

**ALASKA STATE LEGISLATURE
JOINT COMMITTEE ON
ADMINISTRATIVE REGULATION REVIEW**

February 20, 2001
2:50 p.m.

HOUSE MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Jeannette James
Representative Joe Hayes

HOUSE MEMBERS ABSENT

All House members present

SENATE MEMBERS PRESENT

Senator Robin Taylor, Vice Chair
Senator Lyda Green
Senator Georgianna Lincoln

SENATE MEMBERS ABSENT

All Senate members present

COMMITTEE CALENDAR

Review of Past Regulations
Review of Current Proposed Regulations
Regulatory & Jurisdictional concerns/State v Federal Governments
Proposed Regulation Review Bill

PREVIOUS ACTION

No previous action to record

WITNESS REGISTER

JIM POUND, Staff
to Representative McGuire
Alaska State Legislature
Capitol Building, Room 116
Juneau, Alaska 99801

POSITION STATEMENT: Provided the committee with a review of
past and proposed regulations.

RON SOMERVILLE, Resource Consultant
House & Senate Majority
Alaska State Legislature
(No address provided.)
POSITION STATEMENT: Discussed dual management.

ACTION NARRATIVE

TAPE 01-4, SIDE A
Number 001

CHAIR LESIL McGUIRE called the Joint Committee on Administrative Regulation Review to order at 2:50 p.m. Representatives McGuire, James, and Hayes and Senator Lincoln were present at the call to order. Senators Taylor and Green arrived as the meeting was in progress.

Review of Current Proposed Regulations

Number 0027

JIM POUND, Staff to Representative McGuire, Alaska State Legislature, began by reviewing a document entitled "Regulations for Review or Comment," which is included in the committee packet. He reviewed regulation changes for the Board of Physical Therapy, the Board of Dental Examiners, the Board of Barbers, the Board of Nursing, and the Board of Public Accountancy, and the State Board of Education.

SENATOR GREEN turned to the regulation changes mentioned for the State Board of Education and related her understanding that there is a waiver of fees for a particular certification.

MR. POUND explained that the fees will be waived for teachers to become certified in areas where there are limited supplies of teachers.

SENATOR GREEN inquired as to who is making up the difference when there is a claim, file, or lawsuit.

MR. POUND reiterated that this waiver is for certification fees, which he believes goes into the general fund.

SENATOR GREEN asked if any other fees are being waived in the state for any other licenses.

MR. POUND replied, "Not under current regulations."

CHAIR McGUIRE agreed to take that up further per Senator Green's interest in doing so.

Number 0109

REPRESENTATIVE JAMES asked whether the list Mr. Pound is reviewing is a list of regulations that are in the process.

MR. POUND replied yes.

CHAIR McGUIRE pointed out that the committee still has time to make a public comment on any of these regulations.

SENATOR LINCOLN expressed the hope that in further discussions on the waiver for teacher certification the committee would be informed the cost of certification and the number of [teachers] that [would be able to utilize the waiver].

Number 0150

REPRESENTATIVE JAMES noted that the committee can still address those regulations that are finalized and legislation can be drafted to fix problems. Representative James inquired as to the status of [regulations] relating to rural airports.

MR. POUND related his understanding that there will be some changes regarding the confusion over the fees at each individual airport for various things. He understood that those regulations were going back out to public hearing.

Number 0174

MR. POUND returned to the regulations for review or comment and noted that he had been reviewing Education & Early Development, supplemental notice 4 AAC 52, which deals with the incorporation of federal special education requirements in the state regulations.

SENATOR GREEN asked if this dealt with the funding issue, that is the federal funding being used for children with disabilities.

MR. POUND answered that there is no reference to a fiscal note in the regulations. However, he suspected that there are

federal dollars available as a result of these [federal requirements] being incorporated into the state's regulations.

SENATOR GREEN informed the committee that there is legislation dealing with removing references to education of gifted children and separating that from [the education of] children with disabilities because of the federal prohibition on federal dollars being used for gifted education, which isn't a federal requirement. Senator Green expressed the desire to avoid duplication.

MR. POUND said that he would have to review the legislation. He then continued with the regulation that would add an additional student, an alternate, to the Alaska State Board of Education.

Number 0219

MR. POUND moved on to the review of regulations for the Department of Environmental Conservation, which involve air quality. These regulations may be of concern for some because a business that is located in an area away from the population isn't problematic even if it has lot of extra pollution. The perception may be that some companies are getting away with things that other companies are not because of the company's location.

REPRESENTATIVE JAMES asked if that was a statutory requirement or did the regulators "dream that up."

MR. POUND answered that the reference to it was statutory. However, it looked as if these air quality [regulations] came from the department after a long process with the stakeholders.

REPRESENTATIVE JAMES announced that she would review those.

MR. POUND moved on to the review of regulations for the Alaska Department of Fish & Game relating to the Board of Fish and the Board of Game. He concluded by reviewing the regulations available for review and comment with the notifications relating to the Alaska Housing Finance Corporation.

Number 0255

CHAIR MCGUIRE directed attention to the already adopted regulations regarding Katchemak Bay/Fox Bay On-Bottom Mariculture.

MR. POUND related his understanding that regulations regarding Katchemak Bay are under legal review. He informed the committee that Katchemak Bay, a critical habitat area, has been closed to all bottom shellfish farming and thus there are some concerns with how that biological decision was made. The way the regulations are written, there are questions regarding what can be done in a critical habitat area. Per the current regulations, it appears that Katchemak Bay will be off limits to about everyone because the regulations appear to go beyond the critical habitat statute.

CHAIR McGUIRE announced her intention to hold a committee meeting on these regulations that have yet to be enacted. She pointed out that members should have a memorandum from her dated February 16, 2001, regarding prior meetings regarding the Board of Pharmacy and the mariculture issue.

Regulatory & Jurisdictional concerns/State v Federal Governments

Number 0308

RON SOMERVILLE, Resource Consultant, House & Senate Majority, Alaska State Legislature, informed the committee that the House and Senate Resources Committees requested that he evaluate how the dual management system is working from the standpoint of the legislature. That review was presented at a February 14, 2001, Resources Committee meeting. Mr. Somerville noted that he had interviewed stakeholders as well as staff from the state and federal agencies. Many of the subsistence users are very pleased with the federal system.

MR. SOMERVILLE pointed out that there are distinct differences between the state and federal systems in regard to the regulations for fish and game. The federal agencies, as authorized under the Alaska National Interest Lands Conservation Act (ANILCA), has a different mandate and does not have the conservation mandates as structured by the state constitution. Primarily, the federal agencies emphasize providing healthy populations as well as the maintenance of federal uses on federal public lands. He noted that the definition of federal public lands is a matter of much litigation. Then there is the state system, which involves all fish and wildlife as well as all lands, save those where the federal government may exercise their jurisdiction as authorized by Congress. From that the dual management system came into being and has been in place for wildlife for some time. Mr. Somerville explained that the state is structured such that there is the Board of Fish and the Board

of Game as well as about 80 advisory committees to make recommendations to the boards.

MR. SOMERVILLE recalled U.S. Senator Murkowski's meetings with U.S. Secretary Babbitt who seemed to say that the federal government would cooperate as best it could with the state, understanding that the federal mandate is outlined in ANILCA. The notion of minimal intrusion into the existing fish and wildlife management program for the state was emphasized by U.S. Secretary Babbitt. Therefore, the question as to whether that resulted, he left for each individual to decide.

MR. SOMERVILLE then began to chronicle the history of dual management, beginning with a memorandum from Commissioner Frank Rue, Alaska Department of Fish & Game (ADF&G), on November 26, 1997, regarding how state staff would cooperate with the federal government. Subsequently, there was an interim memorandum of understanding (MOU) developed between federal agencies and [the Alaska Department] of Fish and Game over the coordination of fish and wildlife management for subsistence uses on federal public lands. This MOU specifies how subsequent protocols will be established for commercial fisheries on the Yukon, sharing data, avoiding overlap, and the development of in-season, post-season, and pre-season management programs. At a point, the advisory committees dropped out, which he felt [was problematic] because they were the crux of the state's regulatory structure. Then the Yukon River Drainage, which is an example of the type of protocol one can expect from the federal/state agencies, was developed. Mr. Somerville reviewed the protocol of the Yukon River Drainage and pointed out that the state provides the things specified while virtually nothing is reciprocated by the federal government.

MR. SOMERVILLE continued by asking how the master MOU is working. He turned to ADF&G's frustration in 1998, which is evidenced [in documentation from Elizabeth Andrew, who chaired a Subsistence Policy Advisory group for the commissioner of ADF&G]. The aforementioned document says that over time federal management will create two classes of rural users. Furthermore, it was noted that no progress had been made in terms of departmental involvement at federal regional council meetings. In the actual regulation process, the state is ignored by the federal agencies and the regional advisory councils.

Number 0440

SENATOR LINCOLN inquired as to the document that Mr. Somerville referred to when stating that the state has to share information with the federal government, but the reverse is not the case.

MR. SOMERVILLE said that he was reading from the Subsistence Management, Information Sharing Protocol draft, which was never signed. In further response to Senator Lincoln, Mr. Somerville pointed out that the master MOU was signed as was the Yukon River Protocol, [both of which mention information sharing].

SENATOR LINCOLN asked if the master MOU has any references requiring the federal government to share information with the state.

MR. SOMERVILLE indicated that the master MOU references the federal government sharing information with the state. In further response to Senator Lincoln, Mr. Somerville remarked that it is clear the state is providing all the information that it can to the regional advisory committees as well as to the federal agencies. However, the reciprocal portion isn't being done, which can be partially attributed to the fact that the overriding process is different. Staff participate in regional advisory committees, but their recommendations are virtually ignored and thus they are frustrated.

SENATOR LINCOLN expressed the need to have facts to support Mr. Somerville's assertion that there is a one-way flow of information.

MR. SOMERVILLE pointed out that the only responsibility of the regional [advisory] councils is to make recommendations to the Federal Subsistence Board who makes its recommendations to the federal agencies. "However, the requirements law are that they will be given deference. In other words, there has to be substantial information to show that the Federal Subsistence Board made an error or didn't adequately consider something for a ... customary and traditional finding before they can reject it," he explained.

Number 0479

SENATOR LINCOLN inquired as to why, with the agreement, the [state] thought it would be reciprocal.

MR. SOMERVILLE answered that he can only assume that the state felt that these were legitimate complaints that could've been dealt with and would've minimized the intrusion had some of the

state's recommendations been accepted. However, [the federal government] isn't required to do so.

MR. SOMERVILLE agreed with Senator Lincoln that the requirement isn't there, but the assumption is that [the state's recommendations would be considered]. He noted that in some cases, the argument could be made that the federal agencies would have the prerogative of involving the state more in their pre-season planning process. That reciprocal exchange is implied in the MOU.

MR. SOMERVILLE read the following points of Elizabeth Andrews:

Problem 1: The federal process does not provide a procedure to determine the amount of harvest necessary to meet rural subsistence needs.

Problem 2: Federal regulations do not recognize the state's identification of fish and wildlife populations or harvestable surplus.

Problem 3: There exists no federal infrastructure, resource assessment program on which to base in-season fishery management season.

MR. SOMERVILLE informed the committee of problems with the board; these were problems noted by staff who attended the Board of Fish meeting. During the meeting, it was difficult to determine whether the comments of federal staff were their personal, agency, or federal perspective. For example, a former ADF&G biologist who now works for the National Parks Service also represented a local Fish & Game advisory committee at one meeting. Furthermore, since federal staff positions and proposals aren't provided in advance to ADF&G staff, it was difficult for the department to respond to federal comments. Moreover, there was no mechanism for a meaningful exchange with the state prior to the comments provided at the board meeting. He then mentioned a Retreat Summary.

MR. SOMERVILLE addressed the impact [of dual management], which has been utilized for over nine years with wildlife. Staff has reported that cooperation has been minimal. For example, the federal regulations differ phenomenally from state regulations. [At the time,] the "fish and wildlife" people asked that the state's regulations not be published in total but rather only those state regulations that are contrary to those adopted by the Federal Subsistence Board. However, the state's regulations

were published in total and then those regulations were modified as [the Federal Subsistence Board] saw fit. The problem with that is that the federal regulatory process isn't as fast as the state's regulatory process. Furthermore, there were cases in which corrections were intended to be made, but were not. Therefore, the resident, whether a subsistence user or not, is placed at risk because [the resident] isn't sure which regulations [to] abide by. Mr. Somerville felt that point to be important because he predicted that the same course will follow for fish regulations. However, he did note that once regulations are adopted the state or anyone can request reconsideration of a regulation, which is a fairly formal process. Up to 1997 there have been about 133 or so requests for reconsiderations, of which only five requested changes have been satisfactorily resolved. One of the requests took six years to resolve. There were no requests for reconsiderations from 1998-2000. Therefore, the question is why. After review of the department's records, it was found that there were 53 complaints of which 36 seemed to be viable and should have been submitted to the federal board. Yet, the department must have felt it a waste of time to submit them.

MR. SOMERVILLE returned to the impact [of dual management] and pointed to the request of reconsideration of the federal board's decision to list the Kenai Peninsula as rural. He informed the committee that the Cooper Landing Fish & Game Advisory Committee has submitted a request for reconsideration, but the state has not. He mentioned a letter from Commissioner Rue, which noted support of the request of reconsideration.

Number 0577

SENATOR TAYLOR recalled that the change in classification of the Kenai Peninsula from urban to rural occurred about two years ago and no one, on behalf of the state, has requested reconsideration.

MR. SOMERVILLE clarified that the Cooper Landing request for reconsideration was filed and the state supports that. However, the state didn't request reconsideration. The problem with such is that the state can make certain claims that others cannot. Therefore, there would be an advantage, technically, to the state requesting reconsideration.

CHAIR MCGUIRE related her understanding that the state's support for that request for reconsideration hasn't been in a formal manner.

MR. SOMERVILLE reiterated that there is a letter, a letter to the chair of the Federal Subsistence Board, in support of this request for reconsideration by the Cooper Landing Advisory Committee.

TAPE 01-4, SIDE B

MR. SOMERVILLE continued. He explained that since the federal rules were adopted and the dual management system began, there were many complaints. He cited letters from Representative Gail Phillips in 1995, the legislature, and the United Fishermen of Alaska. [The United Fishermen of Alaska] pointed out a number of areas in which there was a lack of jurisdiction. There was also a March 28, 1996, letter from the governor regarding adopted regulations that involve state waters and selected but unconveyed lands. The governor's letter also points out the clear violation of advanced notice and the proposed rule making as established in the Federalism Effect of Executive Order 12612. Then, on June 1, 1996, the attorney general wrote to the Federal Subsistence Board in objection to the final adoption, which included a key objection to the lack of an environmental impact statement. Mr. Somerville pointed out that other than the Katie John case there has been no litigation by the state, despite the aforementioned complaints.

Number 0572

MR. SOMERVILLE related his belief and agreement with Commissioner Rue that the state is picking and choosing its litigation battles. Although the state probably doesn't have the money to litigate all 40 of those individual problems, there are some that Mr. Somerville would argue to be a major oversight. He said that federal regulations claim authority to set regulations in in-land waters. However, the federal in-land waters definition isn't consistent with anything in state law or other federal law and thus violates the state's interpretation of ANILCA. In conclusion, Mr. Somerville remarked that whether there is litigation or not, "it" costs a lot of money.

REPRESENTATIVE JAMES related her understanding that the federal government's mission, when taking over subsistence, was to manage for subsistence rather than for the sustainable resource, which is the state's mission.

MR. SOMERVILLE agreed with that understanding.

Number 0550

REPRESENTATIVE JAMES remarked that she saw no problem with the federal management of game because it is easy to see where federal land is. However, with fish it is difficult to determine where federal waters are. Representative James expressed her concern that managing the fish specifically for subsistence versus "sustainable balance" would result in a good opportunity for the fish to decline over time. Therefore, she has always expressed her desire to ensure that there enough people measuring the resource and tending to the science in order to determine whether the management was causing a decline. She asked if that is occurring.

MR. SOMERVILLE replied yes. He informed the committee that the federal government received over \$18 million to deal with dual management and some of that is being given to ADF&G in order to extend the department's monitoring programs. However, there is a provision in ANILCA that would allow up to \$5 million to the state on a 50:50 match. Since ANILCA has passed, the most funding received in one year was close to \$1 million, most of which went to the subsistence division in order to perform people assessment issues rather than resource assessment. Therefore, he said that the current monitoring efforts are good, although he was sure the state would argue that it's not enough to do what is expected. He noted the large amount of manpower and costs that go into this system with frequent overlap of jurisdiction.

REPRESENTATIVE JAMES remarked, "I don't buy this dual management stuff. Let them manage what they manage and we manage what we manage." However, she acknowledged that there may be duplication. Representative James felt that if the money were spent to monitor the resource, it would show a decline when managed for subsistence only without any management for the sustained resource. With the evidence of a difference [decline], there is the option to change it.

MR. SOMERVILLE said, "I don't have a magic wand, though, as to how you're going to do that." Currently, the federal government makes a decision and the state has to pick up the slack.

Number 0509

SENATOR LINCOLN related her belief that she and Mr. Somerville don't differ on the notion of having the state manage its own resource. However, with all the information provided, Senator

Lincoln pondered what [the state] expected. The federal government was given the ability to come in and manage Alaska's fisheries under their regulations and thus Senator Lincoln said that she wasn't surprised [with the outcome]. However, she predicted that this is the tip of what the federal government will do in managing Alaska's fisheries.

SENATOR LINCOLN noted her agreement that to go back now and unravel the adopted regulations would be extremely costly. She didn't hear the legislature saying that it was willing to put more money into this. "There's not much happening in the way of a resolve," she said. She noted her [solution] of a vote of the people for a rural preference and then move to get state management back.

Number 0483

SENATOR LINCOLN asked Mr. Somerville how he thought Alaska would fare with a Republican-led administration and House of Representatives, and an equally divided Senate. Furthermore, she inquired as to how Mr. Somerville is proposing a resolution at the state level.

MR. SOMERVILLE noted that he has worked hard on the subsistence issue. Personally, Mr. Somerville wasn't sure that the current presidential and congressional makeup would accomplish the relief desired. He agreed with Senator Lincoln that this dual management was predictable. Furthermore, the case can be made that even with a constitutional amendment, there would still be some form of dual management. However, the current situation isn't very good for the resource and thus he questioned whether it is good for the user either.

SENATOR LINCOLN reiterated her earlier question regarding Mr. Somerville's recommendation, as Staff to the Majority, to resolve this situation.

MR. SOMERVILLE noted that he hasn't been asked to provide a specific solution. However, if asked, he said that he would recommend the legislature taking an active role in trying to force the federal agencies to reciprocate. Furthermore, he emphasized his belief that the federal government should pay for what it gets from the state. Mr. Somerville said, "This issue will be resolved when the legislature and the Native community can come to some sort of agreement as where we going."

Number 0422

REPRESENTATIVE JAMES related her understanding that if "we" managed for subsistence, the regional subsistence councils would still be around.

MR. SOMERVILLE agreed that the federal agencies are required to create a regional advisory council system, while the state is not required to do so.

REPRESENTATIVE JAMES expressed her concern with the health of the resource, that is the scientific review of the resource in order to identify with sufficient evidence to determine whether the resource is being managed such that it is being destroyed. Representative James commented that she didn't see anything on the horizon that would solve this problem. Furthermore, even if a constitutional amendment for a rural subsistence priority is passed, the system would be similar to what the federal government currently has.

MR. SOMERVILLE agreed. He then returned to Senator Lincoln's comments and remarked that the Katie John case has polarized the situation. However, assuming that the state wins that case, the state's jurisdiction could be outlined and thus he felt that there would be the opportunity for policymakers to craft workable changes. Mr. Somerville felt that the Native community will be able to see if the bulk of their subsistence is fisheries, the bulk of which would lie in state navigable waters. However, "we" haven't solved the problem when fish move into federal waters, which could result in over utilization that could jeopardize the status of the stock and/or the downstream user.

Number 0384

SENATOR TAYLOR expressed his disappointment in learning that the administration has failed to object on those regulatory changes. Then he turned to an earlier comment that federal, state, and Native land is easy to distinguish, which he refuted with the complicated deer situation in Prince of Wales Island. The "dual management" is causing problems. He said that for the federal government to impose regulations on selected and tentatively approved lands that have not yet been transferred after a survey is specious because that is privately owned land that falls under the state's jurisdiction. Therefore, he felt that there is a patchwork quilt of land identification problems like that all over the state.

SENATOR TAYLOR recalled the suggestion that "we" gave the federal government the authority. To that, he informed the committee that the federal government passed this law in 1980 without consulting the state. There was also the suggestion that now that President George Bush is in office, things may be different. However, Senator Taylor pointed out that President Bush has to enforce the same law as ex-President Bill Clinton.

SENATOR TAYLOR addressed the question of what the Majority is doing. He pointed out that the Majority is supporting the Glacier Bay case and the Katie John appeal. He predicted that the state will win both cases. Senator Taylor noted his agreement with Mr. Somerville that no one will come to the table until a federal district court judge or our U.S. supreme court rules that Congress was wrong in passing this law and it doesn't apply in the state's waters. Furthermore, Senator Taylor agreed with Representative James in that Alaska's resources are being damaged and will continue to be as long as there is federal management.

Proposed Regulation Review Bill

Number 0285

CHAIR MCGUIRE thanked Mr. Somerville for the update. She announced that the draft legislation in the committee packet is working through a few potential constitutional hurdles. She informed the committee that she has been hearing that the regulatory system isn't working and thus her goal is to pass legislation to involve the public more with the laws. She also announced that she will be introducing another piece of legislation. She concluded by relating her belief that there should be a system in place that holds everyone a bit more accountable.

ADJOURNMENT

There being no further business before the committee, the Joint Committee on Administrative Regulation Review meeting was adjourned at 4:12 p.m.