

SENATE CS FOR CS FOR HOUSE BILL NO. 264(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Offered: 5/6/98

Referred: Finance

Sponsor(s): REPRESENTATIVES JAMES, Berkowitz, Cowdery, Kemplen

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to negotiated regulation making; and providing for an effective**
2 **date."**

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 *** Section 1.** AS 44.62 is amended by adding new sections to read:

5 **Article 10. Negotiated Regulation Making.**

6 **Sec. 44.62.710. Purpose and applicability of AS 44.62.710 - 44.62.800.** (a)

7 The purpose of AS 44.62.710 - 44.62.800 is to establish a framework for the conduct
8 of negotiated regulation making consistent with AS 44.62.010 - 44.62.320. Negotiated
9 regulation making is not a substitute for the requirements of AS 44.62.010 - 44.62.320
10 but may be used as a supplemental procedure to permit the direct participation of
11 affected interests in the development of new regulations or the amendment or repeal
12 of existing regulations. A consensus agreement reached by a negotiated regulation
13 making committee may be modified by an agency head as a result of the subsequent
14 regulation making process. AS 44.62.710 - 44.62.800 may not be construed as an

1 attempt to limit innovation and experimentation with the negotiated regulation making
 2 process or to limit other means to obtain public participation in the regulation making
 3 process.

4 (b) The provisions of AS 44.62.710 - 44.62.800 may be used by an agency
 5 even if other provisions of this chapter do not apply to that agency.

6 **Sec. 44.62.720. Determination of need for negotiated regulation making**
 7 **committee.** (a) In addition to the regulation adoption requirements under
 8 AS 44.62.010 - 44.62.320, an agency head may determine that the use of a negotiated
 9 regulation making committee to negotiate and develop a proposed regulation is in the
 10 public interest. In making that determination, the agency head is advised to consider
 11 whether

12 (1) there is a need for a regulation, including whether any legal action
 13 is pending that might resolve the need;

14 (2) there are a limited number of identifiable interests that are held by
 15 more than one person and that will be significantly affected by the regulation;

16 (3) there is a reasonable likelihood that a committee can be convened
 17 with a balanced representation of persons who

18 (A) can adequately represent the interests identified under (2)
 19 of this section; and

20 (B) are willing to negotiate in good faith to reach a consensus
 21 on the proposed regulation;

22 (4) there is a reasonable likelihood that a committee will reach a
 23 consensus on the proposed regulation within a fixed period of time;

24 (5) the negotiated regulation making procedure will not unreasonably
 25 delay the adoption of the final regulation;

26 (6) the agency has adequate resources and is willing to commit those
 27 resources, including technical assistance, to the committee; and

28 (7) the agency head, to the maximum extent possible consistent with
 29 the legal or other obligations of the agency, will use the consensus of the committee
 30 as the basis for the regulation proposed by the agency under AS 44.62.010 - 44.62.320.

31 (b) Upon determining that a negotiated regulation making committee will be

1 formed, an agency head shall notify the public so that interested persons can apply to
2 be appointed to the committee.

3 **Sec. 44.62.730. Use of convener.** (a) An agency head may use the services
4 of an impartial person as a convener to assist in making the determination of need
5 under AS 44.62.720 and to assist the agency to

6 (1) identify the persons who will be significantly affected by a
7 proposed regulation; and

8 (2) conduct discussions with affected persons on the issues of concern
9 and determine whether the establishment of a negotiated regulation making committee
10 is feasible and appropriate for the particular proposed regulation.

11 (b) A person acting as a convener may also be named as a facilitator under
12 AS 44.62.760. The convener shall report findings and make recommendations to the
13 agency. The report and recommendations of the convener shall be made available to
14 the public upon request.

15 **Sec. 44.62.740. Establishment, time line, support, and termination of**
16 **committee.** (a) The agency head may establish a negotiated regulation making
17 committee to assist in the formulation of a proposed regulation. The agency head
18 should strive to achieve and maintain throughout the negotiated regulation making
19 process the balanced committee representation described under AS 44.62.720(a)(3).
20 Members of the committee serve at the pleasure of the agency head. If a committee
21 member is unable to attend a meeting, the agency head may select a designee to serve
22 in that member's place for a meeting.

23 (b) Before notifying the public under AS 44.62.720(b), the agency head shall
24 establish a time line for the work of the committee. The time line must include a
25 completion date for the transmission to the agency of the report described in
26 AS 44.62.750(d) or (e). The agency shall provide the time line to persons who apply
27 for appointment to the committee. At its first meeting, the committee shall review the
28 time line and recommend to the agency head any revisions to the time line. The
29 agency head shall consider any recommendations and revise the time line if necessary
30 to further the purposes of the negotiated regulation making process.

31 (c) The agency head may expand the membership of the negotiated regulation

1 making committee if necessary to facilitate the workings of the committee.

2 (d) The agency shall make available administrative support to the negotiated
3 regulation making committee, including technical support, that the agency head
4 determines necessary.

5 (e) A negotiated regulation making committee terminates upon adoption under
6 AS 44.62.010 - 44.62.320 of the final regulation under consideration unless the agency
7 head specifies an earlier termination date.

8 **Sec. 44.62.750. Committee duties, procedures, and report.** (a) A negotiated
9 regulation making committee shall consider the matter proposed by the agency head
10 for consideration and shall attempt to reach consensus concerning a proposed
11 regulation and any other matter on which the agency head requests assistance and that
12 is relevant to the proposed regulation.

13 (b) The person representing the agency on a negotiated regulation making
14 committee shall participate in the deliberations of the committee with the same rights
15 and responsibilities of other members of the committee and is authorized to fully
16 represent the agency in the discussions and negotiations of the committee.

17 (c) An agency head may adopt procedures for the operation of the negotiated
18 regulation making committee. The agency head shall appoint the chair of the
19 committee.

20 (d) If a negotiated regulation making committee achieves consensus on a
21 proposed regulation on or before the completion date established under
22 AS 44.62.740(b), the committee shall transmit to the agency head that established the
23 committee a report containing the proposed regulation.

24 (e) If a negotiated regulation making committee does not reach a consensus
25 on the proposed regulation on or before the completion date established under
26 AS 44.62.740(b), the committee shall transmit to the agency head a report specifying
27 areas in which the committee reached consensus and the issues that remain unresolved.
28 The committee may include in the report other information, recommendations, or
29 materials that the committee considers appropriate. A member of the committee may
30 include as an addendum to the report additional information, recommendations, or
31 materials.

1 (f) AS 44.62.310 - 44.62.312 apply to meetings of a negotiated regulation
2 making committee.

3 **Sec. 44.62.760. Facilitator selection, duties, and authority.** (a) An agency
4 head may appoint a person who is impartial to serve as a facilitator for the negotiations
5 of a negotiated regulation making committee. A person designated to represent the
6 agency on substantive issues may not serve as facilitator.

7 (b) A facilitator appointed or selected under (a) of this section shall

8 (1) preside at the meetings of the committee in an impartial manner,
9 unless the agency head has designated another person as chair;

10 (2) impartially assist the members of the committee to conduct
11 discussions and negotiations and to achieve consensus;

12 (3) coordinate with the agency head regarding the management of
13 records of the committee; and

14 (4) perform other duties related to the negotiated regulation making
15 committee that are assigned by the agency head.

16 (c) A facilitator does not have decision-making authority for the committee.

17 **Sec. 44.62.770. Employees, contractors, and funding.** (a) An agency head
18 may appoint an agency employee or obtain the services of another state employee or
19 a private contractor to serve as a convener or facilitator for a negotiated regulation
20 making committee.

21 (b) Before appointing or selecting a convener under AS 44.62.730 or a
22 facilitator under AS 44.62.760, an agency head shall determine whether a person being
23 considered has a financial or other interest that would prevent the person from serving
24 in an impartial and independent manner. A person disqualified under this criterion
25 may not be considered further.

26 (c) A member of a negotiated regulation making committee shall disclose to
27 the agency and other members of the committee a grant, gift, or other financial benefit
28 that exceeds \$150 and that has been accepted by the disclosing member to finance the
29 disclosing member's participation on the negotiated regulation making committee.

30 **Sec. 44.62.780. Judicial review.** An agency action relating to establishing,
31 assisting, or terminating a negotiated regulation making committee under AS 44.62.710

1 - 44.62.800 is not subject to judicial review. Nothing in this section bars judicial
 2 review if the judicial review is otherwise provided by law. A regulation that is the
 3 product of negotiated regulation making and is later subject to judicial review may not
 4 be given greater deference by a court for that reason than a regulation that is not the
 5 product of negotiated regulation making.

6 **Sec. 44.62.790. Relationship to other requirements.** The negotiated
 7 regulation making authorized by AS 44.62.710 - 44.62.800 is in addition to the
 8 procedures required under AS 44.62.010 - 44.62.320 for adopting, amending, or
 9 repealing regulations, and, if an agency head decides to use negotiated regulation
 10 making, the negotiated regulation making shall, where possible, occur before the
 11 procedures under AS 44.62.010 - 44.62.320 begin.

12 **Sec. 44.62.795. Confidentiality of certain records and documents.**
 13 Notwithstanding AS 09.25.100 - 09.25.220, records from private persons that are
 14 requested or used by a negotiated regulation making committee and working
 15 documents prepared by the committee that analyze or incorporate information from the
 16 records shall be kept confidential if the records or working documents contain
 17 proprietary information and the owner of the records or working documents requests
 18 that the records or working documents be kept confidential.

19 **Sec. 44.62.800. Definitions.** In AS 44.62.710 - 44.62.800,

20 (1) "agency" means a department, an institution, or a division or other
 21 administrative unit of the executive branch of state government authorized or required
 22 by law to make regulations, except that "agency" does not include

23 (A) a board; a commission; a council, except the Alaska Coastal
 24 Policy Council established in AS 44.19.155; an authority; or a public
 25 corporation of the executive branch of state government authorized or required
 26 by law to make regulations; or

27 (B) the Department of Corrections;

28 (2) "agency head" means

29 (A) the commissioner or other head of an agency who has the
 30 authority to adopt regulations for the agency; or

31 (B) for the Alaska Coastal Policy Council established in

1 AS 44.19.155, the co-chair of the council designated under AS 44.19.155(c)
 2 from the members listed in AS 44.19.155(a)(2);

3 (3) "consensus" means unanimous concurrence among the interests
 4 represented on a negotiated regulation making committee;

5 (4) "convener" means a person who is impartial and performs the
 6 services identified under AS 44.62.730 for an agency;

7 (5) "facilitator" means a person who is impartial and performs the
 8 services identified under AS 44.62.760(b) for a negotiated regulation making
 9 committee;

10 (6) "negotiated regulation making" means regulation making through
 11 the use of a negotiated regulation making committee;

12 (7) "negotiated regulation making committee" means an advisory
 13 committee to consider and discuss issues for the purpose of reaching a consensus in
 14 the development of a proposed regulation;

15 (8) "person" has the meaning given in AS 01.10.060, and expressly
 16 includes a public organization of any character;

17 (9) "regulation" has the meaning given in AS 44.62.640 and includes
 18 the amendment or repeal of a regulation.

19 * **Sec. 2.** AS 09.65 is amended by adding a new section to read:

20 **Sec. 09.65.235. Immunity for negotiated regulation making committee and**
 21 **its members.** A civil action for damages or costs may not be brought against a
 22 negotiated regulation making committee established under AS 44.62.710 - 44.62.800
 23 or any of its members for an act or omission occurring in the course and scope of the
 24 official duties of the committee under this chapter.

25 * **Sec. 3.** AS 36.30.850(b) is amended by adding a new paragraph to read:

26 (38) contracts for a convener under AS 44.62.730 or for a facilitator
 27 under AS 44.62.760 related to a negotiated regulation making process under
 28 AS 44.62.710 - 44.62.800.

29 * **Sec. 4.** AS 39.25.110 is amended by adding a new paragraph to read:

30 (33) a person employed as a convener under AS 44.62.730 or as a
 31 facilitator under AS 44.62.760 related to a negotiated regulation making process under

1 AS 44.62.710 - 44.62.800.

2 * **Sec. 5.** AS 39.52.960(4) is amended to read:

3 (4) "board or commission" means a board, commission, authority, or
 4 board of directors of a public or quasi-public corporation, established by statute in the
 5 executive branch, but excluding the Alaska Railroad **and members of a negotiated**
 6 **regulation making committee under AS 44.62.710 - 44.62.800;**

7 * **Sec. 6.** AS 39.52.960(4) is amended to read:

8 (4) "board or commission" means a board, commission, authority, or
 9 board of directors of a public or quasi-public corporation, established by statute in the
 10 executive branch, but excluding the Alaska Railroad [AND MEMBERS OF A
 11 NEGOTIATED REGULATION MAKING COMMITTEE UNDER AS 44.62.710 -
 12 44.62.800];

13 * **Sec. 7.** AS 09.65.235; AS 36.30.850(b)(38); AS 39.25.110(33); AS 44.62.710, 44.62.720,
 14 44.62.730, 44.62.740, 44.62.750, 44.62.760, 44.62.770, 44.62.780, 44.62.790, 44.62.795, and
 15 44.62.800 are repealed July 1, 2003.

16 * **Sec. 8.** Sections 1 - 5 and 7 of this Act take effect immediately under AS 01.10.070(c).

17 * **Sec. 9.** Section 6 of this Act takes effect July 1, 2003.