

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

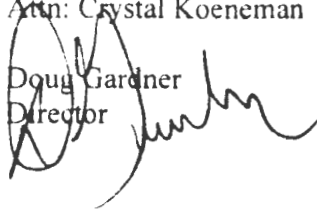
MEMORANDUM

February 23, 2016

SUBJECT: AO 279 Reorganizing CFEC Functions into ADF&G; Art. III, sec. 23 Constitution of the State of Alaska
(Work Order No. 29-LS1523)

TO: Representative Cathy Muñoz
Attn: Crystal Koeneman

FROM: Doug Gardner
Director



Question Presented

The question you asked, is whether Alaska Governor Bill Walker's use of Administrative Order No. 279 ("AO 279") violated the Alaska Constitution by transferring certain functions of the Commercial Fisheries Entry Commission ("CFEC") to the Alaska Department of Fish and Game ("ADF&G"), instead of an Executive Order as provided by article III, section 23 of the Constitution of the State of Alaska.

Brief Answer

Based on the information available, the transfer of some licensing and permitting functions by AO 279 may violate art. III, sec. 23 of the Constitution of the State of Alaska, which provides that where a reorganization requires the force of law, that the governor is required to make changes in the organization of the executive branch by way of an executive order. As you know, unlike an administrative order, an executive order may be disapproved by the legislature within the first 60 days of a regular session by a majority vote during a joint session. An administrative order may not be used to amend law, as further discussed below.

Discussion

Art. III, sec. 23 of the Constitution of the State of Alaska provides:

SECTION 23. Reorganization. The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the

members in joint session, these orders become effective at a date thereafter to be designated by the governor.

This section is discussed in the Alaska Constitutional Convention Proceedings (pages 2226 - 2229) and it appears clear that the delegates viewed this section as providing the governor the power, as an administrative matter, to reorganize the functions of the executive branch, but not to enlarge, diminish, or otherwise alter those functions. This power of reorganization applies to both department functions and functions of boards and commissions.

NORDALE: I just perhaps could amplify the Committee's thinking a bit on this. We were thinking primarily of laws setting up boards and sort of sloppy administration, as we have at the present time. Now then, when the governor sees there are too many departments set up functioning by themselves or functioning under boards and there isn't any coordination, he has the right to suggest a reorganization and a different assignment of functions. . . .

LONDBORG: Mr. President, just another word along that line, and I think Mrs. Nordale brought it out quite clear, now the other way would be if the governor wanted some reorganization he would have to go to the legislature and have a bill introduced by somebody or on his own request and that bill would be acted upon to make this necessary change. For instance, deleting a certain board or ceasing its functions and putting it under the single department head or something of that nature, whatever major change he would want he would have to depend upon the legislature to pass that bill and get it into operation. Doing it this way, he sets forth an executive order but it does not become effective until it slips through the next session of the legislature without being voted on by the legislature. I suppose you could call it reverse legislation. The governor makes a new law and if the legislature does not want it done away with, well, then they can let it go through, but I think it runs in line with the strong executive we have where he can set forth his changes and the legislature by being silent on it, in that way they approve of the order. (Constitutional Convention Proceedings, Part III, Page 2229; emphasis added)

Please note that an executive order does not become effective until after the legislature has had an opportunity to disapprove it. The legislature disapproves an executive order by majority vote of the members in joint session (at least 31 votes). AS 24.08.210 provides that executive orders are to be submitted to each house on the day it organizes, but the governor has taken the position that his power to submit an executive order cannot be so restricted in time (*see* Senate Journal, January 23, 1991, Page 60).

Administrative Order 279 provides:

ADMINISTRATIVE ORDER NO. 279

I, Bill Walker, Governor of the State of Alaska, under the authority of Article III, Sections 1 and 24 of the Alaska Constitution, and in accordance with AS 44.17.020 and AS 44.17.070, order the following reorganization within the Department of Fish and Game:

The administrative and research functions of the Alaska Commercial Fisheries Entry Commission (Commission) are transferred to the Department of Fish and Game (Department) under authority of the Commissioner of Fish and Game. This transfer is necessary for efficient administration and will provide for appropriate and effective performance of these functions.

BACKGROUND AND PURPOSE

The objectives of this Order are to streamline administrative and research functions of the agencies, identify cost-saving measures, and provide appropriate support to the commercial fishing industry in the state.

Administrative Order No. 60, dated July 1, 1980, transferred the Commission from the Office of the Governor to the Department, in the interest of efficient administration and logical organization of functions. The transfer was for reasons of budgeting and administration. The Department was not given authority to regulate the policies or activities of the Commission, except those that were purely administrative in nature. Administrative Order No. 60 remains in effect, but is amended as follows: Administrative functions as defined by this Order include the following:

- (1) Licensing and permitting services (ministerial services only);
- (2) Information technology services;
- (3) Accounting services;
- (4) Payroll services;
- (5) Procurement services;
- (6) Budget services.

At the discretion of the commissioner, positions associated with these listed services and functions may be transferred from the Commission to the appropriate divisions within the Department. Additional administrative functions subject to this Order also may be transferred from the Commission to the Department at the discretion of the Commissioner.

This reorganization creates efficiency and costs savings and is in accord with sound administrative principles and practices. This Order takes effect immediately.

Dated this 16th day of February, 2016

In my opinion, the focus of this discussion regarding application of art. III, sec. 23, is on the assigned functions transferred by AO 279 from CFEC to ADF&G: "(1) Licensing and permitting services (ministerial services only)." The reason for this focus is that while the other functions transferred appear to have an administrative or ministerial function, the licensing and permitting functions exercised by CFEC are statutory duties and in certain circumstances, may include the exercise of decision making and in some cases the weighing of evidence. The difficulty with analyzing AO 279 is that on its face, it transfers administrative or ministerial functions, but it is unclear which permitting and licensing functions have been transferred. Currently, CFEC's statutory duties are set forth in AS 16.43.100, which provides in relevant part:

Sec. 16.43.100. Duties and general powers.

(a) To accomplish the purposes set out in AS 16.43.010, the commission shall

(1) regulate entry into the commercial fisheries for all fishery resources in the state;

(2) establish priorities for the application of the provisions of this chapter to the various commercial fisheries of the state;

(3) establish administrative areas suitable for regulating and controlling entry into the commercial fisheries;

(4) establish, for all types of gear, the maximum number of entry permits for each administrative area;

(5) designate, when necessary to accomplish the purposes of this chapter, particular species for which separate interim-use permits or entry permits will be issued;

(6) establish qualifications for the issuance of entry permits;

(7) **issue entry permits to qualified applicants;**

(8) **issue interim-use permits as provided in AS 16.43.210, 16.43.220, and 16.43.225;**

(9) establish, for all types of gear, the optimum number of entry permits for each administrative area;

(10) administer the buy-back program provided for in AS 16.43.310 and 16.43.320 to reduce the number of outstanding entry permits to the optimum number of entry permits;

(11) provide for the transfer and reissuance of entry permits to qualified transferees;

(12) provide for the transfer and reissuance of entry permits for alternative types of legal gear, in a manner consistent with the purposes of this chapter;

(13) establish and administer the collection of the annual fees provided for in AS 16.43.160;

(14) administer the issuance of commercial fishing vessel licenses under AS 16.05.490;

(15) issue educational entry permits to applicants who qualify

under the provisions of AS 16.43.340 - 16.43.390;

(16) establish reasonable user fees for services;

(17) issue landing permits under AS 16.05.675 and regulations adopted under that section;

(18) establish and collect annual fees for the issuance of landing permits that reasonably reflect the costs incurred in the administration and enforcement of provisions of law related to landing permits;

(19) establish a moratorium on entry into commercial fisheries as provided in AS 16.43.225;

(20) when requested by a regional development organization formed under former AS 44.33.895, provide to the organization, without charge, public information contained in the commission's data with respect to relevant fisheries, including limited fisheries, fishery participants, and limited entry permit holders' harvests and earnings; and

(21) administer, when necessary to accomplish the purposes of this chapter, a Bering Sea hair crab fishery vessel permit system under AS 16.43.451 - 16.43.521.

(b) The commission may do all things necessary to the exercise of its powers under this chapter, whether or not specifically designated in this chapter. [Bold and italics added for emphasis.]

Based on the language of AO 279 (licensing and permitting services, limited to ministerial services only) and a letter from CFEC Commissioners Ben Brown and Bruce Twomley to Senator Dunleavy, Senate Department of Fish and Game Finance Subcommittee, Senator Stoltze, Senator Micciche and Senator Egan, dated February 17, 2016, it appears that ADF&G will be engaging in permitting and licensing functions that are by statute *specifically committed to the lawful statutory authority of CFEC*.

For example, the transfer of entry permits may only be accomplished "through the commission" under AS 16.43.170 (transfer of entry permits). AS 16.43.180 (emergency transfer of permits) establishes a process that is also committed to the discretion of CFEC and conducted under regulations adopted by the commission. Emergency transfer of a permit may require review and evaluation of facts and documents submitted by the permit holder, that may ultimately require agency expertise by CFEC to make these decisions.

Again, based on the language in AO 279 it is hard to evaluate how ADF&G can perform either of these licensing functions which are: (1) specific statutory duties of CFEC that in some cases affect the rights and liabilities of permit holders; and (2) where these statutory functions could be more than purely "ministerial." *See*, 1991 Alaska Op. Atty. Gen. File No. 663-92-0294 WL 542010 (transfer permissible under AS 44.17.060 where the duties being transferred are "purely administrative in nature").

Conclusion

Under AO 279, ADF&G appears to be issuing licenses that are currently committed

solely to the statutory authority of CFEC to issue. Under AO 279, ADF&G could in some cases, be doing more than just collecting fees and performing ministerial functions at least with respect to issuing a permit in certain situations like emergency transfers of permits. For these reasons, based on the information available, the transfer of licensing duties may require the force of law by the passage of legislation, or through the use of an executive order, before ADF&G can perform statutory duties which it does not currently appear to have and which may be more than ministerial.

If the governor intends to move the responsibilities for issuing permits and licenses from CFEC to ADF&G, reassignment of those functions will likely require an executive order or legislation, to amend current statutes to provide ADF&G with the authority to conduct licensing and permitting activities that are currently the statutory responsibility of CFEC.

DDG:dla
16-194.dla

Alaska State Legislature

State Capitol, Room 208
Juneau, Alaska 99801-1182
Phone: 907-465-3779
Fax: 907-465-2833
Toll Free: 800-469-3779

145 Main St. Loop
Second Floor
Kenai, Alaska 99611
Phone: 907-283-7223
Fax: 907-283-7184



REPRESENTATIVE MIKE CHENAULT SPEAKER OF THE ALASKA STATE HOUSE

February 25, 2016

The Honorable Bill Walker
Governor, State of Alaska
PO Box 110001
Juneau, AK 99811-0001

Dear Governor Walker:

It has been brought to my attention that there may be legal issues with Administrative Order 279, issued on February 16, 2016.

Representative Cathy Munoz requested a legal opinion from Legislative Legal in regards to Administrative Order 279 and whether it is a violation of the State Constitution by transferring certain functions of the Commercial Fisheries Entry Commission to the Department of Fish and Game by issuing an Administrative Order rather than an Executive Order. A copy of that opinion is enclosed.

I respectfully request the attorney general review the opinion and issue a response in regards to the issues raised in the Legislative Legal opinion. As you are aware, there is a significant difference between an executive order and an administrative order particularly in regards to the Legislature's having the ability to review an executive order.

I also note that Representative Louise Stutes has legislation, House Bill 112, that would accomplish the goals established in your administrative order. I believe proper protocol should have been heeded and that your staff would have discussed the transfer of certain duties of CFEC to ADF&G with Representative Stutes before your administrative order was issued. However, how this was handled is your decision and I am not trying to be critical. I do however feel compelled to point out that it would have been a matter of common courtesy to inform Representative Stutes beforehand.

Thank you for looking into this matter. I look forward to a response from the attorney general.

Please don't hesitate to contact me if you would like to discuss this further.

Sincerely,

A handwritten signature in cursive script, reading "Mike Chenault".

Representative Mike Chenault
Speaker, Alaska State House of Representatives

cc: Senator Kevin Meyer, Senate President
Representative Cathy Munoz
Representative Louise Stutes