

CS FOR HOUSE BILL NO. 264(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE STATE AFFAIRS COMMITTEE

Offered: 1/20/98
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 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.** In addition to the regulation adoption requirements under AS 44.62.010 -
 8 44.62.320, an agency may determine that the use of a negotiated regulation making
 9 committee to negotiate and develop a proposed regulation is in the public interest. In
 10 making that determination, the agency shall consider whether

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

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

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

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

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

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

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

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

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

30 **Sec. 44.62.730. Use of convener.** (a) An agency may use the services of an
 31 impartial person as a convener to assist in making the determination of need under

1 AS 44.62.720 and to assist the agency to

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

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

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

11 **Sec. 44.62.740. Establishment, support, and termination of committee.** (a)

12 The agency may establish a negotiated regulation making committee to assist in the
13 formulation of a proposed regulation. Members of the committee serve at the pleasure
14 of the head of the agency. If a committee member is unable to attend a meeting, the
15 agency head may select a designee to serve in that member's place for a meeting.

16 (b) The agency head may expand the membership of the negotiated regulation
17 making committee if necessary to facilitate the workings of the committee.

18 (c) The agency shall make available administrative support to the negotiated
19 regulation making committee, including technical support, that the agency determines
20 necessary.

21 (d) A negotiated regulation making committee terminates upon adoption under
22 AS 44.62.010 - 44.62.320 of the final regulation under consideration unless the agency
23 specifies an earlier termination date.

24 **Sec. 44.62.750. 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 on which the agency requests assistance and that is relevant to
28 the proposed regulation.

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

1 represent the agency in the discussions and negotiations of the committee.

2 (c) An agency may adopt procedures for the operation of the negotiated
3 regulation making committee. The agency head shall appoint the chair of the
4 committee.

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

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

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

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

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

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

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

27 (3) coordinate with the agency regarding the management of records
28 of the committee; and

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

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

1 **Sec. 44.62.770. Employees, contractors, expenses, and funding.** (a) An
2 agency may appoint an agency employee or obtain the services of another state
3 employee or a private contractor to serve as a convener or facilitator for a negotiated
4 regulation making committee.

5 (b) Before appointing or selecting a convener under AS 44.62.730 or a
6 facilitator under AS 44.62.760, an agency shall determine whether a person being
7 considered has a financial or other interest that would prevent the person from serving
8 in an impartial and independent manner. A person disqualified under this criterion
9 may not be 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 and per diem expenses as authorized for boards and
13 commissions under AS 39.20.180, only if

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

16 (2) the agency determines that teleconference, telephone, or other
17 electronic medium is not planned for the meeting in order for the member to
18 participate; and

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

22 (d) The state may accept grants or gifts from any appropriate source to finance
23 the negotiated regulation making process of a committee if

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

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

29 (3) any other requirement of law has been met.

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 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 44.62.795. 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, a division, or another
 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) "consensus" means unanimous concurrence among the interests
 29 represented on a negotiated regulation making committee;

30 (3) "convener" means a person who performs the services identified
 31 under AS 44.62.730 for an agency;

1 (4) "facilitator" means a person who performs the services identified
2 under AS 44.62.760(b) for a negotiated regulation making committee;

3 (5) "negotiated regulation making" means regulation making through
4 the use of a negotiated regulation making committee;

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

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

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

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

13 **Sec. 09.65.235. Immunity for negotiated regulation making committee and**
14 **its members.** A civil action for damages or costs may not be brought against a
15 negotiated regulation making committee established under AS 44.62.710 - 44.62.800
16 or any of its members for an act or omission occurring in the course and scope of the
17 official duties of the committee under this chapter unless the act or omission
18 constitutes gross negligence or reckless or intentional misconduct.

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

20 (38) contracts for a convener under AS 44.62.730 or for a facilitator
21 under AS 44.62.760 related to a negotiated regulation making process under
22 AS 44.62.710 - 44.62.800.

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

24 (33) a person employed as a convener under AS 44.62.730 or as a
25 facilitator under AS 44.62.760 related to a negotiated regulation making process under
26 AS 44.62.710 - 44.62.800.

27 * **Sec. 5.** AS 09.65.235; AS 36.30.850(b)(38); AS 39.25.110(33); AS 44.62.710, 44.62.720,
28 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
29 44.62.800 are repealed July 1, 2003.

30 * **Sec. 6.** This Act takes effect immediately under AS 01.10.070(c).