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MEMORANDUM

April 14, 2014

SUBJECT: Review of AOGCC comments on HB 140 relating to regulations
(Work Order No. 28-LS0478)

TO: Representative Lora Reinbold
Attn: Crystal Koeneman

FROM:  Terry Bannister
Legislative Counsel

You have asked for a review of the comments you received from the Alaska Oil and Gas Conservation Commission (AOGCC). This memo provides a quick review of the comments. This memo does not address a particular version of the bill. For additional information on your bill and AOGCC, please review my memo to you of April 10, 2014.

1. Comment 1 -- ex parte communications. As I read these comments, they appear to equate proposed regulation adoption procedures and quasi-judicial hearing procedures. Ex parte communications with a commissioner at a quasi-judicial hearing where the commissioners are acting in a judicial capacity and rendering a decision in a particular matter, is generally not allowed.

However, it does not appear from my research that communications by or with the agency need to be prohibited for the regulation adoption process. In addition, HB 140 does not require that the commissioners themselves answer the questions.

2. Comment 2 -- deliberative process privilege. These comments address the quasi-judicial activities of AOGCC, where the AOGCC is adjudicating disputes. Even if the decisions on regulations are made at hearings under the open meeting requirements (AS 44.62.310), these regulation adoption hearings are not the same thing as administrative adjudications.

3. Comment 3 -- governor overriding regulations. Under the bill, the reasons for which the governor may return the regulations are limited. AS 44.62.040(c) would allow the governor to return the Board's proposed regulations to the Board for two particular reasons.¹ The first is for a failure of the regulations to be consistent with the faithful

¹ The two reasons are (1) if they are "inconsistent with the faithful execution of the laws," and (2) to enable the Board to "respond to specific issues raised by the Administrative Regulation Review Committee."

execution of the laws. As I read this requirement, and it could be read other ways, it means that the regulations must comply with the statutory authorities for the regulations, which is a basic requirement for a regulation to be valid. The second requirement is to enable the AOGCC to respond to the specific issues raised by the Administrative Regulation Review Committee (ARRC). The governor does not develop these specific issues.

The bill does not state that the governor may cancel or invalidate the regulations. It states that the governor may return them to the agency for review. The provision does not state what procedure the Board must follow after the return before resubmitting the proposed regulations to the lieutenant governor, and whether or not the governor could continue this return and review indefinitely. The return is within the governor's discretion. To the extent the procedures are not clear and the governor has the discretion whether or not to return the regulations, the governor exercises some undefined control over the regulations.

4. Comment 4 -- up-front estimates. Even though the AOGCC may have provisions in place that AOGCC says work better, this does not prevent the legislature from making the cost estimates a requirement and placing them in statute. This is basically a policy argument.

5. Comment 5 -- increase to burden of hearing process. These are policy arguments.

6. Comment 6 -- AOGCC cost increases. These are policy arguments.

7. Comment 7 -- concession about federal law. These comments appear to apply to the requirement that the AOGCC provide the reason for the regulation, including a federal law or court decision, in amended AS 44.62.190(d). The bill does not state that this information concedes federal jurisdiction, and these comments are an overbroad conclusion about the possible effect a person could draw from providing the information. If, in fact, a federal law or decision is the reason behind the regulation, silence on the subject does not change the content of the regulation.

If I may be of further assistance, please advise.

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