.

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CALL TO ORDER

Co-Chair Foster called the House Finance Committee meeting to order at 1:35 p.m.

MEMBERS PRESENT

Representative Bryce Edgmon, Co-Chair  
Representative Neal Foster, Co-Chair  
Representative DeLena Johnson, Co-Chair  
Representative Julie Coulombe  
Representative Mike Cronk  
Representative Alyse Galvin  
Representative Sara Hannan  
Representative Andy Josephson  
Representative Dan Ortiz  
Representative Will Stapp  
Representative Frank Tomaszewski

MEMBERS ABSENT

None

ALSO PRESENT

Laib Allensworth, Staff, Representative Bryce Edgmon; Megan Wallace, Chief Counsel, Legislative Legal Services; Alexei Painter, Director, Legislative Finance Division.

PRESENT VIA TELECONFERENCE

SUMMARY

HB 39        APPROP: OPERATING BUDGET/LOANS/FUND; SUPP

HB 39 was HEARD and HELD in committee for further consideration.

HB 41        APPROP: MENTAL HEALTH BUDGET

HB 41 was HEARD and HELD in committee for further consideration.

HB 62 RENEWABLE ENERGY GRANT FUND

HB 62 was REPORTED out of committee with eleven "do pass" recommendations and one previously published fiscal impact note from the Department of Commerce, Community and Economic Development: FN7 (CED).

PRESENTATION: MECHANICS OF CONSTITUTIONAL BUDGET RESERVE VOTE, REVERSE SWEEP, AND EFFECTIVE DATES

#hb39

#hb41

#hb62

HOUSE BILL NO. 39

"An Act making appropriations for the operating and loan program expenses of state government and for certain programs; capitalizing funds; amending appropriations; making reappropriations; making supplemental appropriations; making appropriations under art. IX, sec. 17(c), Constitution of the State of Alaska, from the constitutional budget reserve fund; and providing for an effective date."

HOUSE BILL NO. 41

"An Act making appropriations for the operating and capital expenses of the state's integrated comprehensive mental health program; and providing for an effective date."

HOUSE BILL NO. 62

"An Act relating to the renewable energy grant fund and recommendation program; and providing for an effective date."

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Co-Chair Foster reviewed the meeting agenda.

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Co-Chair Edgmon summarized HB 62. He explained that HB 62 extended the Renewable Energy Grant Fund and Recommendation Program for 10 years and set a new sunset date of June 30, 2033.

Co-Chair Foster indicated that Representative Coulombe had joined the meeting.

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Co-Chair Johnson reviewed the fiscal impact fiscal note, for the Department of Commerce, Community and Economic Development (FN1 (CED) allocated to Statewide Project Development, Alternative Energy, and Efficiency. [Co-Chair Johnson had stated that the fiscal note was zero in error.]

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LAIB ALLENSWORTH, STAFF, REPRESENTATIVE BRYCE EDGMON, clarified that the fiscal note had a fiscal impact of \$1.4 million that was included in the governor's budget request.

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Co-Chair Foster reiterated that the fiscal note totaled \$1.4 million and was already included in the governor's budget.

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Representative Josephson asked what the administrative costs were for FY 23.

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Curtis Thayer, Executive Director, Alaska Energy Authority, Department of Commerce, Community and Economic Development, responded that \$1.4 million was appropriated in FY 23. He furthered that the amount the average cost to run the program each year.

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Co-Chair Johnson MOVED to REPORT HB 62 out of committee with individual recommendations and the accompanying fiscal notes.

There being NO OBJECTION, it was so ordered.

HB 62 was REPORTED out of committee with eleven "do pass" recommendations and one previously published fiscal impact note from the Department of Commerce, Community and Economic Development: FN7 (CED).

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^PRESENTATION: MECHANICS OF CONSTITUTIONAL BUDGET RESERVE VOTE, REVERSE SWEEP, AND EFFECTIVE DATES

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Co-Chair Johnson introduced the next item on the agenda.

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MEGAN WALLACE, CHIEF COUNSEL, LEGISLATIVE LEGAL SERVICES, Alaska State Legislature, introduced the presentation entitled, "Constitutional Budget Reverse Sweep and Effective Date Overview," dated March 15, 2023 (copy on file). She indicated that she would review the mechanisms of the Constitutional Budget Reserve (CBR) and the Reverse Sweep in light of the recent litigation surrounding both budget items. She discussed the litigation and its impact on the historical analysis of the sweep and spoke to effective dates.

Ms. Wallace explained the Constitutional provisions of the CBR found in Article IX, Section 17 of the Alaska Constitution. She delineated that subsection (a) established the CBR fund and covered the deposits and investments of the fund. Subsection (b) established a formula in which the legislature was able to access the funds via majority vote. She furthered that subsection (c) allowed for appropriation from the fund for any public

purpose upon approval of three quarters of both houses of the legislature. All of the deficit spending and reverse sweep mechanisms were appropriations under subsection (c).

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Co-Chair Johnson asked about subsection (d). She pointed out that it was amended in 1990. She asked if Section 17 was part of the original Constitution. Ms. Wallace responded that all of Section 17 was approved by the voters in 1990 via a constitutional amendment.

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Ms. Wallace turned to slide 2 titled "CBR Sweep Mechanism:"

The CBR sweep provision was established in Article IX, Section 17 of the Alaska Constitution:

(d) Repayment requirement -"If an appropriation is made from the budget reserve fund, 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 budget reserve fund. The legislature shall implement this subsection by law."

Ms. Wallace explained that subsection (d) meant that any money left in the General Fund (GF) that was available for appropriation was effectively swept into the CBR, which was the reason it was referred to as the "sweep."

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Representative Josephson offered that the debt was not like a credit card debt that had repercussions if the debt was not repaid. There was no penalty or fee for not repaying the CBR. He asked if he was correct. Ms. Wallace answered in the affirmative. She added that there was no specific enforcement or penalty if the legislature did not repay the fund. The only consequence was that there would be a sweep every year until the amount was fully repaid.

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Representative Stapp asked for a definition of "amount of money available for appropriation" in context of the

Earnings Reserve Account (ERA). Ms. Wallace deferred the answer to future slides. She pointed out that there were many upcoming slides that would discuss the topic.

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Ms. Wallace continued on slide 2. She communicated that the sweep occurred by operation of the Constitution under subsection D. The legislature occasionally decided to adopt what was called a "reverse sweep." It was not possible to stop the sweep from happening, but an appropriation could be passed to return all of the swept funds back to all of the original sub funds or accounts from whence they came.

Ms. Wallace discussed slide 3 titled "Reverse Sweep:"

- The "reverse sweep" is an appropriation from the CBR that returns swept funds back to the original subfund or account. The "reverse sweep" is an appropriation under art. IX, sec. 17(c), and requires a 3/4 vote to pass.
- The sweep is effective at the end of a fiscal year (June 30) and the reverse sweep is effective on the first day of the following fiscal year (July 1).

Ms. Wallace commented that if a reverse sweep passed, the only sweep that would actually occur was an accounting event involving the reconciliation of accounts at the end of the fiscal year.

Ms. Wallace moved to slide 4 titled "How the Sweep Works:"

The Department of Administration's Division of Finance(DOF) accountants calculate the sweep while preparing the Annual Comprehensive Financial Report (ACFR). The sweep represents unreserved, undesignated fund balances of the general fund subfunds.

- DOF accountants calculate the sweep in September as the ACFR is prepared yet the amount of the sweep is posted in the financial records as of the end of the fiscal year (June 30th).
- After the ACFR is prepared (historically by the end of October), the ACFR is audited by the legislative auditor. The sweep amount is adjusted

as necessary. The sweep amount is adjusted as necessary.

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Representative Josephson asked if the key agencies that voiced opinions on what was "sweepable" were not in agreement. He noted that included the Office of Management and Budget (OMB), Legislative Finance Division (LFD), and the Division of Legislative Audit. Ms. Wallace replied in the affirmative and furthered that there had been moments of disagreement between the different agencies. Ultimately, the entity that carried out the sweep was the administration via the Division of Finance [Department of Revenue.] She reported that there had been litigation over its decisions regarding what was swept.

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Ms. Wallace continued on slide 5 titled "Statute Implementing Sweep Was Found Unconstitutional:"

- AS 37.10.420 was intended to implement the sweep.
- The Supreme Court in *Hickel v. Cowper* found this statute unconstitutional in 1994.
- Since then, the executive branch has had to implement the sweep without statutory guidance. The list of sweepable funds has been driven by legal interpretations of *Hickel v. Cowper*.
- The legislature could pass a new statute that attempts to define which funds are sweepable, but absent this or a court case the administration's interpretation is operative.

Ms. Wallace offered that after the *Hickel v. Cowper* judgement the legislature had not attempted to define which funds were sweepable.

Ms. Wallace summarized slide 6 titled "*Hickel v. Cowper* - 874 P.2d 922 (Alaska 1994):"

- To determine whether a fund is sweepable under art. IX, sec. 17(d), the two-part test is whether the fund is:

(1) "in the general fund" and (2) "available for appropriation."

- Hickel addressed the phrase "available for appropriation" and held that funds which may be used to pay state expenditures without further legislative action - or further legislative appropriation -- are not available for appropriation and thus not sweepable. On the other hand, funds that require further appropriation are considered "available for appropriation" and are sweepable.

Ms. Wallace advanced to slide 7 titled "Recent Changes in Interpretation and Resulting Litigation:"

- In 2019, relying on an Attorney General opinion, the administration expanded the scope of the sweep to include additional funds.
- Most significantly, the sweep was expanded to include the Power Cost Equalization (PCE) Fund and the Higher Education Investment Fund.
- Litigation followed.

Ms. Wallace detailed that the Hickel v. Cowper judgement was the "law of the land" for roughly 25 years.

Ms. Wallace pointed to slide 8 titled "AFN v. Dunleavy, 3AN-21-06737CI (August 11, 2021):"

- The Alaska Federation of Natives brought a lawsuit against the administration challenging the sweepability of the PCE Fund.
- On August 11, 2021, a Superior Court ruled in favor of the plaintiffs, finding that PCE should not be subject to the sweep because the PCE fund is a separate fund outside the general fund.
- The court noted that the legislature has also created other "separate funds" and listed those other funds in footnote 77 of the opinion. It was there that the court noted that the legislature established the statutory budget reserve fund in AS 37.05.540(a) "as a separate fund in the state treasury." Based on this notation, our office has advised that the statutory

budget reserve fund would also likely be considered outside the general fund and not subject to the sweep.

- The case was not appealed to the Alaska Supreme Court.

Ms. Wallace voiced that the administration decided not to appeal the case to the Supreme Court, but the case would bind the administration in respect to the PCE fund.

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Ms. Wallace continued on slide 9 titled "Short v. Dunleavy, 520 P.3d 142 (Alaska 2022):"

- After the PCE decision and a failed 2021 sweep, the Attorney General wrote a memorandum stating that money already appropriated from the Higher Education Investment Fund (HEIF) for fiscal year 2022 could likely be spent despite the appropriation having an effective date occurring after the sweep, but maintained the position that the HEIF's remaining corpus was subject to the sweep.
  - A group of students then sued the governor alleging that the Higher Education Investment Fund (HEIF) was not sweepable. Legislative Council filed an amicus brief supporting the students' position.
  - The Alaska Supreme Court determined that the HEIF was sweepable. The Court held that the HEIF was "available for appropriation" under the Cowper test, particularly focusing on the fact that the monies in the HEIF, by statute, must be further appropriated to be spent.
  - In 2022, the legislature amended AS 37.14.750(a) to establish the HEIF "as a separate fund in the state treasury." ch. 15, SLA 2022.
- At the time of the Short litigation, the HEIF was established "in the general fund."

Ms. Wallace elaborated that since the administration could not expend the funds without a legislative appropriation the Alaska Supreme Court determined that HEIF was sweepable. The plaintiffs had argued that the court should

consider overruling the Cowper decision ruling, but the court refused. Therefore, the legislature adopted HB 322 [HB 322 - Ak Marine Hwy Funds, Higher Ed Inves Fund, Chapter 15 SLA 22, 06/29/2022] that amended AS 37.14.750(a) to establish the HEIF as a separate fund from GF in the state treasury as well as the Alaska Marine Highway System Fund in AS 19.65.060 (a) and the Alaska Marine Highway Vessel Replacement Fund in AS 37.05.550(a). She noted that although the Supreme Court upheld the HEIF corpus sweep in the prior year, the legislature passed a supplemental fund transfer and reestablished the fund in the previous year's operating budget and deposited \$342.5 million into the fund subsequent to the governor's veto.

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Ms. Wallace discussed slide 10 titled "Scoop vs. Sweep:"

- After the failed 2021 sweep, the Attorney General advised it was legally defensible to not sweep the FY 22 funds appropriated in the budget that had passed but not yet taken effect, and the governor ordered that those FY 22 appropriations not be swept.

- It was from here that the concept of "scooping" the funds before they are swept was born.

- In the Short v. Dunleavy litigation, the superior court held that the HEIF was available for appropriation and sweepable, but that the FY 22 appropriations made from the HEIF should not be swept, even though those appropriations had not yet taken effect at the time of the sweep. The superior court reasoned that "the money is no longer available for appropriation because the money can now be expended without further legislative action." This decision was ultimately affirmed by the Alaska Supreme Court, although the Court did not specifically analyze the "scoop" portion of the superior court's opinion.

Ms. Wallace advanced to slide 11 titled "Special Effective Dates:"

- Article II, sec. 18 of the Alaska Constitution provides "Laws passed by the legislature become effective ninety days after enactment."

The legislature may, by concurrence of two-thirds of the membership of each house, provide for another effective date."

- Enactment occurs when the governor signs the bills or allows the bill to become law without signature. See AS 01.10.070, and art. II, sec. 17, Constitution of the State of Alaska.

Ms. Wallace moved to slide 13 titled "Retroactivity Clause:"

- A retroactive clause does not amount to a special effective date.
- A retroactivity provision may be adopted by majority vote rather than the two-thirds vote required for effective dates. ARCO Alaska, Inc. v. State, 824 P.2d 708 (Alaska 1992).

Ms. Wallace highlighted slide 14 titled "Failure of Effective Dates and Resulting Litigation:"

- Historically, the Attorney General has advised that "A strict interpretation of the absence of an effective date would imply that no money may be expended under the appropriations made in this bill until 90 days after you sign the bill. However, it would be irresponsible to disrupt state government functions to await the constitutionally specified effective date." 1989 Inf. Op. Att'y Gen. (May 25, 883-89-0076).
- However, in 2021, the Attorney General filed suit against the Legislative Affairs Agency, alleging that LAA improperly advised employees that it would "likely" be the legislature's position that "the retroactivity clause enables the work of the Legislature to continue." The Attorney General's suit was dismissed by the superior court on grounds that the action was prohibited under Article III, Section 16 of the Alaska Constitution. The case is under appeal and awaiting final decision from the Alaska Supreme Court. (Taylor v. LAA, S-18292).

- To avoid litigation and uncertainty, the legislature should adopt special effective dates on appropriation bills.

Ms. Wallace recounted that in 2021, the legislature initially passed its budget, but it failed to approve the special effective dates for the budget. A government shutdown might occur in the scenario where effective dates were not approved. Previous historical attorney general opinions implied that the administration could rely on retroactivity provisions to keep state government operating while waiting for the bill to take effect in 90 days. However, in 2021, the attorney general took an opposite view.

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Representative Josephson was familiar with all of the cases apart from Taylor. He understood that Attorney General (AG) Taylor approved all of the appropriations for FY 22 except for sweeping the corpuses of all funds. He referred to it as the Taylor memo. He surmised that the slide countered what actually happened 2021 and was perplexed. Ms. Wallace answered that Representative Josephson was correct. She elucidated that two distinct issues or positions existed. The summary related to the scoop and also addressed the FY 22 appropriations as one issue. Subsequently, the lawsuit was filed, and she thought it was "a matter of opinion" whether they were consistent or not.

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Representative Hannan concluded that the presentation touched on big funds and litigation. She recalled that there had been an agreement between OMB and LFD on which funds were sweepable and which were not. She remembered a list of smaller funds and the nexus between OMB, LFD, and the Department of Law on whether funds were sweepable or not. She wondered about the list.

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ALEXEI PAINTER, DIRECTOR, LEGISLATIVE FINANCE DIVISION, responded that LFD did not have opinions on which funds should be swept and which should not. He communicated that the Division of Legislative Audit held those opinions. He delineated that there were multiple lists regarding sweepable funds. In 2019, the Division of Finance in conjunction with DOL and OMB changed the scope of what the DOF had done in the past and implemented future sweeps based on the changes. He recalled that Legislative Audit had agreed to the changes. He described the sweep issue as an "academic issue" until FY 2020, when no reverse sweep occurred. Legislative audit disagreed with the scoop provision in the FY 2021 statewide audit. He elaborated that in the prior year, the legislature and the governor made a series of changes to the budget to cope with the ramifications of funds not being swept in FY 2021 and FY 2022. There were several funds where the effective dates were changed to June 30<sup>th</sup> versus July 1<sup>st</sup>. Some funds were no longer subject to the sweep by the action, like the Department of Environmental Conservation's Spill Prevention and Response Fund.

Mr. Painter continued that there were a number of funds where the legislature and governor decreased appropriations from sweepable funds to bring revenue and expenditures in line because the funds balances were no longer available. Currently, there were likely fewer issues if a reverse sweep was not adopted. However, there were still impacts that were evident in the supplemental because the purpose of the funds was a way to deal with volatile revenue. He exemplified a Department of Labor and Workforce Development (DOL) fund where the expenditures and revenues did not match up to pay claims due to the workings of the accounts and the inconsistency of when funds came into the account; due to the sweep, there were no funds when needed. Consequently, an Unrestricted General Fund (UGF) request for DOL was included in the supplemental to account for it. The result of not having a reverse sweep was that more UGF was spent on a year to year basis. Some of the funds' revenue lapsed into the CBR instead of replenishing the funds. He lacked current information regarding the consequences of the most recent fiscal year without a reverse sweep. He was unsure if there were any lingering disagreements among agencies regarding sweepable funds due to litigation. He noted that the only disagreement he was aware of was between the auditor and administration regarding the scoop provision.

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Representative Hannan had found the prior list information helpful in understanding the issue regarding the many funds that were affected. She commented that by legislative policy, there were a number of areas where the public was required to pay fees for licensure, investigations, etc., those smaller funds in various agencies where the revenue collected was expended in the next fiscal year. She asked if there was a sense of how many of the small funds, funded by fees that were not part of a reverse sweep that needed to be recapitalized existed. Mr. Painter answered that in the absence of FY 2022 financials, he thought that there would be more balances resolved than in FY 2021, the first year of the sweep. It would be expected that the current years and future sweeps would be fairly minimal. However, it was difficult to do more than speculate at the moment without current financials.

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Co-Chair Edgmon hoped that there would be a presentation at some point about the reason why the CBR and the sweep was ever enacted. He recounted that in 1990, when the CBR was enacted, there were many oil tax disputes involving hundreds of millions of dollars. The CBR was set up as a fiscal stability tool or "lockbox" that required a three-quarters vote to expend. With the onset of declining revenues in 2014, the three-quarters vote was routinely employed and not weaponized as it was in more recent years leading to multiple years of special sessions that carried on into the summer or fall. He relayed that during the 2000's, oil revenue was high and grew the balance of the CBR to \$16 billion. He furthered that his point was that many of the theories in the presentation had not been tested since the three-quarters vote had been seen as perfunctory. Currently, the vote was difficult to obtain and was avoided if possible. The three quarters vote was a very high bar that instigated all of the "machinations" and issues currently under discussion that in prior years worked as a gentleman's agreement. He believed that providing some background on how the CBR became a contested issue brought clarity to the present situation.

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Representative Stapp asked what the Cooper test was. Ms. Wallace returned to slide 6. She read through the definition of what comprised a sweepable fund:

(1) "in the general fund" and (2) "available for appropriation."

Representative Stapp quoted from the Alaska Constitution Article 9, Section 15 and read the last sentence as follows:

All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.

He read from the Cooper case:

"The ERA was effectively not subject to appropriation because "all income from the Permanent Fund shall be deposited into the General Fund unless otherwise provided by law. The ERA was established as a separate account in the fund and all income from the fund shall be deposited by the corporation into the account as soon as it is received. Therefore, money in the ERA never passes through the general fund as is never appropriated as such from the legislature."

Representative Stapp asked if the legislature appropriated money from the ERA. Ms. Wallace responded in the affirmative. She elucidated that money was appropriated for several purposes. During the time of the Hickel decision, the legislature only appropriated money from the ERA for the Permanent Fund Dividend. In addition, the notion that the legislature never appropriated money from the ERA was corrected by the court in a later statement. Representative Stapp commented that his fear was that the state might have made the entirety of the ERA subject to the sweep provision. Ms. Wallace answered that the Supreme Court addressed that concern in Footnote 32 of the opinion. She explained that because the ERA was established outside of the GF and was not part of the GF the ERA failed the two part test. The decision in the Short Case from 2022 reaffirmed the Hickel Case and the Hickel precedent.

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Representative Josephson noted that the Hickel case also addressed endowments and trust funds. He noted that they

were separate due to the way they were designed and created to be self-sustaining and were not available for appropriation. He deduced that they did not pass one part of the two part test. He asked for comment. Ms. Wallace responded that Representative Josephson was correct in that the endowment trust funds had not been historically swept. The Hickel case addressed trust receipts and decided that they were counted as available for appropriation because they were appropriated for the purposes they were created and were only counted for in Article IX, Section 17 (b) in the calculation of whether the legislature could access the CBR by a majority vote. She noted that the legislature had never accessed the CBR using that provision. Representative Josephson wondered if there had ever been a challenge regarding the sweep for funds based on fees for the expense of a board or commission, etc. Ms. Wallace responded that prior presentations from the OMB director indicated that funds from donations were not sweepable.

Representative Josephson asked whether Mr. Painter had an opinion regarding if a three-quarter or simple majority vote was necessary to expend funds from the CBR for the FY 24 budget.

Mr. Painter responded that he would have to revise his math given the decrease in the price of oil. Generally due to the balance of the ERA, they were not close to the threshold. He noted that with the comparison of the prior year's appropriation provision, the calculation was done on all appropriations. The closest the legislature had gotten to the simple majority vote was when \$4 billion was deposited into the Permanent Fund for inflation proofing in the previous year. He surmised that the inflation proofing in FY 23 was estimated to be \$4.2 billion but considering the ERA balance the calculation would be a few billion short.

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Representative Coulombe was confused about the funds that could not be swept under DOR. She asked why funds like the Exxon Valdez oil spill account was not sweepable. Mr. Painter responded that the list in statute like the HEIF Fund, had been modified and is no longer in the GF. The Exxon Valdez oil spill fund was not available for appropriation other than the specific amount appropriated because the expenditure was determined by the trustees of

the fund. The Public School Trust Fund was established before statehood and only the amount set in statute was available for appropriation. Sometimes the test for the "available for appropriation" part could be difficult to determine with trusts. He ascertained that the only part that could potentially be subject to the sweep would be the amount available for appropriation and only if the legislature chose not to appropriate that amount.

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Representative Galvin asked about the appealed decision in the case on slide 14, Taylor versus LAA. She asked if Ms. Wallace had heard anything about the decision or the timing of it. Ms. Wallace replied that it was unknown.

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Co-Chair Edgmon referred to the Wielechowski decision that ruled on the legislature's power to appropriate. He related that the power was constitutionally created and rose above anything in statute. He asked whether he was correct. Ms. Wallace answered that from a general perspective, it was correct. She elucidated that if a statute recommended appropriating funds via a formula or percentage the current legislature could use its own discretion whether they were going to follow it.

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Co-Chair Johnson reviewed the agenda for the following day's meeting.

#  
ADJOURNMENT

[2:46:20 PM](#)

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