

**ALASKA STATE LEGISLATURE  
ADMINISTRATIVE REGULATION REVIEW COMMITTEE**

February 2, 2005

5:06 p.m.

**MEMBERS PRESENT**

Representative Tom Anderson, Chair  
Senator Gene Therriault, Vice Chair  
Representative Vic Kohring  
Representative Sharon Cissna  
Senator Ben Stevens

**MEMBERS ABSENT**

Senator Lyman Hoffman

**COMMITTEE CALENDAR**

OVERVIEW: REGULATORY PROCESS

- HEARD

**PREVIOUS COMMITTEE ACTION**

No previous action to record

**WITNESS REGISTER**

DAVE STANCLIFF, Staff  
to Senator Gene Therriault  
Alaska State Legislature  
Juneau, Alaska

POSITION STATEMENT: Explained the updated statutory regulation adoption process.

DAVE MARQUEZ, Chief Assistant Attorney General  
Supervising Attorney  
Legislation and Regulations Section  
Department of Law (DOL)  
Juneau, Alaska

POSITION STATEMENT: Described the Legislation and Regulations Section in the Department of Law.

DEBORAH BEHR, Assistant Attorney General  
Legislation and Regulations Section  
Department of Law

Juneau, Alaska

POSITION STATEMENT: Explained the updated statutory regulation adoption process.

ROBERT PEARSON

Regulations/Online Public Notice  
Office of the Lieutenant Governor  
Juneau, Alaska

POSITION STATEMENT: Explained the lieutenant governor's role in the regulation adoption process.

LARRY HACKENMILLER

Interior Cabaret, Hotel, Restaurant, and Retailers Association  
POSITION STATEMENT: Voiced problems with the Department of Environmental Conservation's new food code.

KRISTIN RYAN, Director

Division of Environmental Health  
Department of Environmental Conservation (DEC)  
Juneau, Alaska

POSITION STATEMENT: Explained the public process during promulgation of an updated food code.

#### **ACTION NARRATIVE**

**CHAIR TOM ANDERSON** called the Joint Committee on Administrative Regulation Review meeting to order at [5:06:11 PM](#). Representatives Anderson, Therriault, Kohring, and Cissna were present at the call to order. Senator Ben Stevens joined the meeting while it was in progress.

#### OVERVIEW: REGULATORY PROCESS

CHAIR ANDERSON announced that he wanted committee members to look at proposed regulations--the Alaska Food Code. He said there was a Legislative Legal Services memo that he thought was written by Terri Lauterbach, and he requested it be kept confidential. He added that there were two members of the hospitality industry interested in commenting on the food code, and Ben Brown from the Department of Environmental Conservation was in attendance to answer questions.

CHAIR ANDERSON stated that last session the committee was "most fruitful" because of changes made by Senator Therriault who helped create and pass legislation to promote better public input in the regulatory process and allow stronger emphasis on

the committee's reviews. He said the legislation was House Bill 424, Senate Bill 333, and Senate Bill 203.

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DAVE STANCLIFF, Staff to Senator Therriault, referred to a manual describing steps in the regulation adoption process, pointing out a new step that provides for a concurrent legal review by the Department of Law (DOL), the regulatory agency, and Legislative Legal Affairs based on recently passed House Bill 242. Mr. Stancliff stated that the review, "happens concurrently, and hopefully anything that is spotted with regard to errors or nonconformity within the constitution or statute is worked out ... [which] makes for better quality as people formulate the regulations." He said it also allows the committee to be notified if a resolution cannot be reached between the legislative arm of government and the administrative arm. He added that the constitution does not allow for legislative oversight for amending and annulling regulations, but it does allow oversight to ensure that regulations follow the intent and the spirit of laws passed by the legislature.

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CHAIR ANDERSON asked if Senate Bill 333 expedites the process for administrative decisions, and Senate Bill 203 sets up the adjudication board.

MR. STANCLIFF answered, yes, there were three phases of reform that the Administrative Regulation Review Committee undertook in order "to improve the way government works," and to put the administrative branch in greater harmony with the legislative branch in the development of law.

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CHAIR ANDERSON praised the new process.

[5:13:57 PM](#)

SENATOR THERRIAULT said good staff is key.

DAVE MARQUEZ, Chief Assistant Attorney General, Supervising Attorney, Legislation and Regulations Section, Department of Law (DOL), said the Legislation and Regulations Section provides final legal review of state regulations, subject to the

Administrative Procedures Act. It also provides a manual and training for state agencies for the preparation of regulations. The section consists of five attorneys, two paralegals, and two office assistants, he said. He assured the committee that his department will work cooperatively with the legislature.

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DEBORAH BEHR, Assistant Attorney General, Legislation and Regulations Section, Department of Law, discussed the administration's efforts to implement House Bill 424, which became effective in October of 2004. She said that she has trained over 100 agency personnel and 40 assistant attorney generals. She further related that she has updated the state manual, and has worked closely with Legislative Legal Services.

MS. BEHR referred the committee members to handouts of the legislative review process and an accompanying flow chart clarifying it. She said that the review process is working well. Ms. Behr said her intent is to review the administrative regulation review process that the legislature has told state agencies to follow. The definition of a regulation is specified by the legislature, she added. It is "pretty broad," and covers every rule, regulation, order, and general application. She stated that the Administrative Procedures Act only applies to state agencies and not municipalities. Ms. Behr pointed out that the legislature has to have a law in place that it would like the administration to interpret [in order for regulations to be promulgated].

MS. BEHR explained the steps in the regulation process. Initially, the state agencies, assisted by the agency attorneys, develop draft regulations with associated notices and fiscal notes. Those draft regulations are distributed to the public and the legislature, including the Administrative Regulation Review Committee. She added that there must be opportunity for public comment, which is usually a 30-day written comment period, and, if appropriate, there is additional time for oral hearings. Next, the agency takes a formal action to adopt the regulations by first sending them to DOL for review. If DOL approves the regulations, DOL issues a legal opinion to the Lieutenant Governor's office. Ms. Behr said it is rare to totally disapprove of a regulation.

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MS. BEHR stated, "At that point the governor can return the regulation for failure to faithfully execute the laws of the state or for failure to consider comments by the regulation review committee -- that's a very powerful tool." She added that usually a regulation takes effect 30 days after it is filed with the lieutenant governor's office. This gives the public 30 days to challenge it or to conform to the new regulation. She added that bills can always trump regulations. The entire process takes time, she said, but "these are serious matters."

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MS. BEHR said that a common question is how to get more information on regulations, and she noted that each department has a contact person for regulations. She said that copies of regulations are all on the web at no charge. Ms. Behr also noted that many people only find out about a regulation once it is being enforced, so there is a provision to allow for a petition for changes, many of which are quite successful. People can also ask for legislation to address their concerns, she noted.

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MS. BEHR stated that the new process is successful because it involves the legislature early on in the process.

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REPRESENTATIVE KOHRING asked if the promulgated regulations reflect what the agency proposes or if they reflect legislation.

[5:26:28 PM](#)

MS. BEHR reiterated that a state agency can't adopt regulations without legislation, and DOL makes sure the agency is following the statute.

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REPRESENTATIVE KOHRING inquired as to how a sponsor's intent is followed in the regulations.

MS. BEHR said statutes can be interpreted in different ways and it is not always easy to determine if legislative intent has been followed. The new review process will allow legislative counsel to point out discrepancies with legislative intent. She

suggested that the legislature provide statutes that are as clear as possible.

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SENATOR THERRIAULT said the new process will help the agencies be clearer; the legislature will have input, but it still doesn't have the power to stop the regulatory process.

MS. BEHR explained that if a legislator is frustrated that an agency is not following the intent of legislation, new legislation can be filed. She added that when the legislature comments, the agency takes it seriously.

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CHAIR ANDERSON brought forth the example of the food code issue. He said although the legislative attorney has concerns with the Department of Environmental Conservation's (DEC) proposed regulations, the concern is not enough to merit changes. Therefore, DEC can move forward with its regulations, and the legislature can only note its concerns.

MS. BEHR said that DEC does not have to stop its process, but the legislature could change statute in order to force a regulatory change. However, she said that she believes the legislative concerns are only technical, and since the legislature is involved so early in the process, it will likely be resolved before the final regulations are issued. She noted that DOL isn't staffed to have an attorney involved in each individual regulation.

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ROBERT PEARSON, Regulations/Online Public Notice, Office of the Lieutenant Governor, explained that the lieutenant governor's role is to perform a final review of regulations and file them. The final review uncovers typos and points that need clarification, and, although it is not formal, the review helps ensure that regulations follow intent. He said that the on-line public notice system is advanced, and it now features a daily digest of all proposed regulations/actions that is e-mailed to all interested parties. Those in business need to be proactive with agencies, he said, and the lieutenant governor's office does everything it can to avoid the public from being "blindsided."

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REPRESENTATIVE KOHRING asked if there is a concerted effort on the part of the administration to keep regulations to a minimum, so as not to be cumbersome to industry or Alaskans in general.

MR. PEARSON said he can't speak for the administration, but said that the lieutenant governor shares the philosophy of less government. The office has limited legal powers but does return regulations if the laws are not faithfully executed, he said. The lieutenant governor has the legal obligation to file properly promulgated regulations, he added.

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CHAIR ANDERSON said the committee will now discuss the food code issue.

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LARRY HACKENMILLER, Interior Cabaret, Hotel, Restaurant and Retailers Association (I-CHARR), informed the committee that he is a member of the hospitality industry. He noted five concerns with the proposed DEC regulations. He said there are regulations that require him to do things that he is not able to do or is illegal to do. In fact, in one regulation the word "fish" was replaced by "seafood", which was then non-sensibly defined as fresh water fish. Mr. Hackenmiller said his main concern is that the regulations are not clear, which he characterized as typical of agencies. Mr. Hackenmiller suggested more scrutiny and reinsertion the word "fish" in the food code regulations.

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CHAIR ANDERSON noted that the committee received a fax from Mr. Hackenmiller.

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MR. HACKENMILLER then questioned the regulation requiring an operator to ensure each applicant and employee reports information regarding any food borne illness. However, a potential employer is forbidden from asking an applicant medical questions. He said that often employees do not know they have a virus, and the only way to tell is with a medical examination, which is not required in the regulations. Therefore, the only

way to ensure there is [no food borne illness] is to break the law.

MR. HACKENMILLER questioned permit requirements for bar owners to require employees to have food handler cards, even though bars are exempt from having a certified food protection manager. He said the regulations seem to require training and a "heck of a lot of paper work" because of the reporting requirements.

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MR. HACKENMILLER turned attention to the self-assessments that will be required every three months, and inquired as to the reason for the collection of the information [and its use]. He said it seems to be paperwork that is self-incriminating and for which he should be read the Miranda Rights prior to filling out the form. He questioned what level of fine would be imposed on an operator who did not fill out the forms. He characterized the reporting as a useless administrative hurdle.

MR. HACKENMILLER said the language for civil fines seems "wide open," leaving room for litigation. He expressed concern that the fines will depend on the attitudes of the investigator and operator. It is too arbitrary with no schedule, he said, and this is more of an administrative function rather than protecting public health. "The fine situation is really terrible," he opined. There are also grammatical changes he said he will recommend to DEC. He concluded by saying that this committee was a good outlet for his concerns, and he expressed hope that the problems can be worked out prior to the adjudication process.

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CHAIR ANDERSON encouraged Mr. Hackenmiller's continued participation.

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KRISTIN RYAN, Director, Division of Environmental Health, Department of Environmental Conservation, told members of the committee that any comments it receives should be forwarded, in writing, to DEC for the official public record. She noted that there will be workshops on the food code throughout the state, and DEC will accept comments until March 15.

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REPRESENTATIVE CISSNA asked if the meeting in Fairbanks will be teleconferenced.

MS. RYAN answered that there will be many public workshops and they are not teleconferenced.

5:50:10 PM

CHAIR ANDERSON said the committee will take up regulations regarding assisted living in the near future.

**ADJOURNMENT**

There being no further business before the committee, the Administrative Regulation Review Committee meeting was adjourned at 5:50:35 PM.