

**HOUSE BILL NO. 264**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES JAMES, Berkowitz, Cowdery, Kemplen

Introduced: 4/25/97

Referred: State Affairs, Finance

**A BILL**

**FOR AN ACT ENTITLED**

1 "An Act providing for a negotiated regulation making process; and providing for  
2 an effective date."

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

4 \* **Section 1.** AS 44.62.175(a) is amended to read:

5 (a) The lieutenant governor shall publish or contract for the publication of the  
6 Alaska Administrative Journal. The journal shall be published weekly. The journal  
7 must include

8 (1) notices of proposed actions given under AS 44.62.190(a);

9 (2) notices of state agency meetings required under AS 44.62.310(e),  
10 even if the meeting has been held;

11 (3) notices of solicitations to bid issued under AS 36.30.130;

12 (4) notices of state agency requests for proposals issued under  
13 AS 18.55.255, 18.55.320; AS 36.30.210; AS 37.05.316; AS 38.05.120; and  
14 AS 43.40.010;

1 (5) executive orders and administrative orders issued by the governor;  
 2 (6) written delegations of authority made by the governor or the head  
 3 of a principal department under AS 44.17.010;

4 (7) the text or a summary of the text of a regulation or order of repeal  
 5 of a regulation for which notice is given under AS 44.62.190(a), including an  
 6 emergency regulation or repeal whether or not it has taken effect;

7 (8) a summary of the text of recently issued formal opinions and  
 8 memoranda of advice of the attorney general;

9 (9) a list of vacancies on boards, commissions, and other bodies whose  
 10 members are appointed by the governor; [AND]

11 (10) in accordance with AS 39.52.240(h), advisory opinions of the  
 12 attorney general; **and**

13 **(11) a notice under AS 44.62.750 and 44.62.760 relating to the**  
 14 **establishment of a negotiated regulation making committee.**

15 \* **Sec. 2.** AS 44.62 is amended by adding new sections to read:

16 **Article 10. Negotiated Regulation Making.**

17 **Sec. 44.62.710. Purpose and applicability of AS 44.62.710 - 44.62.830.** (a)

18 The purpose of AS 44.62.710 - 44.62.830 is to establish a framework for the conduct  
 19 of negotiated regulation making consistent with AS 44.62.010 - 44.62.320. It is the  
 20 intent of the legislature that state agencies, whenever appropriate, use the negotiated  
 21 regulation making process to resolve controversial issues before the commencement  
 22 of the formal regulation making process under AS 44.62.010 - 44.62.320. Negotiated  
 23 regulation making is not a substitute for the requirements of AS 44.62.010 - 44.62.320  
 24 but may be used as a supplemental procedure to permit the direct participation of  
 25 affected interests in the development of new regulations or the amendment or repeal  
 26 of existing regulations. A consensus agreement reached by a negotiated regulation  
 27 making committee may be modified by an agency as a result of the subsequent  
 28 regulation making process. AS 44.62.710 - 44.62.830 may not be construed as an  
 29 attempt to limit innovation and experimentation with the negotiated regulation making  
 30 process.

31 (b) The provisions of AS 44.62.710 - 44.62.830 may be used by an agency

1 even if other provisions of this chapter do not apply to that agency.

2 **Sec. 44.62.720. Determination of need for negotiated regulation making**  
 3 **committee.** In addition to the regulation adoption requirements under AS 44.62.010 -  
 4 44.62.320, an agency may determine that the use of a negotiated regulation making  
 5 committee to negotiate and develop a proposed regulation is in the public interest. In  
 6 making that determination, the agency director shall consider whether

7 (1) there is a need for a regulation;

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

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

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

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

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

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

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

22 (7) the agency, to the maximum extent possible consistent with the  
 23 legal obligations of the agency, will use the consensus of the committee as the basis  
 24 for the regulation proposed by the agency under AS 44.62.010 - 44.62.320.

25 **Sec. 44.62.730. Petition to use negotiated regulation making committee.**

26 (a) Except as provided in (b) of this section, a person may petition an agency to  
 27 request the use of a negotiated regulation making committee in the development or  
 28 revision of a regulation. Each agency shall prescribe the form of the petition and the  
 29 procedure for its submission, consideration, and disposition. Within 60 days after  
 30 submission of a petition, the agency shall, if the agency determines under  
 31 AS 44.62.720 that using the committee is in the public interest, initiate negotiated

1 regulation making under AS 44.62.750, or, if the agency determines under  
 2 AS 44.62.720 that using the committee would not be in the public interest, the agency  
 3 shall deny the petition and send the person a written statement of the reasons for the  
 4 denial.

5 (b) A prisoner may not petition the Department of Corrections to request the  
 6 use of a negotiated regulation making committee. In this subsection, "prisoner" has  
 7 the meaning given in AS 33.30.901.

8 **Sec. 44.62.740. Use of convener.** (a) An agency may use the services of an  
 9 impartial person as a convener to assist in making the determination of need under  
 10 AS 44.62.720 and to assist the agency to

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

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

16 (b) The convener shall report findings and make recommendations to the  
 17 agency. Upon request of the agency, the convener shall ascertain the names of persons  
 18 who are willing and qualified to represent the interests that are held by more than one  
 19 person and that will be significantly affected by the proposed regulation. The report  
 20 and recommendations of the convener shall be made available to the public upon  
 21 request.

22 **Sec. 44.62.750. Notice of committee formation.** (a) If, after making a  
 23 determination under AS 44.62.720, an agency decides to establish a negotiated  
 24 regulation making committee, the agency shall publish in the Alaska Administrative  
 25 Journal and, as appropriate, in newspapers and other publications a notice that includes

26 (1) an announcement that the agency intends to establish a negotiated  
 27 regulation making committee to negotiate and develop a proposed regulation;

28 (2) a description of the subject and scope of the regulation to be  
 29 developed and the issues to be considered;

30 (3) a list of interests that are identified under AS 44.62.720(2);

31 (4) a list of the persons proposed to represent the affected interests and

1 the agency;

2 (5) a proposed schedule for completing the work of the committee;

3 (6) an explanation of how a person may apply for or nominate another  
4 person for membership on the committee; and

5 (7) a statement that persons may send comments on the proposed  
6 committee to the agency at a specified address.

7 (b) If the agency is proceeding at the same time with the procedures under  
8 AS 44.62.010 - 44.62.320, the agency may include the notice required by (a) of this  
9 section in the notice given under AS 44.62.190.

10 (c) The lieutenant governor shall establish and maintain a list of persons who  
11 wish to receive agency notices regarding establishing negotiated regulation making  
12 committees and shall provide the notices to the persons for a reasonable charge.

13 (d) The agency shall provide a period of at least 30 days for the submission  
14 of comments and applications for membership on a negotiated regulation making  
15 committee.

16 **Sec. 44.62.760. Establishment, support, and termination of committee.** (a)  
17 If, after considering comments and applications submitted under AS 44.62.750, the  
18 agency still determines under AS 44.62.720 that the use of a negotiated regulation  
19 making committee is in the public interest, the agency may proceed to establish the  
20 committee.

21 (b) If, after considering comments and applications submitted under  
22 AS 44.62.750, the agency decides not to establish a negotiated regulation making  
23 committee, the agency shall notify the persons who commented on or applied for  
24 membership on the committee of the reasons for the decision. The agency shall also  
25 publish a notice of the decision in the Alaska Administrative Journal and, as  
26 appropriate, in newspapers and other publications.

27 (c) The agency shall provide appropriate administrative support to the  
28 negotiated regulation making committee, including technical support.

29 (d) A negotiated regulation making committee terminates upon adoption under  
30 AS 44.62.010 - 44.62.320 of the final regulation under consideration unless the agency,  
31 after consulting the committee, or the committee itself specifies an earlier termination

1 date.

2 **Sec. 44.62.770. Expansion of committee membership.** (a) A negotiated  
3 regulation making committee may by consensus expand its membership, either by  
4 contacting and recruiting persons whose participation the committee believes is  
5 essential to the success of the negotiated regulation making process or after reviewing  
6 a petition or nomination submitted under (b) of this section.

7 (b) A person who will be significantly affected by a proposed regulation and  
8 who believes that the person has an interest that is held by more than one person and  
9 that the interest will not be adequately represented by a person on a negotiated  
10 regulation making committee may petition to be a member of the committee or  
11 nominate another person for membership on the committee. A petition or nomination  
12 must be submitted to the negotiated regulation making committee and must include

13 (1) the name of the petitioner or nominee and a description of the  
14 interest the person represents;

15 (2) evidence that the petitioner or nominee is authorized to represent  
16 parties related to the interest the person proposes to represent;

17 (3) a written commitment that the petitioner or nominee will actively  
18 participate in good faith in the development of the regulation under consideration; and

19 (4) a description of the interest affected and an explanation of reasons  
20 that a person already on the committee does not adequately represent the interest.

21 (c) Upon receiving a petition or nomination under (b) of this section, a  
22 negotiated regulation making committee shall decide by consensus at its next meeting  
23 whether or not to expand its membership.

24 **Sec. 44.62.780. Committee duties, procedures, and report.** (a) A negotiated  
25 regulation making committee shall consider the matter proposed by the agency for  
26 consideration and shall attempt to reach consensus concerning a proposed regulation  
27 and any other matter the committee determines is relevant to the proposed regulation.

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

1 (c) A negotiated regulation making committee may adopt procedures for the  
2 operation of the committee.

3 (d) If a negotiated regulation making committee achieves consensus on a  
4 proposed regulation at the conclusion of the negotiations, the committee shall transmit  
5 to the agency that established the committee a report containing the proposed  
6 regulation.

7 (e) If a negotiated regulation making committee does not reach a consensus  
8 on the proposed regulation, the committee shall transmit to the agency a report  
9 specifying areas in which the committee reached consensus and the issues that remain  
10 unresolved. The committee may include in the report other information,  
11 recommendations, or materials that the committee considers appropriate. A member  
12 of the committee may include as an addendum to the report additional information,  
13 recommendations, or materials.

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

16 **Sec. 44.62.790. Facilitator selection, duties, and authority.** (a) An agency  
17 may nominate an impartial person to serve as a facilitator for the negotiations of a  
18 negotiated regulation making committee, subject to the approval of the committee by  
19 consensus. If the committee does not approve the agency's nomination for facilitator,  
20 the agency shall submit a substitute nomination. If the committee does not approve  
21 the substitute nomination of the agency for facilitator, the committee shall select by  
22 consensus a person to serve as facilitator. A person designated to represent the agency  
23 on substantive issues may not serve as facilitator or presiding officer for the  
24 committee.

25 (b) A facilitator approved or selected by a negotiated regulation making  
26 committee shall

- 27 (1) preside at the meetings of the committee in an impartial manner;  
28 (2) impartially assist the members of the committee to conduct  
29 discussions and negotiations and to achieve consensus; and  
30 (3) manage the keeping of minutes and records.

31 (c) A facilitator does not have decision-making authority.

1           **Sec. 44.62.800. Employees, contractors, expenses, and funding.** (a) An  
 2 agency may employ or enter into a contract for the services of a person to serve as a  
 3 convener or facilitator for a negotiated regulation making committee or may use the  
 4 services of a state employee to act as a convener or facilitator for the committee.

5           (b) An agency shall determine whether a person being considered for a  
 6 position as a convener or facilitator of a negotiated regulation making committee has  
 7 a financial or other interest that would prevent the person from serving in an impartial  
 8 and independent manner. A person disqualified under this criterion may not be  
 9 considered further.

10           (c) Members of a negotiated regulation making committee are responsible for  
 11 their own expenses of participation. However, an agency may pay for a committee  
 12 member's reasonable travel expenses as authorized for boards and commissions under  
 13 AS 39.20.180, other actual and necessary expenses incurred in serving on the  
 14 committee, and a reasonable daily rate of compensation if

15           (1) the committee member certifies a lack of adequate financial  
 16 resources to participate in the committee; and

17           (2) the agency determines that the committee member's participation  
 18 on the committee is necessary to ensure an adequate representation of the interests  
 19 identified under AS 44.62.720(2) or 44.62.770.

20           (d) An agency may accept grants or gifts from any source to fund the  
 21 negotiated regulation making process if

22           (1) information on the name of the person giving the grant or gift and  
 23 on the amount of the grant or gift is available to the public;

24           (2) the grant or gift is given to and accepted by the agency without  
 25 placing any condition on the membership of a negotiated regulation making committee  
 26 or the outcome of the negotiated regulation making process; and

27           (3) there is consensus among the members of the negotiated regulation  
 28 making committee that the acceptance of the grant or gift will not diminish the  
 29 integrity of the negotiated regulation making process.

30           **Sec. 44.62.810. Judicial review.** An agency action relating to establishing,  
 31 assisting, or terminating a negotiated regulation making committee under AS 44.62.710

1 - 44.62.830 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. 44.62.820. Relationship to other requirements.** The negotiated  
7 regulation making authorized by AS 44.62.710 - 44.62.830 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 decides to use negotiated regulation making,  
10 the negotiated regulation making shall, where possible, occur before the procedures  
11 under AS 44.62.010 - 44.62.320 begin.

12 **Sec. 44.62.830. Definitions.** In AS 44.62.710 - 44.62.830,

13 (1) "agency" means a department, institution, board, commission,  
14 division, authority, public corporation, or other administrative unit of the executive  
15 branch of state government authorized or required by law to make regulations;

16 (2) "consensus" means unanimous concurrence among the interests  
17 represented on a negotiated regulation making committee, unless the committee agrees  
18 on another definition;

19 (3) "convener" means a person who performs the services identified  
20 under AS 44.62.740 for an agency;

21 (4) "facilitator" means a person who performs the services identified  
22 under AS 44.62.790(b) for a negotiated regulation making committee;

23 (5) "negotiated regulation making" means regulation making through  
24 the use of a negotiated regulation making committee;

25 (6) "negotiated regulation making committee" means an advisory  
26 committee to consider and discuss issues for the purpose of reaching a consensus in  
27 the development of a proposed regulation;

28 (7) "person" has the meaning given in AS 01.10.060, and expressly  
29 includes a public organization of any character;

30 (8) "regulation" has the meaning given in AS 44.62.640 and includes  
31 the amendment or repeal of a regulation.

**1** \* **Sec. 3.** This Act takes effect immediately under AS 01.10.070(c).