

**ALASKA STATE LEGISLATURE**  
**SENATE RESOURCES STANDING COMMITTEE**

February 13, 2023

3:30 p.m.

**MEMBERS PRESENT**

Senator Click Bishop, Co-Chair  
Senator Cathy Giessel, Co-Chair  
Senator Bill Wielechowski, Vice Chair  
Senator Scott Kawasaki  
Senator James Kaufman  
Senator Forrest Dunbar  
Senator Matt Claman

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

SENATE BILL NO. 33

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

- HEARD & HELD

PRESENTATION(S): OVERVIEW OF THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

- HEARD

PRESENTATION(S): OVERVIEW OF THE 404 PRIMACY FEASIBILITY STUDY

- HEARD

**PREVIOUS COMMITTEE ACTION**

BILL: SB 33

SHORT TITLE: RENEWABLE ENERGY GRANT FUND

SPONSOR(S): SENATOR(S) KAUFMAN

01/18/23	(S)	PREFILE RELEASED 1/13/23
01/18/23	(S)	READ THE FIRST TIME - REFERRALS
01/18/23	(S)	RES, FIN

**WITNESS REGISTER**

EMMA TORKELSON, Staff  
Senator James Kaufman  
Alaska State Legislature  
Juneau, Alaska

**POSITION STATEMENT:** Presented the sectional analysis for SB 33 on behalf of the sponsor.

CURTIS THAYER, Executive Director  
Alaska Energy Authority  
Anchorage, Alaska

**POSITION STATEMENT:** Provided invited testimony in support of SB 33.

CONNER ERICKSON, Planning Manager  
Renewable Energy Fund (REF) program  
Alaska Energy Authority  
Anchorage, Alaska

**POSITION STATEMENT:** Answered questions during the hearing on SB 33.

JASON BRUNE, Commissioner  
Department of Environmental Conservation (DEC)  
Juneau, Alaska

**POSITION STATEMENT:** Presented overviews of the Department of Environmental Conservation and the 404 Primacy Feasibility Study.

MEG KOHLER, Director  
Division of Administrative Services  
Department of Environmental Conservation (DEC)  
Anchorage, Alaska

**POSITION STATEMENT:** Participated in the overviews of the Department of Environmental Conservation and the 404 Primacy Feasibility Study.

JULIE PACK, Assistant Attorney General  
Environmental Section  
Civil Division  
Department of Law  
Anchorage, Alaska

**POSITION STATEMENT:** Answered questions during the overview of the 404 Primacy Feasibility Study.

SHANNON MILLER, Program Manager  
Division of Water  
Department of Environmental Conservation (DEC)  
Anchorage, Alaska

**POSITION STATEMENT:** Answered questions during the overview of the 404 Primacy Program.

## **ACTION NARRATIVE**

[3:30:07 PM](#)

**CO-CHAIR CLICK BISHOP** called the Senate Resources Standing Committee meeting to order at 3:30 p.m. Present at the call to order were Senators Kaufman, Dunbar, Claman, Wielechowski, Co-Chair Giessel, and Co-Chair Bishop. Senator Kawasaki arrived soon thereafter.

### **SB 33-RENEWABLE ENERGY GRANT FUND**

[3:31:02 PM](#)

**CO-CHAIR BISHOP** announced the consideration of SENATE BILL NO. 33 "An Act relating to the renewable energy grant fund and recommendation program; and providing for an effective date."

[3:31:29 PM](#)

**SENATOR JAMES KAUFMAN**, District F, speaking as sponsor of SB 33, introduced the legislation speaking to the following sponsor statement:

SB 33 extends the sunset date of the Renewable Energy Grant Fund and Recommendation Program to June 30, 2033.

The Renewable Energy Fund (REF) program was originally established in 2008 with the passage of House Bill 152 and later received a ten-year extension in 2012, in both cases receiving unanimous vote in the legislature. The REF is managed by the Alaska Energy Authority in coordination with a nine member Renewable Energy Fund Advisory Committee.

Since its inception, the Renewable Energy Fund has distributed over \$300 million dollars in grant funds for qualifying and competitively selected renewable energy projects across the state. These REF grants have been supplemented by both federal and local funding to the tune of hundreds of millions of

dollars. These combined funds help to stabilize and reduce energy costs for consumers by supporting renewable energy projects in both rural and urban communities across Alaska.

As technology has improved and the available renewable energy sources have expanded, so too has the number of proposed projects. In Round 14, 39 applications from around the state were submitted and 27 were recommended to receive funding. Thirty-one applications were submitted for Round 15, which closed in December 2022. As energy prices climb, it is important to take advantage of all alternative sources of energy and heat, especially in our most vulnerable communities. The Renewable Energy Grant Fund is an important tool which supports Alaskan communities meet their energy needs.

SB 33 will extend the Renewable Energy Grant Fund for a further 10 years, supporting energy independence in more of Alaska's communities.

[3:32:12 PM](#)

SENATOR KAWASAKI joined the committee.

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SENATOR CLAMAN noted that Legislative Audit didn't review the program this year.

CO-CHAIR BISHOP responded the audit would be presented in Senate Finance.

[3:34:57 PM](#)

EMMA TORKELSON, Staff, Senator James Kaufman, Alaska State Legislature, Juneau, Alaska, presented the sectional analysis for SB 33 on behalf of the sponsor.

**Sec 1.** - Amends Section 5, Ch. 31, SLA 2008, as previously amended, to extend the repeal date of the fund to June 30, 2033.

**Sec 2.** - Makes the sunset extension retroactive to June 30, 2023 if the bill takes effect after the Fund sunsets on that date.

**Sec 3.** - Establishes an immediate effective date under AS 01.10.070(c).

CO-CHAIR BISHOP turned to invited testimony.

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CURTIS THAYER, Executive Director, Alaska Energy Authority, Anchorage, Alaska, stated that the legislature has appropriated more than \$300 million since the inception of the Renewable Energy Grand Fund in 2008. Ninety programs currently are in development, 44 of which are new in the last four years. Legislative funding for these new programs was \$4.7 million and \$15 million. The previous estimate that the program has displaced 30 million gallons of diesel is under review by an independent economist and the new number will be shared with the legislature when it's available. Of the \$300 million in funding, 85 percent has gone to rural Alaska and 15 percent to the Railbelt. Increasingly, the focus has shifted to wind and secondarily to solar and hydro. He highlighted that power for Prince of Wales is over 90 percent renewable. Importantly, the feasibility stage determines whether a project is viable. After that the project receives independent, state, or federal funding that take it to the next level.

MR. THAYER reported that application round 15 attracted 33 applicants who were vying for \$31 million. The next step is to do an economic analysis and feasibility study of those projects to narrow the field to fit with the available funds. He said this program has been very successful and extending it another 10 years would be very beneficial. The bill that was considered last year didn't make it through the process but it had no opposition.

SENATOR KAWASAKI requested an explanation of the evaluation process and stages to qualify an application that result in 85 percent of the REF funding going to rural areas and just 15 percent to the Railbelt.

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CONNER ERICKSON, Planning Manager, Renewable Energy Fund (REF) program, Alaska Energy Authority, Anchorage, Alaska, stated that there is a four-step evaluation process, the first of which is an eligibility review of both the applicant and the project. The second stage is a more thorough review of the economic, financial, and technical feasibility of the project. The third stage is to rank the applications based on the scoring that's part of the state's due process, the matching funds that would be contributed, and other criteria. The fourth stage is to weight the projects to ensure the statutorily required balance between each of the energy ratings. He noted that all the

projects were funded in the last two application rounds, but that was really subject to the available funding.

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SENATOR KAWASAKI reiterated that it seemed that rural projects score higher than those on the Railbelt. He asked if it was because the stage three ranking gives more points to rural areas because the cost of energy is so much higher compared to the Railbelt, or something else.

MR. ERICKSON replied that it depends on who applies and it just so happens that for the last two application rounds there were many more applicants from rural areas than the Railbelt. He acknowledged that a cost of energy score is attributed to each application in stage three and more points are given to applications with higher energy costs.

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CO-CHAIR GIESSEL highlighted that the bill packet provides the statutory guidance for each stage of the process and it was likely posted on BASIS as well.

CO-CHAIR BISHOP asked the sponsor if he had anything to add.

SENATOR KAUFMAN thanked the committee for hearing the bill and for clarifying that the backup material included information about the statutory process.

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CO-CHAIR BISHOP held SB 33 in committee.

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At ease

**PRESENTATION(S): OVERVIEW OF THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

[3:44:59 PM](#)

CO-CHAIR BISHOP reconvened the meeting and announced an overview of the Department of Environmental Conservation (DEC).

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JASON BRUNE, Commissioner, Department of Environmental Conservation (DEC), Juneau, Alaska, began the overview of the Department of Environmental Conservation (DEC) with the mission statement:

Conserving, improving, and protecting Alaska's natural resources and environment to enhance the health, safety, and economic and social well-being of Alaskans.

COMMISSIONER BRUNE reviewed the five values he instituted when he became commissioner:

- We make **Objective** decisions, based on science and facts.
- We are **Accountable** for our actions and stand proudly behind our work, as individuals and as an organization.
- We perform to the highest ethical standards, and produce transparent and consistent regulatory actions to show our **Integrity**.
- We support and encourage **Collaboration** across programs and partners to meet challenges and further our collective mission.
- We strive to provide excellent **Customer Service** both inside and outside of the organization by being professional, responsive, reliable, and respectful.

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COMMISSIONER BRUNE stated that the four main areas of environmental protection and human health are: Air Quality, Water Quality, Spill Prevention and Response, and Environmental Health.

He stated that DEC is accountable to the legislature for funding and direction. With that in mind, he established metrics to facilitate reporting department activities to the legislature when he became commissioner.

COMMISSIONER BRUNE reported the following from the chart on slide 5:

- The department issued more than 11,000 permits, approvals, certifications, and plan reviews in 2021 and about 10,000 were processed in 2022. Inspections and site visits in 2021 numbered just more than 2,000 and that increased to nearly 3,500 in 2022.
- There was less emphasis on virtual inspections in 2022 than 2021, but those inspections are still important because they can save time and money.

- All documents and files continue to be scanned so the 75 percent of DEC employees who work remotely 2-3 days/week still have access to their files.

- In an effort to turn around the annual turnover rate of 25-30 percent, he instituted additional training and development plans for each employee. Training hours are tracked for each employee and the department is averaging 50 hours per week of training for all of DEC. In SPAR, nearly 2.5 weeks is devoted to training every year. That has brought retention in that division to record levels. The department-wide annual turnover rate has dropped 14 percent, which is an accomplishment.

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SENATOR CLAMAN asked how many positions were in the department when he started and how many of those were filled, compared to the total positions today and number that are filed.

COMMISSIONER BRUNE answered that there were 470 positions when he started and there are 516 positions today. Positions that are vacant for more than six months are flagged for elimination.

CO-CHAIR BISHOP asked if he'd shared his training model with any other commissioners.

COMMISSIONER BRUNE replied that the need for training, career opportunities, and the opportunity for telework is discussed at the cabinet level on a regular basis.

CO-CHAIR BISHOP asked if DEC had a voluntary inspection program, similar to the voluntary inspections request that OSHA offers. A "Yellow Card" is issued if something needs to be corrected, but it's "no foul" and there's time to correct the problem. A citation is only issued in a voluntary inspection if there is an immediate threat to life and health.

COMMISSIONER BRUNE said he liked the reference to soccer. He opined that compliance assistance and partnering with the regulating community was imperative; the department jumps at the opportunity to work collaboratively to get projects moving forward.

SENATOR KAWASAKI referenced a document that shows a vacancy rate of just over 6 percent and asked what the turnover is during any particular year.

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COMMISSIONER BRUNE clarified that when he became commissioner four years ago, the turnover rate was 25-30 percent. Today, the turnover rate is 14 percent. That's different than the vacancy rate, which is the percent of the year that a position is unfilled. The 6 percent vacancy rate refers to the percentage of time that all the 516 positions at DEC are unfilled. That's a budgetary problem.

SENATOR KAWASAKI asked if DEC currently had enough experienced to monitor the permits that are issued. He also asked about the current backlog for inspections, site visits, and permit approvals for both air and water quality.

COMMISSIONER BRUNE confirmed that the department had sufficient experienced staff to monitor permits. To the question about backlogs, he said that's not generally been an issue but he would follow up with the exact data.

CO-CHAIR BISHOP asked him to forward the information to his office for distribution.

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COMMISSIONER BRUNE advanced to slide 6 and reviewed DEC leadership positions in the FY2024 operating budget. He provided a brief description of each individual in the positions of deputy commissioner, special assistant to the commissioner, and the directors for the Division of Administration, the Division of Environmental Health, the Division of Air Quality, the Division of Spill Prevention and Response, and the Division of Water. He also noted the assistant attorney general position working within DEC.

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MEG KOHLER, Administrative Services Director, Department of Environmental Conservation (DEC), Anchorage, Alaska, advanced to slide 7 and highlighted the following in the Division of Environmental Health:

- 1) The division took on the national subtitle C RCRA hazardous waste management. Positions have been filled and the division is moving forward with the program.
- 2) Microreactor siting permit regulations for the Eielson area.
- 3) Raw milk and food security

4) IIJA funded projects to review drinking water plans and recreational and commercial shellfish testing.

5) The environmental health laboratory is also enjoying forward progress because of the additional federal funds.

CO-CHAIR BISHOP asked where the microreactor permit would be sited.

MS. KOHLER replied it would be sited at Eielson [Air Force Base].

CO-CHAIR BISHOP asked for the timeframe to execute the permit.

COMMISSIONER BRUNE answered that the Air Force said it wanted to let the contract in July. DEC went through the project scoping in December and January to ensure public concerns were heard, and the regulation package will be released in the next month. This will provide additional opportunity for public comment and the hope is that those regulations for where the facility can be sited will be completed by July. He noted that this same process will be followed for other projects designed to replace diesel in rural Alaska.

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SENATOR DUNBAR said based on an earlier presentation, it seemed as though it would be quite a while before microreactors would be commercially available. There may be a project at Eielson, but that is very different than the small rural communities that would benefit from replacing diesel. He then asked for additional information about the environmental health laboratory.

COMMISSIONER BRUNE responded that a bill that passed last year instructed DEC to put forward a siting regulatory package. He noted he had a meeting with tribal interests and Alaska Native corporations to ensure they were aware of the siting. The process should be very transparent and the regulations can be amended going forward. To the question about the lab, he said it's a great facility that does testing for human health, including shellfish, milk, and drinking water. He offered to give a tour anytime.

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SENATOR CLAMAN how many positions were authorized for the subtitle C RCRA program.

COMMISSIONER BRUNE replied the legislature approved six positions last year.

SENATOR CLAMAN asked what the funding source was for the subtitle C RCRA program, and the breakdown if federal funds were involved.

COMMISSIONER BRUNE said the assumption process for RCRA was 100 percent general fund. Once the state receives primacy for that program, the federal government will provide about \$600,000 for the state oversight.

SENATOR CLAMAN asked if that was \$600,000 annually, and if so, how much of the program that pays for.

COMMISSIONER BRUNE replied it is an annual payment and those federal receipts will pay for 50-60 percent of the program.

SENATOR CLAMAN asked what the timeline was to get the subtitle C RCRA program approved.

COMMISSIONER BRUNE explained that it was a two-year process to implement. DEC currently was developing the application and would submit it next January for the Environmental Protection Agency (EPA) approval. DEC anticipates it will be overseeing the program July 1, 2024.

SENATOR CLAMAN offered his understanding that DEC would finish the application process within the next six months and EPA would have about six months to approve or not approve the application.

COMMISSIONER BRUNE clarified that the approval or disapproval would come 17 months from now.

SENATOR CLAMAN asked if it would be 2025 before DEC was running the program.

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COMMISSIONER BRUNE clarified that it would be FY2025, but the department anticipates the program will be up and running July 1, 2024.

SENATOR KAWASAKI asked for an explanation of the timeline to get the permits in place for the microreactor at Eielson.

COMMISSIONER BRUNE said it was frustrating to learn that the Air Force intends to let that contract in July. He said he argued

that it wasn't possible to push regulations through without meaningful public dialog, and that was why he mandated a scoping process. About 100 comments came in from the public and those are being used to develop the regulatory package, which should be released in several weeks. The comment period will be either 60 or 90 days, although only 30 days is required. DEC has to respond to the comments and get the package to the Lieutenant Governor for approval. The process has to be completed within a year of starting, but the hope is to complete it sometime in July.

SENATOR KAWASAKI asked if that means that DEC won't release the permit until sometime after July.

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COMMISSIONER BRUNE clarified that the regulations need to be in place before the entity can apply and follow the process. He noted that the local governmental jurisdiction also has to sign off on the project.

SENATOR KAWASAKI asked for confirmation that he was not anticipating a backlog in the review and permitting of large IIJA-funded projects.

COMMISSIONER BRUNE responded that 32 communities in Alaska were unserved and still using honey buckets. It's a priority for DEC, the governor, and the congressional delegation and DEC used IIJA funds to add positions to help meet the timelines. He noted that many of the IIJA funded projects will impact wetlands so it would be helpful for the state to assume 404 primacy. He said it's unlikely that those 32 communities will be upgraded immediately because the state doesn't have the capacity to do the upgrades all at once. The EPA has said the state will have 10-15 years to do this, but the goal is to get those communities off honey buckets as soon as possible.

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MS. KOHLER spoke to the following highlights from the Division of Air quality:

- 1) Fairbanks [State Implementation Plan] SIP support & implementation
- 2) Regulatory monitoring network
- 3) Rural monitoring network

- 4) Modelling support
- 5) Ongoing permitting, compliance, and public support for clean air
- 6) IRA funding details forthcoming

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MS. KOHLER briefly mentioned the following highlights from the Division of Spill Prevention & Response:

**Spill Prevention & Response**

- 1) Spill reporting made easier
- 2) 18 AAC 75 Article 4
- 3) Prevention Preparedness and Response Realignment
- 4) Response at ~150 PFAS contaminated sites
- 5) ANCSA litigation
- 6) Cost Recovery
- 7) PFAS Regulatory Package

COMMISSIONER BRUNE said he was pleased to report that the department has been authorized to move forward with the regulatory package to set PFAS limits in the state. This work will begin in the next several months.

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SENATOR DUNBAR said he grew up in Cordova and addressing PFAS contamination was a passion of his. He noted that a fund that was established to pay the cost to recover PFAS throughout the state wasn't sufficient to run the expanded number of recovery programs. He recalled that \$0.009 was collected on every gallon and \$0.04/barrel at Alyeska. He asked if that was correct and if the division supports the proposal to increase the \$0.009 surcharge to \$0.015.

COMMISSIONER BRUNE stated that originally SPAR was funded with \$0.04 for every barrel of oil produced in the state and an additional \$0.01 for the response account. That's \$0.05. The SPAR allocation stops once the response account reaches \$50 million. Right now the balance is in the \$30 million range. To

the second question, he said the administration absolutely supports diversification of funding and increasing the refined fuel surcharge from \$0.0095 to \$0.015. He noted that he was also pleased to have received some general fund dollars for SPAR.

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SENATOR KAWASAKI mentioned the potential for lawsuits in the interest of statehood defense and asked if there was any discussion about the federal SIP.

COMMISSIONER BRUNE said yes; the department was watching that closely. Once the public comment period is finished, the EPA will consider those comments, and the SIP will be finalized later this year. At that point it will be ripe for potential litigation. He also noted the potential for litigation regarding the EPA's responsibility for certifying wood stoves.

SENATOR CLAMAN recapped his understanding that the money is collected from different entities.

COMMISSIONER BRUNE clarified that \$0.05 cents is collected on every barrel of oil produced from Cook Inlet and the North Slope. Of that, \$0.04 goes to the prevention account and \$0.01 goes to the response fund. The refined fuel surcharge is \$0.095/gallon and that goes toward funding SPAR.

SENATOR CLAMAN asked if he supported increasing the \$0.095 to \$0.015 cents.

COMMISSIONER BRUNE answered yes.

SENATOR CLAMAN asked whether the \$0.05/barrel charge would remain the same.

COMMISSIONER BRUNE said that's correct.

[4:20:03 PM](#)

MS. KOHLER jumped to slide 12 and highlighted that Legislative Finance calculations show that DEC's general fund budget per resident worker is just 38 cents a day to protect human health and the environment.

She displayed the chart on slide 13 that illustrates that DEC's budget is less than one percent of the state's total operating undesignated general fund (UFG). She also noted the FY2023 and FY2024 IIJA funding the department will receive.

CO-CHAIR BISHOP thanked the presenters.

**PRESENTATION(S) : OVERVIEW OF THE 404 PRIMACY FEASIBILITY STUDY**

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CO-CHAIR BISHOP announced the consideration of an overview of the 404 Primacy Feasibility Study.

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JASON BRUNE, Commissioner, Department of Environmental Conservation (DEC), Juneau, Alaska, stated that he, Shannon Miller and Julie Pack were eager to talk about the Clean Water Act, Section 404 Dredge and Fill Feasibility Study that the legislature funded last year with \$1 million.

COMMISSIONER BRUNE began the presentation with a review of DEC's existing primacy programs.

- The state assumed primacy of the Clean Air Act in the 1970s.
- Soon thereafter the state assumed primacy over the Safe Drinking Water Act.
- In the mid-2000s, the legislature directed DEC to assume primacy of the National Pollution Discharge Elimination System (NPDES) program under Section 402 of the Clean Water Act. The transition took four years and the program was up and running in 2012.
- Last year the legislature provided funding for six positions so DEC could assume oversight of the Resource Conservation and Recovery Act by July 1, 2024. This is handling hazardous waste.
- The state is now working to assume primacy over Section 404 of the Clean Water Act to regulate the discharge of dredge and fill material.

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COMMISSIONER BRUNE advanced to slide 3 to discuss the history of the state's efforts to assume primacy over the regulation of dredge and fill activities.

- In 2013, the legislature passed Senate Bill 27, mandating that DEC take reasonable steps to assume primacy of the Section 404 program. The bill passed both bodies with bipartisan support.

COMMISSIONER BRUNE deferred to Julie Pack with the Department of Law to talk about the legal components of assuming Section 404 primacy.

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SENATOR CLAMAN asked if he was saying that after the legislation passed in 2013, the department did not take reasonable steps to assume primacy. Rather, the department did an investigation and decided not to proceed.

COMMISSIONER BRUNE clarified that the department was taking reasonable steps, but oil prices fell and the program was not funded. It was just last year that the legislature provided \$1 million to commence the feasibility study.

SENATOR CLAMAN asked if DEC did any studies or if any reports were prepared in the 2013 era, similar to the report the committee has today.

COMMISSIONER BRUNE yes and that was submitted last year as part of the record last year. He offered to provide a copy again this year.

SENATOR CLAMAN said he'd appreciate that.

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SENATOR WIELECHOWSKI commented that the fiscal situation hadn't really changed since 2013 because money was still a problem and the budget was still not balanced.

COMMISSIONER BRUNE said the legislature holds the purse but he believes that this is an investment that is well worth making. In the long run, he said it's an opportunity to diversify the funding. The regulated community supports partially funding this through user fees and there's a ground-swell of support among states to get the federal government to provide some support to states that assume Section 404 primacy. He acknowledged the current budgetary issues and expressed hope that this two year effort would result in a program that is funded by the federal government, users, and some general fund.

SENATOR WIELECHOWSKI offered his perspective that the fundamental concern had always been the money. He noted that the federal government has more staff to run the program than DEC is proposing, and the states that have assumed primacy - Florida, New Jersey, and Michigan, have more staff to run their programs and nowhere near the acreage in wetlands that Alaska has. For example, Michigan has 6.5 million acres of wetlands and 82 staff in 10 offices to run the program; New Jersey has 915,000 acres in wetlands and 176 staff; and Florida has 10 million acres in

wetlands and just increased the program staff from 170 to 212 and the current budget request if for an additional 33 staff.

SENATOR WIELECHOWSKI stated that despite overwhelming support in the legislature to assume Section 404 primacy, it's never penciled out. Furthermore, even if the state were to assume primacy, it would still be subject to federal regulations.

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COMMISSIONER BRUNE countered that while there are 175 million acres of wetland in Alaska, just 0.1 percent has been developed. Furthermore, those other states need more staff because they have more economic activity associated with the development on wetlands. In Florida, for example, the ongoing building boom is largely on wetlands. The number of positions DEC has proposed is based on the activities those staff will do, not the wetland acreage. He also posited that any economic activity beyond what's anticipated will lead to more royalties and taxes and will pay for itself. He further posited that not only does industry want the state to assume primacy, but the environmental community also wants this because of the compensatory mitigation to the watershed. He described this as a win-win.

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SENATOR WIELECHOWSKI asked if he would be willing to insert a provision in the budget that requires the program to be cost neutral to the general fund.

COMMISSIONER BRUNE answered no but he had committed on record to work with the regulated community to ensure it has skin in the game. He recounted the process to take the application to EPA and the Corps of Engineers and then have the discussion with the regulated community. It has to be fair for all the entities that benefit from the state assuming Section 404 primacy.

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SENATOR CLAMAN articulated his concern that only three states had moved forward to assume Section 404 primacy, which was just the opposite for Section 402 primacy to oversee the regulation of wastewater discharge under the Clean Water Act. Only three states and the District of Columbia declined to move forward. He counted 23 states that had looked at the issue and decided not to move forward, primarily for cost and complexity reasons. He agreed with Senator Wielechowski that it was a black hole of expense. He emphasized, "I just want to say that I'm very skeptical when you see that many states declining to go forward

and there's zero federal funding to support this if we take it over."

COMMISSIONER BRUNE countered that the states that declined to move forward likely had already developed all their wetlands. He pointed to California that had developed more than 90 percent of its wetlands. It wouldn't benefit that state to assume primacy, but Alaska has 175 million acres of wetlands. He maintained that nobody has more interest in deciding what areas to protect, to develop, and to mitigate any impacts than the state itself.

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SENATOR CLAMAN said he was more interested in Wyoming, Montana, Minnesota, North Dakota, Kentucky, and other states that have resource development and undeveloped wetlands. Those states have chosen not to move forward and assume Section 404 primacy.

COMMISSIONER BRUNE responded that the issue is doing what's right for the wetlands and trying to partner with the development community to ensure that projects go forward while protecting the value of the wetlands in perpetuity.

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SENATOR KAWASAKI added to Senator Wielechowski's comments by pointing out 1) that the state has a \$500 million structural deficit in FY2024 and 2) that in 2013 there was \$19 billion in the statutory budget reserve and the constitutional budget reserve and the legislature still declined to pursue primacy. He also questioned whether DEC could actually fill the new positions given the recruitment and retention problems executive branch agencies are facing. He also voiced concern that the permits are done properly, timely for industry, and with protections in place.

COMMISSIONER BRUNE opined that DEC was a role model among the state agencies for retaining and promoting employees. The turnover rate was cut in half in last four years.

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SENATOR DUNBAR asked 1) why the state didn't wait until the program was federally funded and 2) why Florida was able to assume primacy in just two years when it took New Jersey and Michigan seven or more years.

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COMMISSIONER BRUNE argued that 1) the two year timeframe was achievable because the EPA and Corps of Engineers just went

through the process with Florida and it was fresh on their minds; 2) the state had an excellent relationship with the Corps and EPA; and 3) Congress designed these programs to be assumed by states and provided funding. DEC received \$49,000 from the EPA to do wetlands delineation.

SENATOR DUNBAR asked why the state didn't wait until the federal government funded the program.

COMMISSIONER BRUNE offered his belief that it was a good investment of state dollars to move forward now and to concurrently work to get the federal government to fund the program. He pointed out that even if there was federal funding, it would not be available until after the application was approved.

[4:45:08 PM](#)

JULIE PACK, Assistant Attorney General, Environmental Section, Civil Division, Department of Law, Anchorage, Alaska, stated that before she goes through Section 404 of the Clean Water Act from a legal perspective, she wanted to articulate the Department of Law's position on how EPA's 404 veto power intersects with the 404 assumption program if a state were to assume the program. That position is that the EPA's statutory 404(c) power will not be affected by state assumption of the 404 program.

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SENATOR CLAMAN asked if she was saying that if the state assumes 404 permitting authority, EPA will still have veto authority over any decision the state makes as to its portion of the 404 program.

MS. PACK replied that just three states have assumed the program and EPA has only finalized this power 14 times as of the most recent determination. Because there are so few instances of the 404 assumption context and veto context, no court has opined on the specific question of how they intersect. It is a technical, legal grey area, but Section 404(j) provides for a federalization process. In that process, when the EPA receives a copy of a permit application, it has the opportunity to raise objections that the state must resolve. If the state doesn't resolve the objections, EPA can federalize the permit and return it to the Corps. Once the permit is back on the federal track, EPA's 404(c) power applies the way it did for Bristol Bay.

[4:48:03 PM](#)

SENATOR CLAMAN asked if she said there were 14 instances of a state permit being federalized in one of those three states.

MS. PACK clarified that the 13 instances she mentioned were EPA's previous exercise of its 404(c) power. None of those 13 vetoes were over state permits issued by a state-assumed program. She said she was trying to illustrate that there was a lot of daylight between the two concepts.

SENATOR CLAMAN asked if the EPA had taken any action to disapprove a state permit in any of the three states that have assumed 404 authority.

MS. PACK answered yes; EPA federalized one Florida permit and in Michigan or New Jersey it used the federalization power under 404(j) to return a permit to the Corps.

SENATOR CLAMAN asked if that was what was referred to as a veto.

MS. PACK replied those are two separate concepts. The 404(c) is commonly referred to as the veto power and the 404(j) was similar but it applies specifically to state permits.

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SENATOR CLAMAN asked where 404(c) comes into play if a permit is federalized under 404(j).

MS. PACK replied that 404(c) has not come into play in any of the three state-assumed programs.

[4:51:05 PM](#)

SENATOR WIELECHOWSKI offered his understanding that 404(c) was the provision under which EPA effectively vetoed the Pebble Mine project.

MS. PACK answered yes.

SENATOR WIELECHOWSKI asked if she was aware that the administration was contemplating a lawsuit to challenge that authority.

MS. PACK answered yes.

SENATOR WIELECHOWSKI asked whether the administration had made a decision to move forward with the lawsuit.

MS. PACK replied that the administration issued a press release that the Department of Law was discussing and preparing to bring a lawsuit.

SENATOR WIELECHOWSKI asked if she agreed that it seemed odd that she was touting EPA's veto power when DOL was preparing a lawsuit to overturn that authority.

MS. PACK said she'd agree if that were the extent of the story, but there's more. EPA used the language under 404(c) to do what it did on the Pebble Mine but had never done before in any of the previous 13 vetoes. The Department of Law is challenging the veto independent of what is at play here.

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SENATOR DUNBAR asked her to speak to the Florida case and whether the state had filed a lawsuit about the federalization.

MS. PACK explained that the federalization was specifically related to a dispute about how waters of the US (WOTUS) applied. The Trump administration issued the MWPR rule, which was a different definition of WOTUS than the Biden administration is implementing. That rule was vacated in August, 2021 and the permit was federalized. Nobody sued Florida.

SENATOR DUNBAR said it sounds as though the state of Florida did not sue the federal government.

MS. PACK said that's correct.

SENATOR DUNBAR asked what kind of project led to the federalization.

MS. PACK said she would follow up with a written response.

[4:54:29 PM](#)

CO-CHAIR BISHOP asked, if the program is approved, would the state be required to undergo an annual EPA audit to keep the primacy program.

SHANNON MILLER, Program Manager, Division of Water, Department of Environmental Conservation (DEC), Anchorage, Alaska, said it depends. The department has conversations with EPA on a regular basis and makes adjustments as needed, so it doesn't have an annual review of the water programs that other primacy programs may have. She said she anticipates this model will continue and corrections will be made as they come up.

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MEG KOHLER, Administrative Services Director, Department of Environmental Conservation (DEC), Anchorage, Alaska, added that the statutes require the state to submit a report to EPA on an annual basis.

COMMISSIONER BRUNE conveyed that all the state's other primacy programs have the state review framework (SRF) process whereby EPA issues a report card every five years. He reminded the committee that EPA notified him three years ago that DEC wasn't doing enough inspections for the 404 program. He asked the legislature for additional positions to do those additional inspections. He said that's an example of the level of collaboration DEC has with EPA to protect human health and the environment. That will continue.

[4:56:58 PM](#)

CO-CHAIR BISHOP asked if the state owned the entire 175 million acres of wetlands.

COMMISSIONER BRUNE replied it's a mix of ANCSA lands, state lands, and federal lands all over the state.

CO-CHAIR BISHOP asked what percentage of state land is wetlands.

COMMISSIONER BRUNE said he'd follow up with the information.

CO-CHAIR BISHOP mentioned carbon sequestration and earlier efforts to establish a compensatory mitigation program within DNR. He then asked if the 404 program would allow other states to buy into some of the state's wetlands.

COMMISSIONER BRUNE said he wasn't aware that carbon tied into the 404 assumption program.

CO-CHAIR BISHOP said he mentioned mitigation to stimulate thinking about other revenue streams to supplant the use of general funds. He mentioned the \$800 million cost for wetlands mitigation offset on the AKL&G project to highlight the need to look for ways to improve project economics.

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There being no further business to come before the committee, Co-Chair Bishop adjourned the Senate Resources Standing Committee meeting at 5:01 p.m.