

ALASKA LEGISLATURE

2303

HOUSE and SENATE FINANCE COMMITTEE FILES,

2001 - 2002

CON Requirements

- Of the ten **least** densely populated states only two have a CON requirement. Of those two, one requires a CON only for counties with a population of over 100,000 and the other requires a CON only for long term care beds.
- Of the top 15 least densely populated states only four require the CON (the two above plus two more).

- Residents of states with high population densities have options/choices by virtue of having lots of facilities.
- This provides choice and drives efficiency in delivering health care.

- States with small populations need a “free market system” to foster choices and competition.
- Why is Alaska the only one in the top seven least densely populated states with a CON requirement?

Myth

- “Non-profit” and “Not-for-profit” do not necessarily mean efficient operation of the organization.
- Many “Non-profit” and “Not-for-profit” organizations that are funded through charities are driven to greater efficiency because the donors may donate to other causes (donors have choices).
- Health care organizations (and other types of organizations) that have a monopoly are not driven to be efficient and provide the highest quality— they can exist, and continue to exist, and be inefficient, by virtue of their being the *only* choice no matter how bad the choice is.

Carl Wales

- Resident of Fairbanks since 1993.
- I do not work for any part of the health care system.
- I do not own stock in or benefit in any way from the health care industry beyond being a patient.

Accompanying material

- Spreadsheet showing state sizes and populations plus the calculations to determine population density and ranking.
- Chart of states requiring the CON taken from the Community Catalyst web site.

Certificate of Need shown compared to Population and Size

Rank by Population	State	Population (2000 est.*)	Rank by Size	State	Size (Sq. miles of land**)	Pop Density	Rank by Density	C O N	
48	<u>Alaska</u>	626,932	1	<u>Alaska</u>	570,374	1.10	1	Y	
51	<u>Wyoming</u>	493,782	9	<u>Wyoming</u>	97,105	5.09	2	N	
47	<u>North Dakota</u>	642,200	17	<u>North Dakota</u>	68,994	9.31	3	N	
46	<u>South Dakota</u>	754,844	16	<u>South Dakota</u>	77,122	9.79	4	N	
36	<u>New Mexico</u>	1,819,046	5	<u>New Mexico</u>	121,365	14.99	5	N	
39	<u>Idaho</u>	1,293,953	11	<u>Idaho</u>	82,751	15.64	6	N	
35	<u>Nevada</u>	1,998,257	7	<u>Nevada</u>	109,806	18.20	7	Y	18
38	<u>Nebraska</u>	1,711,263	15	<u>Nebraska</u>	75,898	22.55	8	Y	17
34	<u>Utah</u>	2,233,169	12	<u>Utah</u>	82,168	27.18	9	N	
32	<u>Kansas</u>	2,688,418	13	<u>Kansas</u>	81,823	32.86	10	N	
28	<u>Oregon</u>	3,421,399	10	<u>Oregon</u>	96,003	35.64	11	Y	
40	<u>Maine</u>	1,274,923	39	<u>Maine</u>	30,865	41.31	12	Y	
24	<u>Colorado</u>	4,301,261	8	<u>Colorado</u>	103,729	41.47	13	N	
20	<u>Arizona</u>	5,130,632	6	<u>Arizona</u>	113,642	45.15	14	N	
27	<u>Oklahoma</u>	3,450,654	19	<u>Oklahoma</u>	68,679	50.24	15	N	
33	<u>Arkansas</u>	2,673,400	27	<u>Arkansas</u>	52,075	51.34	16	Y	
30	<u>Iowa</u>	2,926,324	23	<u>Iowa</u>	55,875	52.37	17	Y	
31	<u>Mississippi</u>	2,844,658	31	<u>Mississippi</u>	46,914	60.64	18	Y	
21	<u>Minnesota</u>	4,919,479	14	<u>Minnesota</u>	79,617	61.79	19	N	
49	<u>Vermont</u>	608,827	43	<u>Vermont</u>	9,249	65.83	20	Y	
37	<u>West Virginia</u>	1,808,344	41	<u>West Virginia</u>	24,087	75.08	21	Y	
2	<u>Texas</u>	20,851,820	2	<u>Texas</u>	261,914	79.61	22	N	
17	<u>Missouri</u>	5,595,211	18	<u>Missouri</u>	68,898	81.21	23	Y	
23	<u>Alabama</u>	4,447,100	28	<u>Alabama</u>	50,750	87.63	24	Y	
15	<u>Washington</u>	5,894,121	20	<u>Washington</u>	66,582	88.52	25	Y	
18	<u>Wisconsin</u>	5,363,675	25	<u>Wisconsin</u>	54,314	98.75	26	N	
25	<u>Kentucky</u>	4,041,769	36	<u>Kentucky</u>	39,732	101.73	27	Y	
22	<u>Louisiana</u>	4,468,976	33	<u>Louisiana</u>	43,566	102.58	28	Y	

Certificate of Need shown compared to Population and Size

26	<u>South Carolina</u>	4,012,012	40	<u>South Carolina</u>	30,111	133.24	29	Y	
41	<u>New Hampshire</u>	1,235,780	44	<u>New Hampshire</u>	8,969	137.78	30	Y	
16	<u>Tennessee</u>	5,689,283	34	<u>Tennessee</u>	41,220	138.02	31	Y	
10	<u>Georgia</u>	8,186,453	21	<u>Georgia</u>	57,918	141.35	32	Y	
11	<u>North Carolina</u>	8,049,313	29	<u>North Carolina</u>	48,718	165.22	33	Y	
14	<u>Indiana</u>	6,080,485	38	<u>Indiana</u>	35,870	169.51	34	Y	
8	<u>Michigan</u>	9,938,444	22	<u>Michigan</u>	56,809	174.04	35	Y	
12	<u>Virginia</u>	7,078,515	37	<u>Virginia</u>	39,598	178.76	36	Y	
42	<u>Hawaii</u>	1,211,537	47	<u>Hawaii</u>	6,423	188.62	37	Y	
1	<u>California</u>	33,871,648	3	<u>California</u>	155,973	217.16	38	Y	
5	<u>Illinois</u>	12,419,293	24	<u>Illinois</u>	55,593	223.40	39	Y	
6	<u>Pennsylvania</u>	12,281,054	32	<u>Pennsylvania</u>	44,820	274.01	40	N	
7	<u>Ohio</u>	11,353,140	35	<u>Ohio</u>	40,953	277.22	41	N	
4	<u>Florida</u>	15,982,378	26	<u>Florida</u>	53,997	295.99	42	Y	
45	<u>Delaware</u>	783,600	49	<u>Delaware</u>	1,955	400.82	43	Y	
3	<u>New York</u>	18,976,457	30	<u>New York</u>	47,223	401.85	44	Y	
19	<u>Maryland</u>	5,296,486	42	<u>Maryland</u>	9,775	541.84	45	Y	
29	<u>Connecticut</u>	3,405,565	48	<u>Connecticut</u>	4,845	702.90	46	Y	
13	<u>Massachusetts</u>	6,349,097	45	<u>Massachusetts</u>	7,838	810.04	47	Y	
43	<u>Rhode Island</u>	1,048,319	50	<u>Rhode Island</u>	1,045	1003.18	48	Y	
9	<u>New Jersey</u>	8,414,350	46	<u>New Jersey</u>	7,418	1134.32	49	Y	19
44	<u>Montana</u>	902,195	4	<u>Montana</u>	145.556	6198.27	50	Y	
50	<u>Washington, D. C.</u>	572,059	51	<u>Washington, D. C.</u>	61.4	9316.92	51	Y	
		*Source; Department of Commerce, Bureau of Census				**Source: Almanac - U.S.; Department of Commerce, Bureau of the Census		Based on Community Catalyst 1999 chart	

<http://www.ipl.org/youth/stateknow/popchart.html>

Certificate of Need shown compared to Population and Size

- 17 Only for long term beds
- 18 Only for counties over 100,000 population
- 19 Only for acute care hospitals

Certificate of Need Chart

18-Nov-99														
Certificate is required for:														
State	CON (Y/N)?	Oversight Agency	Change in ownership	Constructing a new hospital	Closing a hospital	Decreasing services	Decreasing # of beds	Merger or consolidation	Limits # of acquisitions	Considers community benefits and/or level of indigent care before issuance	Public access to application	Public notice of application	Public hearing on application	Public able to appeal decision
Alabama	Y	State Health Planning and Development Agency		X			X ²				X	X	X	
Alaska	Y	Department of Health and Social Services		X			X ¹							X
Arizona	N													
Arkansas	Y	State Board of Health (Division of Health Facilities Services)		X										
California	Y	Office of Statewide Planning and Development		X								X	X ⁴	
Colorado	N													
Connecticut	Y	Office of Health Care Access	X			X	X					X	X	
District of Columbia	Y	State Health Planning and Development Agency	X		X	X	X ²			X ⁴	X		X ³	X
Delaware	Y	Delaware Health Resources Board	X ⁶	X							X	X	X ²	X
Florida	Y	Agency for Health Care Administration	X ³	X								X	X ²	
Georgia	Y	Department of Community Health		X								X		
Hawaii	Y	State Health Planning and Development Agency		X ¹		X	X						X	X
Idaho	N													
Illinois	Y ⁷	Health Facilities Planning Board	X	X	X	X	X				X	X	X	
Indiana	Y ⁶	The State Department												
Iowa	Y	Department of Public Health and Facilities Council		X		X ⁵	X ³			X		X	X	X
Kansas	N													
Kentucky	Y	Cabinet for Human Resources	X ⁹	X		X ^{8,1}	X ^{9,1}						X ¹	X ¹⁰

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Louisiana	Y	Department of Health and Hospitals		X										
Maine	Y	Department of Human Services and Certificate of Need Advisory Committee	X ¹¹							X	X	X	X	X
Maryland	Y	State Health Resources Planning Commission	X ²	X	X ²	X ^{2,1}	X ^{2,1}					X ¹²	X ²	X
Massachusetts	Y	Department of Public Health	X	X		X ¹	X ¹				X		X ¹³	X
Michigan	Y	Department of Public Health and Certificate of Need Commission	X	X										
Minnesota	N													
Mississippi	Y	State Department of Health	X ¹	X								X	X ¹	
Missouri	Y	Missouri Health Facilities Review Committee				X ¹⁴	X ¹⁴					X	X ²	
Montana	Y ¹⁵	Department of Public Health and Human Services									X	X	X ¹⁶	
Nebraska	Y ¹⁷	Department of Health and Human Services Regulation and Licensure												
Nevada	Y ¹⁸	Department of Human Resources		X ¹⁸										
New Hampshire	Y	Health Services Planning and Review Board	X	X						X	X	X	X	X
New Jersey	Y	Department of Health and Senior Services	X ¹⁹	X										
New Mexico	N													
New York ²⁰	Y	Department of Health		X									X ¹⁶	
North Carolina	Y	Department of Health and Human Services	X ³	X			X ¹			X				

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North Dakota	N													
Ohio	N													
Oklahoma	N ¹¹													
Oregon	Y	Health Division of the Department of Human Resources		X										X
Pennsylvania	N													
Rhode Island	Y	Department of Health		X			X ¹				X		X	X
South Carolina	Y	Department of Health and Environmental Control	X	X								X	X ²	X
South Dakota	N													
Tennessee	Y	Health Facilities Commission		X		X ²²						X	X	X
Texas	N													
Utah	N													
Vermont	Y	Health Policy Council	X	X			X ¹			X		X	X ²	
Virginia	Y	Department of Health		X								X	X	
Washington	Y	Department of Health	X	X						X			X ²	
West Virginia	Y	West Virginia Health Care Cost Review Authority	X	X	X	X	X			X	X	X	X ¹⁶	X
Wisconsin	N													
Wyoming	N													
Total: 51	35		18	29	4	11	15	0	0	8	10	19	25	16
Percentage	69%		35%	57%	8%	22%	29%	0%	0%	16%	20%	37%	49%	31%

Notes are on the following page

Notes

1. For any change
2. Hearing not required, must be requested
3. CoN not needed if gave prior notice
4. All applicants must certify that they will provide uncompensated care (charity care and bad debt) for the next five years at a percentage equal to or greater than the previous two years
5. Hearing only for purchase or lease of hospital
6. Only for acquisition of a nonprofit health care facility
7. Referred to as "certificate of exemption"
8. CoN only needed for Comprehensive Care Beds
9. But may be exempt
10. Any affected person may appeal the decision
11. But, only in the case of lease arrangements
12. For change in bed capacity or services
13. DPH may hold a hearing, or applicant, state, or 10 taxpayers may request a hearing
14. CoN not required, but must give notice
15. CoN not required for hospitals
16. Hearing not required, must be requested, or Authority may schedule on own initiative
17. As of June 12, 1997, a CoN in Nebraska is only required when creating, relocating, or converting long term care beds
18. CoN only required for counties with a population less than 100,000 and for projects costing more than \$2 million
19. Only for acute care hospitals
20. New York does not have licenses or CoNs, it has "certificates" that encompass both licensing and CoN
21. CoN for long term care facilities such as nursing homes
22. Only for discontinuing obstetrical or maternity services

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FY2002 SUPPLEMENTALS

	A	B	C	D	E	F	G	H	I
1	Sec. No.	Department	BRU or Component	Supplemental Need	General Funds	Federal Funds	Other Funds	Fund Source	Total Funds
2	FAST TRACK SUPPLEMENTAL								
3	1	Court System	Judicial Conduct	Legal fees in excess of FY2001 supplemental. Actual amount is \$6829.77.	6.8				6.8
4	2(a)	Comm & Ec Dev	Alaska Science & Technology Foundation	Idaho National Engineering and Environmental Laboratory Grant Contract for Alaska Business Research. Funds are available March 1, 2002.			25.0	Statutory Designated Prog Rcpts	25.0
5	2(b)	Comm & Ec Dev	International Trade & Business Development	International Trade and Business Endowment - replace unrealized FY02 Investment Earnings - Fund Source Change	230.4		-230.4	Internat'l Trade and Dev. Fund Earnings Reserve	0.0
6	3	Corrections	Palmer Correctional Center	New well including pump and wellhouse as primary water well has failed and is nonrepairable. Statutory designated program receipts (SDPR) are from interest earnings of Northern Tobacco Securitization Corporation (NTSC).			172.2	Statutory Designated Prog Rcpts	172.2
7	4(a)	Health & Soc Svcs	Medicaid Services	Medicaid Services - Projected to run out April 16. \$4.57m GF is for FY2001 bills paid in FY2002; 1.8m GF is from underfunding last year below low case scenario; 6.34m GF is for caseload at mid-case range and cost increases, particularly for seniors and disabled.	12,712.5	106,618.0	23,903.3	Statutory Designated Prog Rcpts	143,233.8
8	4(b)	Health & Soc Svcs	Subsidized Adoptions & Guardianship	Formula program caseload growth	2,529.6				2,529.6
9	5	Transportation	Marine Highway Stabilization Fund	Marine Highway Stabilization Fund FY02 deficit due to Columbia fire and fuel cost increases. If not funded, Spring/Summer service would need to be drastically cut, reducing revenues during highest revenue season. Ships would be put into lay-up status for extended periods.	2,876.9				2,876.9
10	6	Military & Vets	Disaster Planning & Control	Costs to maintain 24-hour State Emergency Coordination Center (SECC), the agency that coordinates all federal, state and local jurisdictional responses associated with any disaster or event.	100.0				100.0
11	7	Natural Resources	CIP	Scope change for SLA97, CH50, Sec 15(k), P9, L13 - from prepare and administer the Kalgin Island II, Caribou Hills, S. Ninilchik-Dome View, South Ninilchik Black timber sales in Kenai Peninsula to Kenai Peninsula to reduce risks from wildfire.					0.0
12	8	Governor	Elections	Costs for printing and mailing a Primary Election Voter Education Guide in time to explain the new law (shifted from FY2003 budget which will be amended)	25.0				25.0
13	9(a)	Comm & Ec Dev	Power Cost Equalization & Rural Electrification Fund	Technical correction to add the inadvertently omitted FY02 appropriation from the Power Cost Equalization Endowment fund to the Power Cost Equalization and Rural Electfication Fund			7,062.2	PCE EF	7,062.2

FY2002 SUPPLEMENTALS

	A	B	C	D	E	F	G	H	I
1	Sec. No.	Department	BRU or Component	Supplemental Need	General Funds	Federal Funds	Other Funds	Fund Source	Total Funds
14	9(b)	Comm & Ec Dev	Power Cost Equalization & Rural Electrification Fund	Fully fund the statutory formula in the PCE statute. Cost increase is due to higher fuel costs.	1,100.0				1,100.0
15	9(c)	Comm & Ec Dev	Power Cost Equalization	Fully fund PCE statute. Increase due to higher fuel costs.			1,100.0	PCE	1,100.0
16	9(d)(1)	Comm & Ec Dev	Power Cost Equalization	Delete sufficient authorization from FY02 to pay FY01 late bills			-56.8	PCE	-56.8
17	9(d)(2)	Comm & Ec Dev	Power Cost Equalization	Add authorization to pay power cost equalization program FY01 late bills			56.8	PCE	56.8
18	10(a)(1)	Transportation	Northern Region Highways & Aviation	Chandalar (James Dalton Hwy) Maintenance Station Replacement- Temporary rental and other costs of vacating the maintenance station due to imminent structural failure.	127.8				127.8
19	10(a)(2)	Transportation	Central Region Highways & Aviation	East Fork (Parks Hwy- S of Cantwell) Maintenance Station Replacement- Temporary rental and other costs of vacating the maintenance station due to imminent structural failure.	21.9				21.9
20	10(a)(3)	Transportation	Central Region Highways & Aviation	Willow (Parks Hwy) Maintenance Station Replacement- Temporary rental and other costs of vacating the maintenance station due to imminent structural failure.	45.5				45.5
21	10(a)(4)	Transportation	Northern Region Highways & Aviation	Nome Maintenance Station Imminent Structural Failure - Temporary rental and other costs of vacating the maintenance station to due imminent failure.	72.0				72.0
22	10(b)	Transportation	Northern Region CIP	Chandalar Maintenance Station Replacement Design Costs (SDPR from NTSC - see line 6)			456.8	Statutory Designated Prog Rcpts	456.8
23	10(c)	Transportation	Southeast Region CIP	Title change from West Douglas Highway Extension to Gastineau Channel Second Crossing to match federal project name change					0.0
24	11(a)	University	Systemwide Small Planning, Design and Construction	Funding authority needed in excess of the FY02 small project non-gf receipt authority for Lena Point fisheries and ocean sciences facility for simultaneous excavation with NOAA to prevent disruption and damage to the facility at a later date.			800.0	UA Rcpts	800.0
25	11(b)	University	CIP	Scope Change for Sec 3, Ch 61, SLA 2001 to include UAA Heating, Ventilation, and Air Conditioning Piping Replacement Phases 1-4					
26	12			Lapse Provisions					
27	13			Retroactivity					
28	14			Effective Date					
29				FAST TRACK BILL TOTAL	19,848.4	106,618.0	33,289.1	0.0	159,755.5
30									
31									
32	REGULAR SUPPLEMENTALS								
33	1(a)(1)	Administration	Finance	Contractual costs for maintenance of the State payroll system (AKPAY) core database	150.0				150.0
34	1(a)(2)	Administration	General Relief	Shortfunding for projected caseload	273.0				273.0
35	1(a)(3)	Administration	Leasing	Shortfunding of the amount required to pay leases with the private sector	1,300.0				1,300.0
36	1(a)(4)	Administration	Leasing	FY02 appropriation for the Anchorage Jail lease is short \$4,784.38	4.8				4.8

FY2002 SUPPLEMENTALS

	A	B	C	D	E	F	G	H	I
1	Sec. No.	Department	BRU or Component	Supplemental Need	General Funds	Federal Funds	Other Funds	Fund Source	Total Funds
37	1(a)(5)	Administration	Office of Public Advocacy	Shortfunding of current year exacerbated by increased costs	1,865.0				1,865.0
38	1(a)(6)	Administration	Public Defender	Shortfunding of current year need and fiscal notes	600.0				600.0
39	1(a)(7)	Administration	Public Defender	Mental Health Court attorney approved by the Mental Health Trust			73.0	MHTAAR	73.0
40	1(b) & (c)	Administration	Senior Services	Senior Services Employment Program hold harmless – Federal regulations not promulgated so funds not needed.	-120.0				-120.0
41	2(a)	Comm & Ec Dev	Alaska Aerospace Development Corporation	Replace \$311.9 of unrealized FY02 Alaska Science & Technology Foundation Investment Earnings with AADC receipts.			0.0		0.0
42	2(a)	Comm & Ec Dev	Alaska Aerospace Development Corporation Facilities Maintenance	Replace \$69.2 of unrealized Alaska Science & Technology Foundation FY02 Investment Earnings with AADC receipts.			0.0		0.0
43	2(b)	Comm & Ec Dev	Power Project Fund	Denali Commission Appropriation to the Power Project Fund		4,900.0			4,900.0
44	2(c)	Comm & Ec Dev	Alaska Aerospace Development Corporation	Grant from the U.S. Department of Defense for Kodiak Launch Complex Improvements- Infrastructure Safety Upgrades, Range Safety System, and Road Improvements		20,000.0			20,000.0
45	3(a)	Corrections	Facility-Capital Improvement Unit	The \$160.5 general fund fiscal note funding Ch. 32, SLA 2001 (HB 149 Private Prison in Kenai) is no longer needed since Kenai voters rejected the proposal. Funds are reappropriated to Inmate Health Care.					0.0
46	3(b)	Corrections	Inmate Health Care	Shortfunding in health care costs resulting from continued inflation of pharmacy costs, staff salaries (includes \$676.0 for health care worker/nurses salary costs), contract physician costs and hospital care.	1,839.5				1,839.5
47	3(c)	Corrections	Parole Board	Shortfunding in operations due to increased prisoner hearings and Parole Board activity Chg to 85 ltr 2/28	85.0				85.0
48	3(d)	Corrections	CIP	Offender Tracking Information System Development		762.0			762.0
49	4	Military & Veterans' Affairs	Disaster Relief Fund	The Disaster Relief Fund directly funds the core services of the Division of Emergency Services, 10 full-time positions and the match for another 10 positions. Fund capitalization to cover the core services costs has been done in the supplemental for several years.	680.0				680.0
50	5(a)(1)	Education	Pupil Transportation	Cost for new bus routes approved in current year	541.6				541.6
51	5(a)(2)	Education	Schools for the Handicapped	Education costs for children in state custody who require out-of-state placement	165.5				165.5
52	5(b)	Education	Foundation	Use balance in foundation program resulting from the October student count to fund supplemental needs.	-1,975.9				-1,975.9
53	5(c)	Education	CIP	Federal School Renovation, Individuals with Disabilities Education Act (IDEA) and Technology grants for local school districts		5,400.0			5,400.0
54	5(d)(1)-(2)	Education		Along with a reappropriation of \$198.6 from the Department of Law, this will fund the McGraw-Hill assessment contract increase of \$498.9.	300.3				300.3

FY2002 SUPPLEMENTALS

	A	B	C	D	E	F	G	H	I
1	Sec. No.	Department	BRU or Component	Supplemental Need	General Funds	Federal Funds	Other Funds	Fund Source	Total Funds
55	6	Environ Cons		Amend the FY02 appropriation made by Sec. 89, Ch. 61 for Implementation of the cruise ship bill to correct the fund source from statutory designated program receipts to the Commercial Passenger Vessel Environmental Compliance Fund.					0.0
56	7	Natural Resources	Fire Suppression	Fixed costs and fire suppression costs incurred to date. Updated costs for spring fire suppression will be provided as needed.	7,235.0				7,235.0
57	8(a) - (b)	Fish & Game	CIP	Change fund source on \$28.2 due to shortfall in Commercial Fisheries Limited Entry Commission (CFEC) collections - Dock replacement in King Salmon. (SDPR from NTSC - see line 6)				Rcpt Supp Svcs to Statutory Designated Prog Rcpts	0.0
58	8(a) - (b)	Fish & Game	CIP	Change fund source on \$78.8 due to CFEC shortfall - Statewide facilities repair & maintenance. (SDPR from NTSC - see line 6)				same	0.0
59	8(a) - (b)	Fish & Game	CIP	Change fund source on \$145.0 due to CFEC shortfall - Upper Cook Inlet and Kuskokwim River Coho projects. (SDPR from NTSC - see line 6)				same	0.0
60	8(a) - (b)	Fish & Game	CIP	Change fund source on \$63.0 on FY01 CIP project due to CFEC shortfall - Copper River (Miles Lake) Sonar. (SDPR from NTSC - see line 6)				same	0.0
61	8(a) - (b)	Fish & Game	CIP	Change fund source on \$88.5 due to CFEC shortfall - Mariculture development program. (SDPR from NTSC - see line 6)				same	0.0
62	8(a) - (b)	Fish & Game	CIP	Change fund source on \$200.0 due to CFEC shortfall - Vessel and aircraft repair and maintenance. (SDPR from NTSC - see line 6)				same	0.0
63	9(a)	Governor	Elections	Redistricting: add carryforward language for the remaining balance of the \$947.4 appropriation made in Sec. 20, Ch. 60, SLA 2001					0.0
64	9(b)	Governor		Correct a drafting error in Sec. 36(c), Ch. 61 by adding reference to fiscal year 2001.					0.0
65	9(c)	Governor	Governmental Coordination	Change RPL 01-2-8022 Coastal Impact Assistance Program from Operating to Capital					0.0
66	9(d)	Governor	CIP Governmental Coordination	Additional authorization for the Coastal Impact Assistance Program		3,335.7			3,335.7
67	10(a)(1)	Health & Soc Svcs	Adult Public Assistance	Formula program caseload growth	541.0				541.0
68	10(a)(2)	Health & Soc Svcs	Board on Alcohol & Drug Abuse	Cost of co-locating with AK Mental Health Board			40.9	MHTAAR	40.9
69	10(a)(3)	Health & Soc Svcs	Bureau of Vital Statistics	Increased receipt supported services authority so general funds can be transferred to Community Health/Emergency Medical Services for two-way radio costs			75.0	Rcpt Supp Svcs	75.0
70	10(a)(4)	Health & Soc Svcs	Foster Care Special Needs	Shortfunding of formula program from caseload growth projections	304.6				304.6
71	10(a)(5)	Health & Soc Svcs	General Relief Assistance	Formula program growth	190.7				190.7
72	10(b)	Health & Soc Svcs	Comm Health/EMS	Correct HB 228 Sale of Tobacco Products fiscal note fund source from Tobacco Settlement to Tobacco Use Cessation and Education Fund	-487.9		487.9	Tobacco Use Cessation & Ed Fund	0.0
73	11	Law		Judgments and Claims \$816,486.85	631.5		185.0	PERS Fund	816.5

FY2002 SUPPLEMENTALS

	A	B	C	D	E	F	G	H	I
1	Sec. No.	Department	BRU or Component	Supplemental Need	General Funds	Federal Funds	Other Funds	Fund Source	Total Funds
74	12(a)	Law		Law Office Assistant reclassification costs		1.7	129.4	Inter-Agency Rcpts	131.1
75	12(b)	Law		Fund the \$214.4 general fund portion of the Law Office Assistant reclassification costs with the reappropriation of funds within the Department of Law					
76	13	Military & Vets	Army Guard Facilities Maintenance	Federal funds for increased telecommunications costs for the Distance Learning project		350.0			350.0
77	14(1)	Natural Resources	Geological Development	Federal grant awards for geological projects		493.4			493.4
78	14(2)	Natural Resources	Parks Mgmt	Increased fuel costs	20.2				20.2
79	14(3)	Natural Resources	Parks Mgmt	Increased costs for two-way radio circuits	40.7				40.7
80	14(4)	Natural Resources	Recorder's Office	Costs of title records for new title companies. Title insurance laws require companies to have duplicate records for the past 25 years.			300.0	Statutory Designated Prog Rcpts	300.0
81	14(4)	Natural Resources	Recorder's Office	Assume recording duties in Valdez, Glennallen, and Seward that were previously done by the Courts System without charge. Increased costs to process heavy volume of mortgage refinance activity and implement completed classification study.			235.0	Rcpt Supp Svcs	235.0
82	15(a)(1)	Public Safety	AST	Increased fuel costs	106.1				106.1
83	15(a)(2)	Public Safety	AST- Prisoner Transport	Increased prisoner transports based on higher volume of cases	172.9				172.9
84	15(a)(3)	Public Safety	AST Detachments	Increased fuel costs	125.3				125.3
85	15(a)(4)	Public Safety	AST Detachments	Recruitment Academy Training	81.0				81.0
86	15(a)(5)	Public Safety	AST Detachments	Standby pay due to heightened security	67.5				67.5
87	15(a)(6)	Public Safety	AST	Standby pay due to heightened security	15.7				15.7
88	15(a)(7)	Public Safety	VPSO	Standby pay due to heightened security	11.8				11.8
89	15(a)(8)	Public Safety	AST Detachments	Emergency guard hires needed to guard offenders in areas with no jails.	59.0				59.0
90	15(a)(9)	Public Safety	AST Detachments	Medical examination costs for sexual assault/abuse cases 87.5 (tr 2/28)	87.5				87.5
91	15(a)(10)	Public Safety	AST Detachments	Increased costs for two-way radio circuits	102.4				102.4
92	15(a)(11)	Public Safety	Fish & Wildlife	Increased fuel costs	247.4				247.4
93	15(b)	Public Safety	Batterers Intervention Program	Fund source change to correct the overallocation of PFD felon funds in FY2002.	63.9		63.9	PFD Fund	0.0
94	16(a)(1)	Revenue	Alcohol Beverage Control Board	Contractual costs for a hearing officers to conduct formal hearings on liquor licenses	20.0			General Fund Program Rcpts	20.0
95	16(a)(2)	Revenue	Permanent Fund Dividend Division	Legal costs awarded by state Supreme Court in a class-action suit filed on behalf of applicants denied dividends.			89.9	PFD Fund	89.9
96	16(a)(3)	Revenue	Permanent Fund Dividend Division	Overtime costs to resolve eligibility review and appeal case backlog.			31.9	PFD Fund	31.9

FY2002 SUPPLEMENTALS

	A	B	C	D	E	F	G	H	I
1	Sec. No.	Department	BRU or Component	Supplemental Need	General Funds	Federal Funds	Other Funds	Fund Source	Total Funds
97	16(b)	Revenue	Child Support Enforcement	Recover cost of increased number of paternity testings required by court orders.	43.0				43.0
98	16(c)	Revenue	Child Support Enforcement	Appropriation of interest earned on reserve account balance	60.0				60.0
99	16(d)	Revenue	Treasury Division	Correct fund source for Ch 60, SLA 2000 PCE Fund/Sale of 4 Dam Pool/Energy (HB 446) fiscal note.					0.0
100	16(e)	Revenue	Treasury Division	Repeal fiscal note funding for Ch. 32, SLA 2001 (HB 149 Kenai Private Prison) since Kenai voters did not approve the private prison development.	-20.0				-20.0
101	17(a)	Transportation	Central Region Highways & Aviation	Whittier Tunnel Maintenance and Operations for June 7-30 (current contract expires)			178.0	Rcpt Supp Svcs	178.0
102	17(b)(1)	Transportation	Central Region Facilities	Fuel and Utility Cost Increases	240.9				240.9
103	17(b)(2)	Transportation	Northern Region Facilities	Fuel and Utility Cost Increases	230.6				230.6
104	17(b)(3)	Transportation	Southeast Region Facilities	Fuel and Utility Cost Increases	140.3				140.3
105	17(b)(4)	Transportation	Central Region Highways & Aviation	Fuel and Utility Cost Increases	381.0				381.0
106	17(b)(5)	Transportation	Northern Region Highways & Aviation	Fuel Cost Increases	569.2				569.2
107	17(b)(6)	Transportation	Southeast Region Highways & Aviation	Fuel Cost Increases	39.2				39.2
108	17(c)(1)	Transportation	Ted Stevens Anchorage International Airport (TSAIA) Administration	Utility Cost Increases			10.0	Internat'l Airports Rev Fund	10.0
109	17(c)(2)	Transportation	TSAIA Facilities	Utility Cost Increases			467.0	Internat'l Airports Rev Fund	467.0
110	17(c)(3)	Transportation	TSAIA Field & Equipment Maintenance	Utility Cost Increases			60.0	Internat'l Airports Rev Fund	60.0
111	17(c)(4)	Transportation	TSAIA Safety	Utility Cost Increases			8.0	Internat'l Airports Rev Fund	8.0
112	17(d)	Transportation	State Equipment Fleet Administration	Add authority for increased usage of fuel credit card system			250.0	Highway Working Capital Fund	250.0
113	17(e)(1)	Transportation		Glenn Highway Rut Repair from McCarrey St. to Highland Rd.		6,000.0			6,000.0
114	17(e)(2)	Transportation		Dimond Boulevard Rut Repair		6,000.0			6,000.0

FY2002 SUPPLEMENTALS

	A	B	C	D	E	F	G	H	I
1	Sec. No.	Department	BRU or Component	Supplemental Need	General Funds	Federal Funds	Other Funds	Fund Source	Total Funds
115	17(e)(3)	Transportation		Hillcrest (Anchorage) Bridge Repair- 3rd party repayment for damages. (l/r 2/28)	0.0			General Fund Program Rcpts	0.0
116	17(e)(4)	Transportation		Northern Region Materials Lab Worker Safety Compliance Upgrade. (SDPR from NTSC - see line 6)			600.0	Statutory Designated Prog Rcpts	600.0
117	18(a)-(d)	University	CIP	Eliminate federal receipts since funding source was changed to university receipts via RPL 45-2-0007 for Arctic Supercomputer purchase.		-32,000.0			-32,000.0
118	18 (e)	University		Replace unrealized investment earnings from the Alaska Science and Technology Foundation	1,753.3		-1,753.3	ASTF	0.0
119	19	Misc Claims	Administration	Miscellaneous Claims: -0-, State-dated warrants: 23,744.07	23.7				23.7
120	19	Misc Claims	Corrections	Miscellaneous claims: \$3,204.11	3.2				3.2
121	19	Misc Claims	Fish & Game	Miscellaneous claims: \$3,761.00	3.8				3.8
122	19	Misc Claims	Health & Soc Svcs	Miscellaneous claims: \$21,499.91	21.5				21.5
123	19	Misc Claims	Law	Miscellaneous claims: \$27,060.49	27.1				27.1
124	19	Misc Claims	Military & Veterans' Affairs	Miscellaneous claims: \$274.00	0.3				0.3
125	19	Misc Claims	Public Safety	Miscellaneous claims: \$293.88	0.3				0.3
126	19	Misc Claims	Transportation	Miscellaneous claims: \$32.96					0.0
127	REGULAR SUPPLEMENTAL BILL TOTAL				18,862.5	15,242.8	1,403.8		35,509.1
128									
129	TOTAL FOR BOTH BILLS MINUS THE \$16.5m GF PLACEHOLDER IN FISCAL SUMMARY				22,210.9	121,860.8	34,692.9		178,764.5
130									
131	Ratifications:								
132	20(a)(1)	Transportation		AR 61669-2001 Reimbursable Authority	165,066.62				
133	20(a)(2)	Transportation		AR 64790-2015 Reimbursable Authority	34,614.23				
134	20(a)(3)	Transportation		AR 58904-2001 Reimbursable Proj.	96,773.16				
135	20(b)	Natural Resources	Fire Suppression	FY2001 Fire suppression costs AR 37313-01 Fire Suppression	4,730,000.00				
136	21			Lapse Provisions					
137	22			Retroactivity					
138	23			Effective Dates					
139	24			Immediate Effective Date					

Sec. 1

Subject: Fast Track Supplemental

Date: Tue, 26 Feb 2002 19:32:53 -0500

From: "Marla N. Greenstein" <75471.1003@compuserve.com>

To: "Denny Dewitt, House Finance" <Denny_DeWitt@legis.state.ak.us>

CC: Chris Christensen <cchristensen@courts.state.ak.us>,
Mary Sutton <Mary_Sutton@gov.state.ak.us>

Denny:

Chris will be in Anchorage on Friday and unable to attend the hearing.
This e-mail explains our request:

The primary constitutional responsibility of the Alaska Commission on Judicial Conduct is to recommend discipline for judicial ethics violations to the Alaska Supreme Court. In exercising this constitutional responsibility we incurred appellate costs in FY 01. Last year we sought and received supplemental funding in anticipation of the costs through June 30th. Unfortunately, my conservative assessment of the funds we would require to fulfill these responsibilities was under our actual expenses. Our request of \$6829.77 is the balance owed under our professional services obligation to pursue this matter through the supreme court. Oral argument before the court took place in July and we are awaiting a final decision.

As always, if you or any member of the Committee have any questions, I would be happy to provide additional information.

Thank you,
Marla Greenstein
Executive Director
Alaska Commission on Judicial Conduct

Subject: thought I sent this, but maybe not

Date: Tue, 26 Feb 2002 11:19:11 -0900

From: David Teal <David_Teal@legis.state.ak.us>

Organization: Legislative Finance, State of Alaska

To: Denny DeWitt <Denny_DeWitt@legis.state.ak.us>,
Deb Davidson <Deb_Davidson@legis.state.ak.us>

Sections 3 and 10(b) of the fast track supplemental bill use interest earnings of the Northern Tobacco Securitization Corporation (NTSC) to pay for capital projects. I suggest avoiding use of this money because appropriations of NTSC earnings may jeopardize the legal separation of the NTSC from AHFC and the State.

The reason for creating NTSC as an independent corporate entity was to sell the risk associated with potential reductions in the stream of Tobacco Settlement money to be received by the State. If future Tobacco Settlement cash flow is insufficient to pay debt service on the bonds issued by the NTSC, bondholders may point to appropriations of NTSC earnings as evidence that NTSC is not truly an independent entity. The State could then wind up paying NTSC debt service with GF.

If the legislature determines that the risk to the State is small, or wishes to use the NTSC earnings for any other reason, I suggest that the fund source be changed from Statutory Designated Program Receipts to Miscellaneous Earnings. The NTSC earnings do not appear to pass our test for classification as SDPR.

The preferred alternative—painful as it may be in the short-run—is to leave the earnings with the corporation to be used for debt service and to pay for the projects with general funds (if you chose to fund them). The earnings won't vanish if we don't use them immediately. I'd feel better about spending the earnings if we had a legal opinion saying it would not pierce the corporate veil.

There are several items in the regular supplemental bill that appear every year. We all know that these items—disaster relief fund capitalization and the fixed costs of fire suppression, for example—were shifted to the supplemental in order to make past budgets appear smaller. This approach doesn't help win the "overspent" versus "underfunded" battle with the executive branch. It seems this issue is a lot like the spending limit of SJR 23; a clear limit on expenditures has value because expenditures tend to rise to meet the amount available to spend. Putting the money in the normal operating budget would increase accountability because the legislature would set a limit on expenditures instead of approving whatever costs have been incurred. Obviously, adding to the operating bill is painful, but it would not be a true increase in spending and is cleaner budgeting with potential benefits. Are we ready to attack this? Should we be looking at the supplemental bills when setting spending goals?

There are a few items in the regular supplemental that are questionable, but they can wait. You should probably figure out what you want to do about the unfunded AHFC capital projects, but they can wait for the regular supplemental also.

Sec. 9

**Session 2002 – Fast Track Supplemental Budget Issues
For AEA**

#	ISSUE	COMMENTS	UP-DATED
1	PCE FY 2002 – Endowment \$7,062 million FAST TRACK Section 9 (a)	In SLA 2000, Chapter 60 was passed which dealt with various energy funds and the sale of the 4 Dam pool. Sec 14 provided for funding to be appropriated from the newly created Power Cost Equalization Endowment Fund. However, this was inadvertently missed during the FY 2002 budget process. The capitalization of the fund is required to support the FY2002 PCE program's appropriation, and this supplemental request corrects that oversight. Failure to pass this supplemental request will result in a shortfall in the PCE fund and the program's inability to fully meet its remaining FY 2002 obligations estimated to be \$8.7 million. This supplemental needs an immediate effective date because of the pending fund shortfall.	2/27/02
2	PCE FY 2002 – \$1.1 million FAST TRACK Section 9 (b) Capitalizes the fund Section 9 (c) Authorizes payments	With the continued high cost of fuel in rural areas, the Power Cost Equalization Program has been unable to fully meet its obligations throughout FY 2002. As a result, the PCE program has prorated its obligations to the utilities. This appropriation to the fund, combined with the request for increased authorization, will allow the program to fully meet the anticipated FY 2002 obligations for the period of March to June 2002. Failure to pass this supplemental request will result in continued proration of the program for the remainder of FY 2002. This supplemental needs a March 1, 2002, effective date in order to prevent proration to continue from March to June.	2/27/02
3	PCE FY 2001 - \$56,751.06 FAST TRACK Section 9(d) 1&2	Due the increased cost of fuel oil during FY2001, AEA estimated a pro rata reduction of the Power Cost Equalization Program. Based on this estimate, a 26% reduction was enacted in June of 2001; however, AEA was unable to make payment on \$56,751 worth of grant obligations. This request will allow the program to make payment on its final FY2001 obligations. Failure to pass this supplemental request means that AEA will not meet its FY2001 obligations. AEA's pro rata reduction for FY2002 accounts for this FY2001 requirement, but without approval of this supplemental the required obligations for FY2001 will remain unpaid. This supplemental needs an immediate effective date in order to resolve the inequity.	2/27/02

FY01 Power Cost Equalization Statistical Information as of 2/13/02

Population of Participating Utilities	79,609
Residential Customers	25,089
Commercial Customers	6,513
Community Facilities	1,726
Misc Customers	1,629
Total Number of Customers	<u>34,957</u>
Total Number of Eligible Customers (Res & CF)	26,815
% of Total Customer Base Eligible for PCE	76.71%
Eligible kWh's Residential	87,461,338
Eligible kWh's Community Facilities	33,024,391
Eligible kWh's Total	<u>120,485,729</u>
Total kWh's Sold	403,291,947
% of Total kWh's Sold Eligible for PCE	29.88%

FY01 Total Disbursements To Date: 17,033,000.00

Utility Name	Count	Amount	Percentage
Tanana Power Company	1	113,252.94	0.66%
Napaklak Irclinraq Power Company	1	117,865.74	0.69%
Gwitchyaa Zhoee Utilities (Fl. Yukon)	1	129,292.67	0.76%
Unalakleet Valley Electric Cooperative	1	133,347.56	0.78%
St. Paul Municipal Electric Utility	1	136,182.30	0.80%
Yakutat, City of	1	148,196.73	0.87%
Middle Kuskokwim Electric Cooperative	5	172,471.79	1.01%
McGrath Light & Power	1	198,261.61	1.16%
Aniak Light & Power Company	1	202,840.03	1.19%
Nome Joint Utility System	1	224,360.69	1.32%
Naknek Electric Association, Inc.	1	238,368.36	1.40%
Unalaska Electric Utility	1	240,806.84	1.41%
Gustavus Electric Company	1	248,114.56	1.46%
I-N-N Electric Cooperative	3	267,604.84	1.57%
Sand Point Electric, Inc.	1	329,734.02	1.94%
Nushagak Electric Cooperative, Inc.	2	371,058.52	2.18%
Kotzebue Electric Association, Inc.	1	452,439.13	2.66%
Cordova Electric Cooperative, Inc.	1	592,326.61	3.48%
Bethel Utilities Corporation, Inc.	2	884,008.41	5.19%
Tlingit-Haida Regional Electric Authority	7	1,083,175.74	6.36%
Alaska Power Company	25	1,388,056.54	8.15%
Alaska Village Electric Cooperative	51	6,387,674.00	37.50%
22 Utilities Receiving Over \$100K Annually:	110	14,059,439.63	82.54%
*73 Utilities Receiving Less Than \$100K Annually:	82	2,973,560.37	17.46%
Totals:	192	17,033,000.00	100.00%

Remaining FY01 Disbursement:

Thome Bay	17,175.83
False Pass	11,696.60
Buckland	5,963.84
Akhiok	15,502.63
Umnak	6,411.96
	<u>56,751.06</u>

	Average Rates for Anchorage, Fairbanks, and Juneau	Average Rate for PCE Residential Customers	Straight Average PCE Level	Average Rate PCE customers pay after PCE is applied
6/1/1999	9.9	38.09	14.51	23.58 (reduced level of 73.5%)
6/1/2000	9.9	39.21	20.01	19.20 (100% level)
6/1/2001	9.9	39.91	15.98	23.93 (reduced level of 74.0%)
7/1/2001	9.9	39.91	19.54	20.37 (reduced level of 92.0%)
2/1/2002	9.9	39.01	16.99	22.92 (reduced level of 80.0%)
Est 3/1/02	9.9	39.91	21.24	18.67 (100% projected level)

POWER COST EQUALIZATION
FY 2000 - 2008
(\$ Thousands)

	Fiscal Year Actuals		Fiscal Year Projections						
	2000	2001	2002	2003	2004	2005	2006	2007	2008
Endowment Fund									
Beginning Balance ⁽¹⁾	101,727		95,654	175,779	176,101	176,028	175,927	175,824	175,721
Four Dam Pool Debt Service			9,533						
Four Dam Pool Sale (1/31/02)			80,000						
January Power Sales (8/1/02)				863					
7% Mkt Value Increase (loss) ⁽²⁾	(6,049)		(2,260)	12,355	12,327	12,322	12,315	12,308	12,300
Agency Transfer - Mgmt Fee	(23)		(86)	(96)	(96)	(96)	(96)	(96)	(96)
7% Transfer to PCE Fund ⁽³⁾	0		(7,062)	(12,800)	(12,305)	(12,327)	(12,322)	(12,315)	(12,308)
Balance -- End of Fiscal Year	95,654		175,779	176,101	176,028	175,927	175,824	175,721	175,618
PCE Fund									
Beginning Balance	3,106	17,111	2,527	829	0	0	0	0	0
<u>Revenue</u>									
Fast Track Supplemental	3,600								
Four Dam Pool Debt Service	5,516								
Four Dam Pool Interest	10,378								
Ch 61 SLA 01, section 13			6,854						
Transfer from Endowment Fund			7,062	12,800	12,305	12,327	12,322	12,315	12,308
2% Earnings -- PCE Fund ⁽⁴⁾	227	1,026	86	273	246	247	246	246	246
NPR-A	9,163								
Recovery of Prior Year Outlays	1	7							
Other Funds ⁽⁵⁾			1,100	4,553	6,841	7,385	8,189	9,027	9,898
Total Revenue	28,884	1,033	15,102	17,625	19,192	19,959	20,757	21,588	22,451
Total Revenue and Beginning Balance			17,629	18,453	19,192	19,959	20,757	21,588	22,451
<u>Expenditures</u>									
Appropriation for PCE payments		15,700							
Encumbrance from PCE AR		(34)							
FY00 Reversal of accrual		(222)							
FY00 Outlay in FY01		120							
Est. Total PCE Outlay ⁽⁵⁾	14,783	15,565	15,700	18,453	19,191	19,959	20,757	21,588	22,451
Rural Electric Grants	96	53							
Supplemental Outlay ⁽⁵⁾			1,100						
Total Fund Expenditures	14,879	15,617	16,800	18,453	19,191	19,959	20,757	21,588	22,451
Balance -- End of Fiscal Year	17,111	2,527	829	0	0	0	0	0	0

⁽¹⁾ FY01 CBR Transfer + Interest

⁽²⁾ Actual loss as of 1/31/02 for FY02; AS 42.45.080 (a)(2) requires the fund to be invested in a manner likely to achieve at least a 7% nominal return over time.

⁽³⁾ 7% of MV of fund on 2/1/01 for FY02; 2/1/02 for FY03; Monthly average MV for previous 3 years (excluding months prior to 4DP Sale) As determined on 7/1 of prior fiscal year for FY04 and beyond.

⁽⁴⁾ Actual interest postings through 1/16/02 for FY02; AEA estimate of earnings for future years.

⁽⁵⁾ FY02 PCE Fund revenue and outlays include the Governor's Supplemental Budget request. FY03 - FY08 estimates include a 4% inflation adjustment.

HB

421

HAFIN

FILE

HOUSE COMMITTEE REPORT

(11)

Date Referred to Committee: March 1, 2002

FURTHER REFERRALS:

Date of Committee Action: 3/28/02

The FINANCE Committee considered:

HB 421

HOUSE BILL NO. 421

WATER USE AND APPROPRIATION

"An Act relating to water use and appropriation."

Recommends it be replaced with CS HB 421 (Res) Same Title [] New Title
 For Senate Bills with new title: [] Technical Title [] New Title: HCR _____

- [] attach amendments
- [] add new referral to _____ Committee
- [] Letter of Intent _____ Committee

List of Abbrev. for Depts.:

- ADM
- CED
- COR
- CRT
- EED
- DEC
- DFG
- GOV
- HSS
- LAA
- LAW
- LWF
- MVA
- DNR
- DPS
- REV
- DOT
- UA

<u>NEW FISCAL NOTES</u>				
*For Chief Clerk's Office Use Only				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

<u>PREVIOUS FISCAL NOTES</u>				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
HRES/DNR	1	✓		✓
DNR	2	✓		

<u>Signing with recommendations</u>	Printed Last Name	DP	DNP	NR	AM
<i>[Signature]</i>	Bunde			✓	
<i>[Signature]</i>	W. H. Harris	✓			
<i>[Signature]</i>	HARRIS	✓			
<i>[Signature]</i>	CROFT				✓
<i>[Signature]</i>	DAVIES				x
<i>[Signature]</i>	Leicester	✓			
<i>[Signature]</i>	Hudson				✓
Chair:					
Chair: <i>[Signature]</i>	Williams	✓			

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 421(RES)
(H) Publish Date: 3/22/02

Revision Date/Time (Note if correction): _____ Dept. Affected: DNR
Title: HB421: WATER USE AND APPROPRIATION BRU: _____
Sponsor: House Resources Committee Component: _____
Requester: House Resources Committee Component Number: _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The Department of Natural Resources received \$300K last year for the purposes of addressing the backlog of water rights adjudication applications. This appropriation has remained in the current budget proposal. The department has testified in budget subcommittee meetings this legislative session that it has not yet finished development of a program, or completed hiring for this project. The department has proposed verbally that the required positions for implementing the requirements in this bill will approximate \$80K. It is reasonable to expect that amount to be taken from the above mentioned appropriation.

Prepared by: Jennifer Yuhas, Committee Aide Phone _____

Representative Masek, Co-chair Date 3/22/02
House Resources Committee

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: CSHB 421(RES)
 (H) Publish Date: 3/22/02

Revision Date/Time (Note if correction): _____ Dept. Affected: Natural Resources
 Title: Water Use and Appropriation BRU: Minerals, Land & Water Dev
 Component: Water Development

Sponsor: (H) Resources
 Requester: (H) Fin Component Number: 916

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual	75.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	75.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	75.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	75.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: none
 Check this box (X) if funding for this bill is included in the Governor's FY2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The bill calls for providing Internet access to DNR water rights, water use reports, and temporary water use authorizations. The Internet access would provide the public with following:

- GIS map interface showing location of water rights and permits
- Ability to view specific casefile information about new rights, authorizations or permits. This would not be all documents related to the casefile, but a casefile summary.
- Ability to view DNR regional summary information about rights, authorizations and permit activity (e.g... how many water rights or temporary water use authorizations in a particular region).
- Offer ability to link to DNR well log information system.

Prepared by: Bob Loeffler, Director Phone 269-8600
 Division: Division of Mining Land and Water Date/Time 12-Mar-02
 Approved by: Pat Pourchot Date 12-Mar-02
 Agency: Natural Resources

CSHB 421(RES) FN# 2 - ANAL, SIS: (continued)

- It may be possible to view individual water right certification and permits from the time that the system is developed, but historical documents (other than casefile summaries) would not be available.

As part of this on-line system, DNR will assure on-going updates are made available.

The DNR Water Unit would contract with the Information Resource Management component via RSA to deliver these services. No additional staff are needed to complete this project.

CS FOR HOUSE BILL NO. 421(RES)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE HOUSE RESOURCES COMMITTEE

Offered: 3/1/02

Referred: Finance

Sponsor(s): HOUSE RESOURCES COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to water use and appropriation."

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 * Section 1. AS 46.15.020(b)(2) is amended to read:

4 (2) develop and maintain a standardized procedure for processing
5 applications and the issuance of authorizations, permits, and certifications under
6 this chapter; shall keep a public record of all applications for permits and certificates
7 and other documents filed in the commissioner's office; [AND] shall record all permits
8 and certificates and amendments and orders affecting them and shall index them in
9 accordance with the source of the water and the name of the applicant or appropriator;
10 and shall make the record of applications, authorizations, permits, certificates,
11 amendments, and orders affecting them available to the public on the Internet;

Committees:

Resources
Co-Chair

Transportation

World Trade and
State & Federal Relations

Alaska State Legislature



During Interim: (June-Dec.)
Mat-Su LIO
600 E. Railroad Avenue
Wasilla, AK 99654
(907) 376-2679
Fax: 373-4745

During Session: (Jan.-May)
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Juneau, AK 99801-1182
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1-800-505-2678

Representative Beverly Masek

Sponsor Statement

HB421 "An Act relating to water use and appropriation."

This bill directs the Department of Natural Resources to develop a standardized procedure for processing water rights applications.

Alaska's water is a public trust resource. Our state constitution tasks our legislature with the responsibility to oversee distribution of all public trust resources. The distribution of our state's water has been statutorily delegated to the administrative branch of our state government, specifically to the Commissioner of our Department of Natural Resources.

This legislation is a response to overwhelming public testimony given at meetings conducted in the Fall of 2001. The meetings were initiated by the Department of Natural Resources in order to meet with various environmental groups in order to explain the proposed regulation changes to the water rights adjudication process. Many individuals voiced complaints that they were unsure as to the status of their own permit, or that they could not obtain information as to pending permits in a given area. Examples of water uses that have been distributed for bodies of water with pending applications for adjudication of a water right were revealed at these meetings. Directing the department to develop and implement a standardized procedure is an effort which will better serve the public interest regarding the distribution of our state's water.

This bill also directs the department to make public records, including pending applications for water rights adjudication, available on the internet.

It was agreed in many of the meetings this Fall that the posting of information on the internet was an acceptable method of public notice, and a desirable avenue for public access to records. The department was able to use their website for several well designed pages supporting the proposed regulation changes, and should be able to implement a means of similar access to other matters of public record.

Alaska State Legislature

Representative Beverly Masek
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House Resources Committee

15 January 2002

Alaska Department of Natural Resources
Division of Mining, Land and Water
Bob Loeffler, Director
555 West 7th Avenue, Suite 1070
Anchorage, Alaska 99502

CC: Pat Porchot, Commissioner, Department of Natural Resources

Dear Mr. Loeffler,

I am writing to you regarding the distribution process of the Division of Mining, Land and Water. The passage of HB185 last year contained a sunset clause for temporary water permits. An October 5th Alaska Superior Court ruling deemed the Department of Natural Resources' current process for issuance of temporary water permits arbitrary and capricious, as well as illegal.

I am aware that DMLW solicited a number of meetings this Fall regarding the water rights process. It is my understanding that lack of departmental process in the handling of water rights applications dominated discussions.

As the Co-Chair of the House Resources Committee I am requesting a written proposal from you as to your plan for addressing this discrepancy during the second session of the 22nd Alaska Legislature. This request is based on statements made by Mr. Loeffler at various meetings this Fall, and on Mr. Pourchot's testimony today before the House Finance Committee. I would also like you to supply my office with the policy and procedures that your department has used in the past with regards to the handling of water rights applications, within the next ten days. This request is based upon your testimony that such documents exist and are on file for review.

I look forward to your reply, and to rectifying this situation to the benefit of all Alaskans.

Beverly Masek

Representative Beverly Masek, Co-Chair House Resources Committee

JENN'S NOTES

Proposed Regulation Changes Division of Water Oct. 2001

PUBLIC NOTICE:

(CONSTITUTION)

AK Constitution Article VIII Natural Resources, Section 10. Public Notice:

"No Disposal or leases of state lands, or interests therein, shall be made without public notice and other safeguards of the public interest as may be prescribed by law."

(STATE LAW)

Alaska State Law gives the Department of Natural Resources Commissioner authority to designate types of appropriations that are exempt from public process under AS 46.15.133 Notices; objections. :

"(f) The commissioner may, by regulation, designate types of appropriations that are exempt from this section and provide for ruling on the applications. The commissioner may not exempt under this subsection appropriations for removal under AS 46.15.035, appropriations by the state for sale or sales by the state under AS 46.15.037, or removals of water under AS 46.15.035 and 46.15.037."

(REGULATION)

- Currently temporary water rights are excluded by regulation 11 AAC 93.100 Exemptions to notice.
- The department of natural resources is proposing to repeal this section and amend 11 ACC 93.080 to require that public notice be given once the department begins adjudicating a water right, rather than when an application for a water right is received. It is also proposing that the adjudication process will not begin unless the department determines the process necessary under proposed 11 ACC 93.037 where it will create a "second threshold" allowing up to 50,000 gpd from some sources in what it explains is an effort to avoid the expense of public process in it's justification for this new classification.

When the DNR public notice section of their web site was reviewed 9/21/01, only three applications could be found to have been submitted in the last 6 months. Gary Prokosh confirmed this was the case at a meeting in his conference room the department was holding to explain their proposed regulation changes to some environmental groups, and explained that the no water rights had been adjudicated to his knowledge in the last two and a half months. Bob Loeffler with the department explained that there has never been a back log for temporary water use permits, and that most of the departments time is spent here.

The creation of the classification of water use applications that would qualify for "authorization" of use without necessitating an actual adjudicated water right greatly increases the number of applications that would not be subject to public process at the commissioners discretion.

PRIORITY OF RIGHTS:

(CONSTITUTION)

AK Constitution Article VIII Section 13. WATER RIGHTS says that "Priority of appropriation shall give prior right."

(STATE LAW)

AS 46.15.165. Administrative adjudications allows - under subsection (a) - for the commissioner to "by order, initiate an administrative adjudication to quantify and determine the priority of all water rights and claims", and lists the types of sources he may do that for.

(REGULATION)

The department's proposed regulations express in ARTICLE 4. 11 ACC 93.210 TEMPORARY WATER USE. (b) that "No water right or priority is established by a temporary water use authorization."

When several scenarios were posed and the question was asked in a meeting at the Anchorage DNR office with statewide environmental groups which was teleconferenced to Juneau, Bob Loeffler also answered that no prior right would be recognized by the department for either the first or second tiers of non-substantial use authorizations. He testified that the department would maintain a policy of only recognizing an actual adjudicated right as a primary right even when a second tier authorization is bumped up to a level where the department chooses to adjudicate that use.

This seems to be in conflict with the state constitution in that the constitution guarantees a priority to the water, which was first appropriated. Appropriation may happen under the authorization of use without an adjudication being necessary. This is an established public trust principle with supporting case history.

Although the department has testified that other applicants and / or use entities will be taken into account at the time the department appropriates a water use, examples exist to the contrary.

A Superior Court judicial opinion exists supporting both these statements, as well as admonishing the department for what was found to be ambiguity and capriciousness regarding it's process for appropriation of water.

Water Rights

HB-185 / SB-139

- Late in Session (Gov. forgot to place priority)
- Dept. → ability to charge \$50 / yr for water right, & received \$300K to address backlogged water rights applications, with which it created 5.5 new positions.
- Temporary water rights received 1yr sunset, and extensions clause was removed.

Statute

- Now allows DNR Commissioner to exempt types of water appropriations (but not types of uses) from public notice.
- No checks and balances regarding this issue.

Current Regulations

- Allow for Temporary Water Use Permits without public notice.
- Do not require an application for non-substantial use.
- Define "Non-Substantial Use" as below 5K gpd.
- Do not specify criteria for application review.

Proposed Regulations

- Seem to solve public notice questions by repealing exemptions section.
- Introduces a definition for "Substantial Use" (50K gpd), and requires adjudication for this use.
- Would change requirement for public notice from "when a water rights application is received" to "when the department begins adjudicating a water rights application".
- The department would not adjudicate temporary water use permits, or what it is calling "second threshold applications". It would, however, allow the use of the water without the adjudicated right. The proposed regulations therefore create a higher degree of water use that would not be subject to public process.
- Do not specify criteria for application review.

Communications with DNR. Water Division

- Argues that public process is cost prohibitive.
- Has not "fully adjudicated a water right since 1991"
- Has only posted 3 applications for adjudication to public notice since March 2001
- Has not communicated a plan beyond "in Bob's head" for the processing of the 3K backlogged applications.
- Has never had a backlog for temporary water use permits
- Argues that creating "second threshold" of water use allows people to "use water, and not break the law", ignoring it's circumvention of public process.

(Side note: if second threshold applications do not require processing except at the department's discretion, this regulation will actually be responsible for eliminating the majority of the backlog...what else will the \$300K go toward?)

- Cannot produce or articulate the review process for applications subject to the department's discretion for adjudication.

Complaints

- Process: Farmers would like to know what the \$50 / year fee to the department will be supporting. The department has not yet answered specifically.
- Accessibility: Applicants for water rights adjudication have not felt they have been given accurate, if any, information regarding the status of their pending permit.
- Accessibility: Individuals who have inquired as to the status or specifics of pending permits have been denied access to public information.
- Inconsistency: Water rights have been adjudicated with disregard to pending applications, although the department has testified that all applications will be taken into account before a right is appropriated.
 - Yellow Eagle Mine / home owners
 - BP / FWS at Kaparuk
- Ambiguity: The department cannot produce a criteria for application review, or for it's plan to relieve the backlogged applications.
- Ambiguity: A Superior Court Judge has cited the department's practices as "ambiguous and capricious" as he has found in favor of Greenpeace without holding BP responsible for the Karparuk ice road situation.

Future / Possibilities

- Criteria and process must be drafted for water rights applications that satisfy constitutional requirements for public trust, enable use of the resource for the public good, and facilitate ease of acquiring use in a uniform manner.

(This may require that the drafting process occur outside the department.)

- Statute for eliminating public process must be refined.
- Effectiveness of current process must be evaluated specifically, and measures should be implemented.
 - Regulation Review
 - Departmental Audit
- Statutory revision
 - Possibly a DNR revision
 - Possibly revised to incorporate other departments
 - Possibly revised to institute a separate entity

Review of Water Rights Issues in Alaska

I. Water Is A Pubic Resource To Be Held In Public Trust.

A. Public Trust Doctrine

1. Originally Roman Law.
2. States that certain resources are to be managed to the maximum benefit of the populous.
3. Has been adopted by many civilizations, and defined specifically for each.
4. Has been nationally accepted since the creation of the United States, and has an extensive supporting case history.

B. The Alaska State Constitution addresses this expressly in Article VIII, Natural Resources.

1. Section 2 charges the state with the responsibility to make use of the states water "to the maximum benefit of it's people".
2. Section 3 guarantees the common use of water be reserved for the people.
3. Section 6 guarantees that the states water is public domain.
4. Section 10 requires public notice of water disposal.
5. Section 13 again guarantees that water is reserved for public use and guarantees prior right to priority of appropriation - regardless of it's form.
6. Section 14 guarantees access to navigable waters by the people
7. Section 16 protects the public from being involuntarily divested of their right to use the states waters
8. Section 17 requires the uniform application of regulations for the disposal of water.

C. The people are demanding that the state uphold this responsibility through lawsuits.

II. The Largest Issues Facing State At This Time Are Costly Lawsuits.

A. Access Cases

1. **Katie John**
 - a. It's not about subsistence fishing.
 - b. Federal control of our navigable waters will extend to all facets of water use.
2. **Gulkana Issues**
 - a. Native corporation restricted access on the river as it contested the river was non navigable, and therefore fell under the authority of their property rights
 - b. Landmark case used in other access areas to validate the states responsibility to the people regarding the public trust of water

B. Use Cases

1. **Greenpeace v. State of Alaska Div. of Land Water & Mining**
 - a. Judge Murhpy ruled last week that the public process was in fact violated by DNR's issuance of temporary water permits, and admonished the department for what he found to be ambiguous and inconsistent practices. He also warned the department that this could have been avoided, and that he expects the department to henceforth comply with statutory and constitutional requirements.
 - b. The oil companies were not held responsible.
 - c. The problem was identified as a lack of organization, and disregard for due process at the level of our states water division practices.
2. **Yellow Eagle Mine - Fairbanks**
 - a. The mine struck an aquifer depleting the user supply to local homes.
 - b. Though department acted quickly once faced with an emergency, however, confusion could have been avoided among the affected property owners had a standardized process been in place prior to the incident.
 - c. Yellow Eagle Mine acted with extreme generosity by treating all claimants equally regardless of their adjudication status, thus saving the state an inordinate sum of money. (thank you YEM)

III. Costly Lawsuits Are Avoidable

A. Prevention is the best medicine

1. **Providing for the peoples needs** by adequately satisfying their constitutional rights through the departmental process is one way to discourage the need for judicial intervention.
 - a. The department's primary responsibility is to serve the public interest.
 - b. Orderly compliance to statutory and constitutional authority by the department is necessary.
 1. Confusion regarding processes is a breeding ground for the request for judicial intervention.
 2. Following a standardized process promotes public trust, and assists the judicial branch in its selection of valid claims to be heard.
2. The Katie John case is too far gone for prevention, but we have the chance now in other areas of water rights issues.

B. It may be time to swallow the Litter pill of reconstruction.

1. **Our current structure is in a state of dilapidation, and was virtually condemned by a superior court judge last Friday.**
 - a. The department has argued that the public process is too costly
 - b. Circumventing public process has proven to be a significant cost to the state in time, money, and resources, as well as public service.
2. Although Alaskans are pioneers, and we know that flat roofs don't do well in our environment, others have the blue-prints that we could be using to **build a fortified program.**
 - a. Other states may have issues that differ from those in Alaska, and some states may have problems with their adjudication process that are similar to those faced by our state
 - b. We should also give credit to some states that are either implementing or designing modifications to the process that attempt to alleviate the cumbersome process, while satisfying the states responsibility to provide for the people.
3. Throwing money at the situation can only do so much for the structure.
Someone will need to put forth **real labor.**
 - a. I believe that it is feasible to build a better foundation for Alaska's process for water rights adjudication that will serve the public interest in a timely fashion
 - b. I believe that we have the human resources to do so in a way that meets the needs of those who have a need for water use, and comply with our constitutional duty to the public at the same time

Fairbanks Daily News-Miner

Water use bill draws wide concern

February 23, 2002

By SEAN COCKERHAM News-Miner Juneau Bureau

JUNEAU--Legislation pushed by Delta Junction farmers drew intense fire on Friday from conservationists and state officials.

Critics objected that the bill would remove state oversight from nearly all large-scale use of water, including water from North Slope lakes and streams used to build ice roads for oil development.

"This would then eliminate the protection that the review process has for Alaska's fisheries and wildlife," Alaska Division of Mining, Land and Water Director Bob Loeffler testified.

Other parts of the bill would give farmers a priority use of water, eliminate the fee for maintaining water permits, and require that if the state does not make a decision on a temporary water use application within 30 days then a permit is granted by default.

The bill, which was heard and held in the House Resources Committee, is sponsored by Valdez Republican Rep. John Harris.

His district includes Delta Junction and his aide Pete Fellman, a Delta Junction dairy farmer, said the bill is meant as a vehicle to spur discussion on how to fix an inefficient system.

There has been a host of questions raised in the Interior since legislation passed last year that increased fees and prompted the state to pay closer attention to water issues, Fellman said.

"(The bill) is really an effort on our part to address some of these questions and find out how the Division of Mining, Land and Water is going to serve the people in the state of Alaska," Fellman told the House Resources Committee.

Loeffler said the bill would define a "significant amount of water" as the use of a million or more gallons a day for 100 consecutive days.

"This would essentially eliminate the need for anyone to get a permit anywhere," Loeffler testified.

That would include oil companies building ice roads on the North Slope, testified Jan Konigsberg of the Alaska Public Waters Coalition.

"It would exclude almost all ice road permits and other temporary uses of water, thereby removing the permits from any kind of scrutiny at all," Konigsberg said.

Fellman, in an interview after the hearing, conceded the million gallon number is high but he said it is designed as a starting point for discussion. A problem is that the state does not have a set definition of what "a significant amount of water" is, Fellman said.

Another controversial part of the bill is the automatic granting of a temporary water use permit if the state does not make a decision on an application within 30 days.

"This would eliminate our ability to give public notice (on the permits), when in fact public use is justified," he said.

Fellman said the provision is the result of real problems like a person who applied for a permit in May and did not receive it until around October when the season was over.

He does not trust the state's assertion that such permits are being issued in a timely manner or the promises that speed will improve. "I think the system needs to be streamlined," Fellman said.

The bill would also make agriculture the second highest priority use of water, after domestic use. This would ensure that farmers will have access to water for irrigation, Fellman said.

"It seems a little bold, I understand, but agriculture is the foundation of all economy," he said.

He said farmers borrow a great deal of money to put in an irrigation system and want a guarantee the state will not cut off the supply, he said.

He cited a farmer in Point Mackenzie who could not get a temporary water permit.

Fellman was backed by testimony from three people via teleconference from Delta Junction, who said support is needed to help Alaska become more independent as its own food source.

"Farmers do bear some tremendous costs in gearing up for their operations," testified Phil Kaspari. "Farming is a long-range investment and

not having any security as to whether or not they will be able to use water from year to year makes for some difficult decision-making."

But Fairbanks Republican Rep. Hugh Fate was worried the agricultural priority could conflict with mining. "You wouldn't want to stop a mine the size of Fort Knox for 3 or 4 acres of barley," he said.

Fellman said he was open to discussion with Fate on the matter. "I would be absolutely open to improving the language," he said.

The bill also seeks to drop the \$50 annual state fee for maintenance of water permits.

"If you have a permit already filed, and it is already in the system and there is no change, why do you have to have a yearly fee to maintain that file?" he asked.

Loeffler, of the Alaska Division of Mining, Land, and Water, said removing the fee would cost the division \$130,000 and it would have to ask legislators to foot the bill through the state general fund.

◆ The Alaska Flyfishers Association ◆ Southeast Alaska
Conservation Council ◆ American Rivers ◆ Trustees for Alaska ◆
Trout Unlimited ◆ Northern Alaska Environmental Center ◆
SMART (Scientific Management of Alaska's Resource Treasures)
◆ Alaska Conservation Alliance ◆ Thomas Meacham, Esq. ◆

October 22, 2001

Mr. Gary Prokosch
Chief, Water Resources Section
Department of Natural Resources
550 West 7th Avenue, Suite 900A
Anchorage, Alaska 99501

**RE: Comments on the Proposed Department of Natural Resources, Division
of Mining, Land and Water Regulations, 11 AAC 93.020 - .970.**

Dear Mr. Prokosch:

Thank you for the opportunity to comment on the proposed changes to the above-cited regulations. The stated objective of these proposed regulations is to allow the Department of Natural Resources (DNR) to focus its limited staff on those water rights applications deemed by DNR to be significant. However, the process that the regulations outline is far from ideal, and the regulations have the potential to exacerbate conflicts between users, foster lawsuits, and to negatively impact state resources.

I. General Comments

A. The Proposed Regulations are Drastic and Unnecessary given DNR's recent Staffing Changes

DNR has offered these amendments to its regulations as a result of staffing problems and a backlog of water right applications. DNR states "the proposed changes to the water regulations are intended to streamline DNR's water management process" and will "decrease workload." [Letter from Bob Loeffler to Interested Alaskans, 8/20/01.] DNR also indicates that due to the recent legislative changes, the DNR water staff will more than double (from 4 to 9 positions). Given this significant increase in staff, it is unclear why some of the proposed "streamlining" measures – especially those that will fundamentally alter accepted water law practices in Alaska – are necessary. DNR may wish to assess whether or not the increased staffing will allow it to address its backlog under the existing regulations, before instituting such sweeping changes in the

regulations. Since the staffing problems have now been remedied, it is expected that the current regulations (with some minor housekeeping modifications) will be satisfactory. Creating an entirely new permitting system (without precedents from other jurisdictions), particularly at a time of significant DNR staffing changes, may create unexpected and negative impacts to administration of the state's water resources.

B. The Proposed Regulations Introduce Untested Procedures in the Complex Area of Water Law.

DNR's proposed permitting system is unlike any other western state's water law, and does not appear to be consistent with the Alaska Constitution or the Alaska Water Use Act (AS 46.15.010, *et seq.*). DNR stated that it has not consulted with water law specialists to determine whether the proposed changes may generate legal problems. [Comments of Bob Loeffler, October 2, 2001.] Since Alaska's current water law has been deemed a model water appropriation scheme, and was created after consultation with some of the best water law experts in the nation, it would best serve the public if DNR consulted with water experts prior to instituting this new, untested system.

The new system creates a four-tiered water management scheme for Alaska:

Tier 1

The first tier is for "de minimus" water use, and individuals are not required to apply for a permit to use minor amounts of water, and acquire no water right or priority from such use. Such provisions are typical in many states. This was formerly the "insignificant amount" or "de minimus" water use threshold under Alaska law. 11 AAC 93.970(14).

Tier 2

The (new) second tier allows a person to use water, after application, if DNR deems the water use to be "non-significant." Non-significant is defined as less than 5,000 gallons/day from an anadromous stream, or less than 50,000 gallons/day from a non-anadromous stream or groundwater source. No permit or water right is issued. Nevertheless, the person submits an application, and obtains DNR approval to use water in a "non-significance" letter determination. The applicant receives a "conditional priority date," apparently established by the date DNR receives the application.

DNR, in issuing the "non-significance" determination, *does not* consider the "public interest" factors defined in AS 46.15.080. DNR states "[T]he applicant will not gain water rights until an adjudication takes place" [Loeffler, 8/20/01 Letter, p. 2] yet the user acquires a *potential* water right, that may ripen into a permanent right to appropriate (certificate) after five years of beneficial use, should DNR decide to later adjudicate the use. DNR states that if there is no conflict in the water source, it may never adjudicate (i. e., issue a permit or a certificate of appropriation) the Tier 2 user. There is no public notice of this "non-permit."

If there is a conflict with other water users, or if the applicant wishes to pay for adjudication, DNR will adjudicate, and issue or deny a permit, after public notice.

Tier 3

The (new) third tier allows a person to apply to use a "significant amount of water," defined as greater than 5,000 gallons/day from an anadromous stream, or greater than 50,000 gallons/day from a non-anadromous stream or groundwater source. DNR states that it will "adjudicate" the water right (issue a permit) after "full agency scrutiny" [Notice of Proposed Changes, p. 1] at the time of application. There is public notice of this permit, prior to DNR's action.

Tier 4

The fourth tier is the certificate of appropriation, which is a right to use water in perpetuity. DNR considers this a "ministerial" function, after the water use has been established under a Tier 3 permit for five years. DNR currently issues no notice of this certificate, although a recent case questioned this DNR practice.

This four-tier system could create significant problems for DNR and for any water user that expends time and resources to perfect the beneficial use in reliance on the Tier 2 DNR authorization. By allowing users to use water indefinitely, with no permit and without analysis of "beneficial use" by DNR, the quasi-right may suddenly be diminished in times of shortage, by unknown prior appropriators. The right may never be adjudicated unless other Tier 2 appropriators of the same source seek adjudication, or there are subsequent Tier 3 users.

The history of water use conflicts in Alaska reveals that many conflicts have involved single family domestic and other small (or "non-significant") water users. Conflicts have included those in the North Kenai area, South Anchorage, Auke Nu/Indian Cove in Juneau, and Eagle River, just to name a few. Under these proposed regulations, small water users would be deemed insignificant and would not be adjudicated until a conflict arose. Thus, future similar situations involving unadjudicated small water users would lead to even more complex water management problems.

Further, this scheme appears to focus on the "user," not the impacts to the water source. For example, it allows multiple Tier 2 users of the same anadromous stream water source to use amounts of water that would be considered "significant" (or Tier 3) if a single user sought to use the combined Tier 2 users' amount of water from the stream. The multiple users are individually deemed Tier 2 "non-significant", because DNR reviews the water use in a piecemeal applicant-by-applicant fashion, rather than looking cumulatively at the "whole stream" water use. While the proposed Tier 2 scheme does have a "preliminary determination" by DNR that there will be no effect on "other users" [11 AAC 93.037(b)(4)] there is no mandatory DNR analysis of the effect on public resources.

DNR should submit this new regulatory scheme to qualified experts to ascertain whether it is consistent with Alaska's water law and Constitution, and whether legislative

changes are needed to implement this significant restructuring of Alaska's established water law.

C. The Proposed Regulations Eliminate Most of the "Public Interest" Criteria set forth in AS 46.15.080

The proposed regulations eliminate the "public interest criteria" the Legislature mandated be evaluated before permit issuance under AS 46.15.080, and substitutes the "non-significance" criteria for permitting analysis for Tier 2 water users. The "non-significance" criteria eliminate such necessary considerations as public health, navigation, beneficial use, means of diversion, and intent and ability of applicant to complete the appropriation. *See* AS 46.14.080. The only public interest evaluations are related to fisheries [anadromous streams addressed in 11 AAC 93.037(b)1 and 2] and whether the appropriation will affect "other water users." *See* 11 AAC 93.037b(4). This is not the equivalent of the AS 46.15.080 "public interest" determination. In this regard, Tier 2 and Tier 3 users from the same source are treated differently: a Tier 3 user must have a "public interest" determination and a Tier 2 user does not, although each is, in effect, co-equal in terms of ability to apply their water rights. This may violate the provisions of Article VIII, sec. 17 of the Alaska Constitution (the "uniform application" clause).

D. The Proposed Regulations Create Uncertainty for Valid Water Users Seeking Permanent Appropriations

Under DNR's proposed regulations, the "significant" Tier 3 user, after obtaining a permit and filing the five-year statement of beneficial use could, in many instances, not be issued a certificate because of prior Tier 2 "non-significant users" that have "conditional priority dates" predating the Tier 3 user.

This creates a high degree of uncertainty for all water users. DNR claimed at its public meetings that "that is how the system works in actuality now." However, because of the currently existing public notice provisions, and because DNR must currently affirmatively act to issue a permit (considering all public interest criteria before issuing a permit), applicants are "screened" at the outset to ensure that public resources are being put to beneficial use, consistent with public interest criteria, and are treated equally. The issuance of a "non-significance letter" to Tier 2 users will give the non-permitted applicant an automatic priority date superior to the permitted Tier 3 applicant, who has complied with all of the statutory criteria. This is confusing and could create innumerable conflicts between Tier 2 ("non-significant") and Tier 3 ("significant") users.

II. Comments on Specific Sections

11 AAC 93.035, REQUIREMENT TO APPLY FOR THE USE OF WATER

This section results in a redefinition of the current regulation defining "significant amount" in 11 AAC 93.970(14). The existing definition of "significant amount" includes "any water use that might adversely affect the water rights of other appropriators or the public interest." 11 AAC 93.970(14). "Public interest" is "determined by the criteria set out in AS 46.15.080."

Yet the proposed new definition eliminates the key components in the existing definition of significant amount, the concept of "public interest" and the subsequent application of AS 46.15.080.

There is no justification for eliminating this important aspect of the definition. Given the Alaska courts' recent attention to the "public interest" in the state's water resources, the elimination of this aspect of the definition may be unconstitutional.

11 AAC 93.037. SIGNIFICANT AMOUNT OF WATER

This section places the burden on the self-professed already overworked and backlogged staff to notify persons that they are not using a significant amount of water. This seems like a roundabout way to administer water resources: instead of spending staff time administering those applications that are significant, under these regulations the staff will now spend time notifying people that their water use is not significant. DNR staff must make the "non-significance" determination within 45 days. There is no consequence for DNR's failure to issue the "non-significance" notice, therefore if a water use applicant receives no notice, he/she is left in the position of having a "significant" water use, even though it may actually meet the 11 AAC 93.037(a) and (b) definitions of "non-significance."

Given DNR's past inability to meet its administrative obligations, this could create substantial problems for water users whose use is truly non-significant. The water user will not be able to construct the works, and begin use of the water to perfect an appropriation, despite the fact that such use would be allowed under current law. Conversely, an applicant may, in fact, be seeking a permit for a significant use of water, but the applicant may argue that DNR's failure to render a decision within 45 days constitutes a *de facto* determination of non-significance.

Moreover, the definition of non-significance [subsection (b)(1-3)] is contrary to the current regulations, as discussed above. Finally, the "non-significance" determination may be in effect for the entire water use period, regardless of changing hydrologic circumstances or climatic conditions that may make the water use significant. There is no provision for a review of "non-significance" decisions by DNR upon request or at its own initiative.

Additionally, the proposed approach should be rejected for the following reasons:

(b)(1): The gallon limitation in this subsection (less than 5,000 gallons/day from an anadromous stream is deemed non-significant) does not recognize the potential sensitivity of anadromous streams that may be damaged by withdrawals of far less than

5,000 gallons/day, depending upon the season, the fish species, the method of withdrawal, and the instream flow needs. If a stream has a pending instream flow application, there should be no "minimum" below which the withdrawal is deemed non-significant. There is no requirement that the applicant provide hydrologic information about the timing of withdrawal, so that DNR will be able to assess whether, at times of low flow (i.e. winter) the stream can sustain a withdrawal of 5,000 gallons/day.

[Note: While it is recognized that the current regulations at 11 AAC 93.100 allow a similar exemption, the changes proposed by DNR eliminate the existing regulations' provision that a local, state or federal agency and DNR can allow notice/comment on this type of application to protect the public interest.]

In addition, there should be an automatic "significance" determination for water uses on waterbodies that are "known or suspected to be degraded, polluted or threatened." [See Alaska's Clean Water Actions (ACWA) publications].

(b)(2): This subsection lacks any reasoned analysis of whether withdrawals of 50,000 gallons/day from a non-anadromous stream or aquifer will result in non-significant impacts. Again, DNR should require the applicant to provide hydrologic analysis of the stream or aquifer that justifies any claim that this amount is "non-significant."

(b)(3): This subsection would benefit from a better definition of what "in combination with any other application" means. It is unclear whether an applicant that has filed an application for withdrawals from two different streams (or different tributaries of the same stream), that together exceed 5,000 gallons per day, will be required to be deemed "significant."

It is also unclear whether, for example, an applicant who withdraws 4,900 gallons per day from multiple streams, which contribute to the sustainability of a fishery in a particular watershed, can be deemed "non-significant." Again, seasonal assessments of water availability and diversion methods are important variables that DNR should address prior to deeming a use non-significant.

(b)(4): This subsection allows DNR to make the "non-significance" determination, with no public notice (only agency notice), and without consideration of the public interest. The only consideration is whether it is "likely to have an adverse effect on other water users." While this language may be intended to be the functional equivalent of a "public interest" determination, the use of different language creates a doubt as to what standard should be applied.

(d): There is no limit on the amount of water that can be withdrawn under a "temporary water use permit." This may violate the Alaska Constitution, Article VIII, §§1,2,3,4,10,13,14,16, 17, and AS 46.15.080.

11 AAC 93.039, AGENCY NOTICE

Since neither ADF&G nor DEC received funding to carry out the functions set forth in this section, DNR's reliance on these agencies to perform the new analysis is, in effect, an unfunded mandate to those agencies. As Mr. Loeffler stated during the public

meetings, DEC does not routinely review these permits, and ADF&G does review temporary and other water use permits, but not in all cases (i.e. ADF&G does not routinely review applications for non-anadromous streams).

There is no criteria for the types of permits for which the agencies can "decline to be notified." 11 AAC 93.039(a)(1). Because the public will not receive notice under DNR's revised regulations, the public will be totally dependent upon agencies for analysis of water permits. Thus, the categories or specific "agency declines" decisions should be published, and an opportunity for the public to comment should be allowed. The public relies on the agencies for expertise and/or review of the permits, but if the agency cannot provide that expertise, then the public should be allowed to participate.

Under subsection (c), the word "may" should be replaced by "shall." There should be a requirement that DNR notify the local government, tribal governments, federal land managers of state waters and the local coastal district of all applications for water use which may affect the people or resources of that government or geographic region, allowing a 15 day comment period. This is necessary because coastal districts receive deference in the interpretation and application of their coastal programs, which must be consulted before water use is permitted. In non-coastal areas, the local governments and tribal governments should be notified. (See Governor's Administrative Order 186; and the Millennium Agreement.) The trend in most western water states is to increasingly rely upon local knowledge and expertise about stream and water body characteristics and carrying capacities. DNR would eliminate this important source of expertise by failing to provide required notice to these local entities.

11 AAC 93.040 (14). HYDROLOGIC DATA

DNR should identify, in the regulation or by separate Departmental publication, the types of hydrologic methods it allows to satisfy this requirement. Otherwise, the applicant may expend significant time and money using a method not approved by the Department. Further, given the potential for extreme seasonal variations in flow rate, DNR should require mean monthly flow data.

11 AAC 93.070. DEPARTMENTAL INVESTIGATIONS

The word "may" should be changed to "shall." Without a requirement for investigation, potential use conflicts could easily go unnoticed by DNR.

11 AAC 93.080. PUBLIC NOTICE

It is unclear who will pay for the public notice (the regulation states only that the Department "will prepare" the notice; there is no requirement that the applicant ensure that it is published in the newspaper or pay for the newspaper publication). While AS 46.15.133 states that the applicant will pay, the regulations should also so state.

DNR is proposing to require public notice only when it "begins adjudicating a

water right application.” This means that users of non-significant amounts of water will be able to use water, perhaps indefinitely, with no public notice. DNR’s explanation confirms that “some applications may not be adjudicated for many years (if ever)” and states that no notice will be required, absent adjudication. This may be a violation of Article VIII, section 10, of the Alaska Constitution. Public notice of every water use application should be given.

The provision of subsection (2), posting on the Alaska Online Public Notice System, is a significant improvement. This should be applied whenever a water use application is received and deemed complete by DNR, rather than when the application is adjudicated. The regulation should state that the Online Public Notice should be placed on the first day of the public notice in AS 46.15.133. The proposed language states that the notice will be placed online “during” the comment period. Unless it is online on the first day of newspaper notice, those who rely on online notice may not have sufficient time to comment.

The regulation should include public notice when DNR proposes to issue a certificate of appropriation.

11 AAC 93.100, EXEMPTIONS TO NOTICE (REPEALED)

As stated in the discussion above (under 11 AAC 93.037) this current section (proposed for repeal) contains provisions much more protective of the public’s interest in water than the proposed 11 AAC 93.037. It is recommended that this provision be retained, or that only the *limited* exceptions to public notice be incorporated into 11 AAC 93.037.

11 AAC 93.115, CLOSURE OF AN APPLICATION FOR A WATER RIGHT

(b) This section is a trap for the unwary non-significant water user. DNR proposes to establish the new Tier 2 system of “non-significant” (non-permitted) use, presumably to make the administration of water rights easier for DNR and the applicant. However, under this section, the unwitting applicant who forgets to provide the statement of beneficial use can be immediately terminated from the water right he has spent 5 years perfecting, just for his failure to file a single piece of paper. This section will undoubtedly generate litigation, and appears to violate the “priority of use equals priority of right” concept of Art. VIII, Sec. 13 of the Alaska Constitution.

If DNR does not notify the applicant that (1) his beneficial use statement is due, or (2) DNR intends to terminate his use, then the applicant (who has had no communication from DNR for five years) may suddenly lose his priority date and significant investment. Since under the current law, DNR considers it a “ministerial” duty to issue a certificate after 5 years of beneficial use, it is difficult to see how DNR can automatically terminate the “non-significant” water user for failing to file the beneficial use statement on a specific date. At a minimum, some notice and grace period should be provided.

11 AAC 93.120. ISSUANCE OF A PERMIT TO APPROPRIATE WATER

The regulations are vague as to what triggers a "priority date," and that term appears to grant different rights depending on the type or tier of the application. This lack of clarity could mean that two users that apply simultaneously will have different priority dates, depending upon what tier they apply under and DNR's backlog at the time of the application. Both "significant" and "non-significant" users should have a priority date of the date each application is received by DNR, and this concept needs to be explicitly stated. This is especially confusing when read with the language in proposed 11 AAC 93.035(b) ("unless an application is filed *and* a permit or certificate is issued") (emphasis added).

In addition, under this section the "significant" user has a potential for an extension and is not required to file statements of beneficial use, but the "non significant" user (as proposed under 11 AAC 93.115) can be automatically terminated for failing to file the beneficial use statement. This inconsistency should be remedied.

New Section (i)

This section allows water use to continue, despite DNR's failure to carry out its responsibilities to administer water resources. In no other permitting situation does a failure of a state agency to act result in a permit extension. It is unclear why, with twice as much staff, DNR is now building this step into the regulations.

If DNR fails to act within the time period required, then the permittee should be able to proceed to court for a judicial determination of water rights, and DNR should be required to pay the court costs for the action. Further, section (i) is inconsistent with section (f), which states that there may be no extension longer than 10 years.

11 AAC 93.140. WATER WELLS

This regulation change is acceptable.

11 AAC 93.210. TEMPORARY WATER USE

This section allows temporary water use of significant amounts of water for five years, with no analysis of the public interest factors in AS 46.15.080. This section is likely to be unconstitutional, particularly since there is no limit to the amount of water that may be used, no prior notice to the public, and no consideration of constitutionally mandated public trust-type principles. Although DNR justifies this provision by stating that this does not create a "property right" [see "explanation," p. 11], that argument is misinformed. No water use or appropriation creates a property right under Alaska law. Under Alaska law, the only "right" created is a usufructory right: the right of enjoying a thing, the property of which is vested in another. The water of the state is vested in the people of the state and may be appropriated (used) in accordance with the Constitution, under the appropriation scheme. Further, the five-year permit period is questionable,

given the coterminous period for a full water right. A temporary water use permit should be limited in duration to no more than 1 year, or some other period that is rationally related to the public need for a "temporary" use of water, rather than a lawful appropriation, a concept which has been recognized in the Alaska Water Use Act since 1966, and in the western states' water laws for more than a century.

11 AAC 93.220. SIMPLIFIED PROCEDURE FOR TEMPORARY WATER USE

Same comments as above. While these procedures allow notice to ADF&G and DEC, there is no public notice, nor notice to local government, tribal governments, federal land managers of state waters or coastal management councils. Since, for example, DNR gives away 22 billion gallons of water each winter to the oil industry on the North Slope alone [Gary Prokosch, "North Slope Water Use and Hydrology," March 9, 2000], there must be a recognition that, at a minimum, those people who live in the region and depend upon that water and related resources for subsistence should receive notice and opportunity to comment on the permits. Further, DNR has a legal obligation to make copies of each written determination for granting or denying a temporary permit available to any member of the public upon request.

11 AAC 93.290. COMMISSIONER'S ORDERS

No comment on this section.

11 AAC 93.530. EFFECT OF ORDER

No comment on this section

11 AAC 93.920. EXEMPTIONS

Please see discussion of 11 AAC 93.035.

11 AAC 93.930. PROCEDURE FOR THE TRANSFER AND CHANGE OF APPROPRIATIONS

This section provides public notice of changes in permits to appropriate and certificates of appropriation. The notice to agencies and the Online Public Notice is a positive step. It is recommended that DNR expand this notice to all those who commented on the underlying permit or certificate. The exemption for changes or transfers of uses less than 5,000 gallons/day should be analyzed on the basis of impacts to the resource, not on a strict gallon limit. Further, there are unresolved questions in this section: Does this include applicants without a permit or certificate who have been determined to be not significant? Does "water right holders of record" include those with adjudicated water right applications? Such a lack of clarity should be remedied.

III. Conclusions and Concerns

The proposed regulations provide DNR with too much discretion in determining whether or not to adjudicate small water use applications. If the regulations go forward, standards are needed to clearly identify how and why DNR will make the determination of whether or not to adjudicate an application.

There are no provisions regarding how to handle conflicts among water users, especially where there are pending applications, including instream-flow applications. For example, how will harm to unadjudicated applicants be handled? How will harm from unadjudicated applicants to water rights holders be handled? The regulations should be clear that when conflicts occur for a given water source, that applications will be adjudicated and enforced in order of priority date, including those applications for instream reservations. Any water use or water reservation priority date should be clearly stated as the date the application is received by DNR.

All water right adjudications should include a written public interest determination based on the public interest criteria listed in AS 46.15.080. This will make clear for the public record the information and reasoning used by DNR and other agencies in making decisions. Public notice should be given upon receipt of an application in each tier and for their temporary permits.

While the proposed regulations do not include changes to the instream water right regulations, DNR should make clear that instream water right applications are "significant" applications and water uses, and will therefore be adjudicated on an equal basis with all other water right applications.

Thank you for the opportunity to comment.
Sincerely,

Jenna App
Trustees for Alaska

On behalf of:

Les Gara
The Alaska Flyfishers Association

Back Lindekugel
Southeast Alaska Conservation Council

Steve Rothert
American Rivers

Jan Konigsberg
Trout Unlimited

Arthur Hussey
Northern Alaska Environmental Center

Keith Bayha
SMART (Scientific Management of Alaska's Resource Treasures)

Sue Schrader
Alaska Conservation Alliance

Thomas E. Meacham, Esq.

HB

421

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

REPORTED DMT
MAY 02 2002

DATE: 4/15/02

FURTHER:

DATE TURNED IN TO OFFICE: 3 May 2002

Finance Committee considered CS FOR HOUSE BILL NO. 421(RES)(title am)

HB 421 WATER USE ACT PROCEDURES & RECORDS

"An Act relating to requiring the Department of Natural Resources to develop and maintain a standardized procedure for processing applications and issuing permits, authorizations, and certifications under the Alaska Water Use Act and to make a record of those items and amendments and orders affecting them available on the Internet."

and recommends:

- be replaced with S CS CS HB 421 (RES)
- adopt previous CS CS forthcoming (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

Senate Bill:

- same title
- new title

House Bill:

- same title
- technical title
- new: SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
DNR (Senate Finance)	7/2/02		✓	

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
<i>Lynne Green</i>	✓			
<i>William Custer</i>	✓			
<i>Tommy Hill</i>	✓			
<i>W. B. ...</i>			X	
<i>Benny ...</i>	✓			
<i>Loren ...</i>	✓			
<i>[Signature]</i>	✓			
COCHAIR: <i>[Signature]</i>	✓			
COCHAIR: <i>[Signature]</i>	✓			

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

MAY 02 2002

Fiscal Note Number: _____
 Bill Version: SCS CS HB 421 (FIN) (title am)
 (S) Publish Date: _____

Revision Date/Time (Note if correction): 5/2/2002 Dept. Affected: Natural Resources
 Title: Water Use Act Procedures & Records
 Sponsor: (H) Resources BRU: Minerals, Land & Water Dev
 Requester: Senate Finance Committee Component: Water Development
 Component Number: 916

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous*						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0


POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The 300.0 increment given to the Division in the FY '02 Operating Budget should be sufficient to fund the one-time contractual needs for the on-line system.

Prepared by: SENATE FINANCE COMMITTEE Phone 465-2327

Senator: /s/  Date 5/2/2002
 Senator Peter Kelly

SENATE FINANCE **adopted**
COMMITTEE
Amendment Number: #1
Bill Number: HB 421
Sponsor: Lemay Date: 5/2/02
Logged In By: Mindy

AMENDMENT

OFFERED IN SENATE FINANCE
TO: Senate CS CSHB 421(RES)

BY: SENATOR LEMAN

Page 1, Line 13 through Page 2, Line 5:

DELETE ALL MATERIAL

Insert:

shall require that temporary water use authorizations are valid only to the extent that the water withdrawal and use complies with applicable requirements of AS 16.05.870; and shall make the record of applications, including temporary water use applications under AS 46.15.155 that have been accepted as complete, authorizations, permits, certificates, amendments, and orders affecting them available to the public on the Internet;

Amendments to HB 421

Background. HB 421 now reads as follows (the double underlining is the new amendments made in Senate Resources):

Section 1. AS 46.15.020(b)(2) is amended to read:

07 (2) develop and maintain a standardized procedure for processing
08 applications and the issuance of authorizations, permits, and certifications under
09 this chapter; shall keep a public record of all applications for permits and certificates
10 and other documents filed in the commissioner's office; [AND] shall record all permits
11 and certificates and amendments and orders affecting them and shall index them in
12 accordance with the source of the water and the name of the applicant or appropriator;
13 shall ensure that all permits for water withdrawal are invalid unless the applicant
01 complies with applicable requirements of AS 16.05.870; and shall make the
02 record of applications, including temporary water use applications under
03 AS 46.15.155 that have been accepted as complete, authorizations, permits,
04 certificates, amendments, and orders affecting them available to the public on the
05 Internet:

This briefing paper concerns the following language:

shall ensure that all permits for water withdrawal are invalid unless the applicant complies with applicable requirements of AS 16.05.870;

Problems. Attorneys have suggested the following potential problems:

1. *Invalidating Only the Offending Activity.* The entire permit should not be invalid if, say, Greenpeace sues about a problem in one area. For example, if we issue a permit for 20 lakes, and Greenpeace says we made an error with respect to one lake, withdrawals from the remainder should not be invalidated. This language could potentially be read to invalidate them.
2. *Getting Caught in a Irrelevant Dispute.* If the Title 16 issue did not involve the water withdrawal, the withdrawal should remain valid. For example, building a bridge within an anadromous stream requires a Title 16 permit. If there was a disagreement about placement of the bridge abutment that should not invalidate DNR's permit concerning water withdrawal for a separate project involving the same applicant.
3. *Problems with "Validity."* There are problems with invalidating a permit — rather than just prohibiting the water withdrawal. That is, invalidating a permit for a water right, which is a property right, requires a certain amount of due process, hearing, etc; that ADF&G may not provide in their Title 16 deliberations. Prohibiting a withdrawal that does not meet the law does not invoke these procedural problems.

Solution. Attorneys have suggested that the following language will meet all of the same goals as the offending language but will lessen the potential for the problems outlined above.
shall provide that the water may be withdrawn under a permit issued under this chapter only if the withdrawal also complies with applicable requirements of AS 16.05.870.

Proposed Amendment. Replace Page 1, Line 13, with the following:

shall provide that the water may be withdrawn under a permit issued under this chapter only if the withdrawal also



Official Business

Alaska State Senate

Senate Finance Committee

Mail Stop 3100
State Capitol
Juneau, Alaska 99801-1182

FAX COVER SHEET

DATE: 2 May 2002 TIME: 5:25pm

TO: Legal Services

NUMBER OF PAGES, INCLUDING COVER SHEET: 4

FROM: MINDY ROWLAND
SENATE FINANCE COMMITTEE SECRETARY
PHONE: 465-4935
FAX: 465-2187

NOTES: Final Please!
SCS CS HB 421 (RES) 22-LS 1334 \ 0
plus accompanying 3-page amendment
Thx
Mindy

SENATE CS FOR CS FOR HOUSE BILL NO. 421(FIN)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE SENATE FINANCE COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RESOURCES COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to requiring the Department of Natural Resources to develop and
2 maintain a standardized procedure for processing applications and issuing permits,
3 authorizations, and certifications under the Alaska Water Use Act and to make a record
4 of those items and amendments and orders affecting them available on the Internet."

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

6 * Section 1. AS 46.15.020(b)(2) is amended to read:

7 (2) develop and maintain a standardized procedure for processing
8 applications and the issuance of authorizations, permits, and certifications under
9 this chapter; shall keep a public record of all applications for permits and certificates
10 and other documents filed in the commissioner's office; [AND] shall record all permits
11 and certificates and amendments and orders affecting them and shall index them in
12 accordance with the source of the water and the name of the applicant or appropriator;
13 shall require that temporary water use authorizations are valid only to the extent

#1
↓

1
2
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4
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that the water withdrawal and use complies with applicable requirements of AS 16.05.870; and shall make the record of applications, including temporary water use applications under AS 46.15.155 that have been accepted as complete, authorizations, permits, certificates, amendments, and orders affecting them available to the public on the Internet;

#1 ↑

Committees:

Resources
Co-Chair

Transportation

World Trade and
State & Federal Relations

Alaska State Legislature



Representative Beverly Masek

During Interim: (June-Dec.)
Mat-Su LIO
600 E. Railroad Avenue
Wasilla, AK 99654
(907) 376-2679
Fax: 373-4745

During Session: (Jan.-May)
State Capitol
Juneau, AK 99801-1182
(907) 465-2679
Fax: 465-4822
1-800-505-2678

Sponsor Statement

HB421 "An Act relating to water use and appropriation."

This bill directs the Department of Natural Resources to develop a standardized procedure for processing water rights applications.

Alaska's water is a public trust resource. Our state constitution tasks our legislature with the responsibility to oversee distribution of all public trust resources. The distribution of our state's water has been statutorily delegated to the administrative branch of our state government, specifically to the Commissioner of our Department of Natural Resources.

This legislation is a response to overwhelming public testimony given at meetings conducted in the Fall of 2001. The meetings were initiated by the Department of Natural Resources in order to meet with various environmental groups in order to explain the proposed regulation changes to the water rights adjudication process. Many individuals voiced complaints that they were unsure as to the status of their own permit, or that they could not obtain information as to pending permits in a given area. Examples of water uses that have been distributed for bodies of water with pending applications for adjudication of a water right were revealed at these meetings. Directing the department to develop and implement a standardized procedure is an effort which will better serve the public interest regarding the distribution of our state's water.

This bill also directs the department to make public records, including pending applications for water rights adjudication, available on the internet.

It was agreed in many of the meetings this Fall that the posting of information on the internet was an acceptable method of public notice, and a desirable avenue for public access to records. The department was able to use their website for several well designed pages supporting the proposed regulation changes, and should be able to implement a means of similar access to other matters of public record.

Water Rights

HB-185 / SB-139

- Late in Session (Gov. forgot to place priority)
- Dept. → ability to charge \$50 / yr for water right, & received \$300K to address backlogged water rights applications, with which it created 5.5 new positions.
- Temporary water rights received 1yr sunset, and extensions clause was removed.

Statute

- Now allows DNR Commissioner to exempt types of water appropriations (but not types of uses) from public notice.
- No checks and balances regarding this issue.

Current Regulations

- Allow for Temporary Water Use Permits without public notice.
- Do not require an application for non-substantial use.
- Define "Non-Substantial Use" as below 5K gpd.
- Do not specify criteria for application review.

Proposed Regulations

- Seem to solve public notice questions by repealing exemptions section.
- Introduces a definition for "Substantial Use" (50K gpd), and requires adjudication for this use.
- Would change requirement for public notice from "when a water rights application is received" to "when the department begins adjudicating a water rights application".
- The department would not adjudicate temporary water use permits, or what it is calling "second threshold applications". It would, however, allow the use of the water without the adjudicated right. The proposed regulations therefore create a higher degree of water use that would not be subject to public process.
- Do not specify criteria for application review.

Communications with DNR. Water Division

- Argues that public process is cost prohibitive.
- Has not "fully adjudicated a water right since 1991"
- Has only posted 3 applications for adjudication to public notice since March 2001
- Has not communicated a plan beyond "in Bob's head" for the processing of the 3K backlogged applications.
- Has never had a backlog for temporary water use permits
- Argues that creating "second threshold" of water use allows people to "use water, and not break the law", ignoring it's circumvention of public process.

(Side note: if second threshold applications do not require processing except at the department's discretion, this regulation will actually be responsible for eliminating the majority of the backlog...what else will the \$300K go toward?)

- Cannot produce or articulate the review process for applications subject to the department's discretion for adjudication.

Complaints

- Process: Farmers would like to know what the \$50 / year fee to the department will be supporting. The department has not yet answered specifically.
- Accessibility: Applicants for water rights adjudication, have not felt they have been given accurate, if any, information regarding the status of their pending permit.
- Accessibility: Individuals who have inquired as to the status or specifics of pending permits have been denied access to public information.
- Inconsistency: Water rights have been adjudicated with disregard to pending applications, although the department has testified that all applications will be taken into account before a right is appropriated.
 - Yellow Eagle Mine / home owners
 - BP / FWS at Kaparuk
- Ambiguity: The department cannot produce a criteria for application review, or for it's plan to relieve the backlogged applications.
- Ambiguity: A Superior Court Judge has cited the department's practices as "ambiguous and capricious" as he has found in favor of Greenpeace without holding BP responsible for the Karparuk ice road situation.

Future / Possibilities

- Criteria and process must be drafted for water rights applications that satisfy constitutional requirements for public trust, enable use of the resource for the public good, and facilitate ease of acquiring use in a uniform manner.

(This may require that the drafting process occur outside the department.)

- Statute for eliminating public process must be refined.
- Effectiveness of current process must be evaluated specifically, and measures should be implemented.
 - Regulation Review
 - Departmental Audit
- Statutory revision
 - Possibly a DNR revision
 - Possibly revised to incorporate other departments
 - Possibly revised to institute a separate entity

JENN'S NOTES

Proposed Regulation Changes Division of Water Oct. 2001

PUBLIC NOTICE:

(CONSTITUTION)

AK Constitution Article VIII Natural Resources, Section 10. Public Notice:

"No Disposal or leases of state lands, or interests therein, shall be made without public notice and other safeguards of the public interest as may be prescribed by law."

(STATE LAW)

Alaska State Law gives the Department of Natural Resources Commissioner authority to designate types of appropriations that are exempt from public process under AS 46.15.133 Notices; objections. :

"(f) The commissioner may, by regulation, designate types of appropriations that are exempt from this section and provide for ruling on the applications. The commissioner may not exempt under this subsection appropriations for removal under AS 46.15.035, appropriations by the state for sale or sales by the state under AS 46.15.037, or removals of water under AS 46.15.035 and 46.15.037."

(REGULATION)

- Currently temporary water rights are excluded by regulation 11 AAC 93.100 Exemptions to notice.
- The department of natural resources is proposing to repeal this section and amend 11 ACC 93.080 to require that public notice be given once the department begins adjudicating a water right, rather than when an application for a water right is received. It is also proposing that the adjudication process will not begin unless the department determines the process necessary under proposed 11 ACC 93.037 where it will create a "second threshold" allowing up to 50,000 gpd from some sources in what it explains is an effort to avoid the expense of public process in it's justification for this new classification.

When the DNR public notice section of their web site was reviewed 9/21/01, only three applications could be found to have been submitted in the last 6 months. Gary Prokosh confirmed this was the case at a meeting in his conference room the department was holding to explain their proposed regulation changes to some environmental groups, and explained that the no water rights had been adjudicated to his knowledge in the last two and a half months. Bob Loeffler with the department explained that there has never been a back log for temporary water use permits, and that most of the departments time is spent here.

The creation of the classification of water use applications that would qualify for "authorization" of use without necessitating an actual adjudicated water right greatly increases the number of applications that would not be subject to public process at the commissioners discretion.

PRIORITY OF RIGHTS:

(CONSTITUTION)

AK Constitution Article VIII Section 13. WATER RIGHTS says that "Priority of appropriation shall give prior right."

(STATE LAW)

AS 46.15.165. Administrative adjudications allows - under subsection (a) - for the commissioner to "by order, initiate an administrative adjudication to quantify and determine the priority of all water rights and claims", and lists the types of sources he may do that for.

(REGULATION)

The department's proposed regulations express in ARTICLE 4. 11 ACC 93.210 TEMPORARY WATER USE. (b) that "No water right or priority is established by a temporary water use authorization."

When several scenarios were posed and the question was asked in a meeting at the Anchorage DNR office with statewide environmental groups which was teleconferenced to Juneau, Bob Loeffler also answered that no prior right would be recognized by the department for either the first or second tiers of non-substantial use authorizations. He testified that the department would maintain a policy of only recognizing an actual adjudicated right as a primary right even when a second tier authorization is bumped up to a level where the department chooses to adjudicate that use.

This seems to be in conflict with the state constitution in that the constitution guarantees a priority to the water, which was first appropriated. Appropriation may happen under the authorization of use without an adjudication being necessary. This is an established public trust principle with supporting case history.

Although the department has testified that other applicants and / or use entities will be taken into account at the time the department appropriates a water use, examples exist to the contrary.

A Superior Court judicial opinion exists supporting both these statements, as well as admonishing the department for what was found to be ambiguity and capriciousness regarding it's process for appropriation of water.