

**ALASKA STATE LEGISLATURE
ADMINISTRATIVE REGULATION REVIEW COMMITTEE**

February 18, 2009

3:06 p.m.

MEMBERS PRESENT

Representative Wes Keller, Chair
Senator Donald Olson, Vice Chair
Representative Carl Gatto
Representative David Guttenberg
Senator Albert Kookesh
Senator Kevin Meyer

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

OVERVIEW: REVIEW OF REGULATIONS PROCESS

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

DEBORAH BEHR, Chief Assistant Attorney General
Legislation and Regulations Section
Civil Division (Juneau)
Department of Law
Juneau, Alaska

POSITION STATEMENT: Presented an overview of the administrative regulations process.

JASON HOOLEY, Deputy Chief of Staff
Office of the Lieutenant Governor
Juneau, Alaska

POSITION STATEMENT: Reviewed the online public notice system.

LISA KIRSCH, Attorney
Legislative Legal and Research Services
Legislative Affairs Agency
Juneau, Alaska

POSITION STATEMENT: Reviewed the legislative review process of regulations.

ACTION NARRATIVE

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CHAIR WES KELLER called the Administrative Regulation Review Committee meeting to order at 3:06 p.m. Representatives Keller, Gatto, and Guttenberg and Senators Olson, Meyer, and Kookesh were present at the call to order.

Overview of Regulations Process

[3:07:53 PM](#)

CHAIR KELLER announced that the only order of business would be an overview of the administrative regulations process. He related that typically the chair of the Administrative Regulation Review Committee and his/her staff alert members of proposed new regulations. He further related that members should've received an e-mail newsletter from the committee.

[3:10:06 PM](#)

DEBORAH BEHR, Chief Assistant Attorney General, Legislation and Regulations Section, Civil Division (Juneau), Department of Law, informed the committee that she has held her position since 1991. She highlighted that DOL has the final legal sign off for regulations, which is unique in comparison to other states where regulations are allowed to be placed on the books directly from the state agency without that state's law department review. To have DOL review the regulations is a good consumer check to be sure they are legal. She reviewed the staff present at the hearing and their responsibilities. She then turned to how regulations are developed in Alaska. She explained that in the regulation process she first reviews whether there is implementing statute and whether the legislature has given direction to adopt regulations under the statute. If there is no statute, regulations can't be developed. The goal of the executive branch, she opined, is to implement the laws passed by the legislature. She pointed out that often not every detail, such as the specific application period and the documentation required to apply for a grant, is included in statute, but rather are specified in regulation. The legislature provides the executive branch the authority to implement regulations after following the procedures outlined in the Administrative

Procedures Act. The procedures include providing public notice and the opportunity to comment, consideration of the comments, and adoption of regulations. After the regulations are filed with the lieutenant governor's office, they become the force of law in the state. The court's role is important because it ensures that the regulations were appropriate under the statute. When regulations are [being considered], the statutes, court decisions, and other state agency's regulations are reviewed. Ms. Behr opined that although it's good, in terms of consumer protection, that Alaska has one of the broadest definitions of regulation in the nation, it results in a lot of regulations. She highlighted that AS 44.62.640(a)(3) specifies, in part, "(3) 'regulation' means every rule, regulation, order, or standard of general application ...". The "standard of general application" is important, she noted. She explained that agency directors will relate to her that they are treating everyone who applies to a grant the same and that a regulation isn't necessary. However, Ms. Behr opined that in such a situation a regulation is necessary because treating everyone the same is a regulation that must have followed the appropriate procedures. The legislature also specified that regulations are only for state agencies and thus entities such as the court system or municipalities utilize [rules] other than regulations and they aren't subject to the Administrative Procedures Act or DOL's review.

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MS. BEHR explained that the goal of a regulation is "to implement, interpret, or make specific the law being enforced or administered by it". The aforementioned means that if there isn't a statute, a regulation can't be established. If there is a law, the regulation must be consistent with the law. Therefore, Ms. Behr said that she carefully reviews regulations to ensure the aforementioned is the case. The legislature has specified that when in doubt, a state agency must go through a public process to adopt a regulation rather than impose a standard without the public's ability to comment prior to its implementation.

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REPRESENTATIVE GATTO posed a scenario in which the legislature passed a law that specified no smoking on alternate days without defining alternate days. He asked if the fleshing out of what the legislature meant by alternate days would become the

regulation. He further asked how Ms. Behr would know that the regulation is what the legislature meant.

MS. BEHR answered that she would recommend review of the legislative history, the minutes, and sponsor statements. She noted that currently it's much easier to access the aforementioned since the legislature has become more computerized. Furthermore, the regulations review process is very helpful because through the process legislative intent is reviewed and areas of regulations that aren't consistent with statute are specified.

REPRESENTATIVE GATTO opined that there are surely situations in which the research into the legislative history uncovers conflicts in the intent.

MS. BEHR said that the commissioners of the departments, who are confirmed by the legislature, make those close calls.

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MS. BEHR, continuing her presentation, directed attention to the flow chart entitled "Steps in the Regulation Adoption Process" on page 8 of the publication entitled "Drafting Manual for Administrative Regulations." She explained that processes 1-4 are basically the administrative process prior to public comment. Process 5 begins the public process in terms of notice in the newspaper and specifically to those on the interested person's list, including legislators. She likened the public process to the legislative process, and noted that everything in a regulations file is public. During the public process, the public is given a period during which it can submit comments. Although the public comment period is usually a minimum of 30 days, it's often longer for fishing issues. The statutes require written public comment for all regulations. While oral hearings aren't required, Ms. Behr said she strongly encourages oral hearings on virtually all regulations. The notices are also posted online. She noted that she encourages those speaking with the public who want to comment to suggest that they be specific, concise, and meet the deadlines. The next step in the regulations process is the adoption of the regulations by the agency. Ms. Behr pointed out that there are two types of agencies that adopt regulations, which are agencies that have commissioners who are confirmed or a board or commission. A board or commission must adopt regulations in a public meeting that has been publicly noticed and at which the public can observe. The comments given have to be seriously

considered, but don't have to be followed, she noted. The commissioner or adopting authority has to review all the laws, what's in the best interest of the state, and the public comments during the regulatory process. At that point, process 8, the proposed regulations are submitted to DOL for legal review, which includes a substantive review by agency attorneys who are experts in the field. As related by process 10 of the flow chart, DOL has the ability to review, approve, and send them to the lieutenant governor's office for filing or disapprove them. However, the regulations can only be disapproved for legal reasons not on the basis of policy. Ms. Behr relayed that disapproval of regulations is very infrequent, perhaps once or twice a year. Upon filing of the regulations at the lieutenant governor's office, the regulations generally take effect 30 days in the future at which point they're published on the online public notice system. She noted that the time period between the filing of the regulations with the lieutenant governor's office and the time they take effect is when people can test the regulations without being affected by them.

MS. BEHR mentioned that a typical comment she or the legislature may receive from the public is in regard to how to obtain more information of possible regulations. She suggested that for such inquiries, the individual should be directed to the contact person for regulations in the agency or through web sites on regulations projects. Another typical question is regarding how to comment on regulations to which she encourages people to read the notice, be concise, and be prompt in submitting comments. To that end, Ms. Behr said she refers those who don't understand the regulations process to the manual on regulations, which includes web sites for contact. In conclusion, Ms. Behr highlighted that people often don't react to regulations until after they impact them, at which point individuals can petition for a regulation change, and the commissioner has to seriously consider that.

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JASON HOOLEY, Deputy Chief of Staff, Office of the Lieutenant Governor, explained that currently when the lieutenant governor's office files a regulation, the committee is notified through committee aide as to the specifics of the regulations and hard copies of the regulations are provided as well. The Office of the Lieutenant Governor also maintains the online public notice system, which includes agency meetings, procurement announcements, regulations whether they are proposed, adopted, or emergency. He noted that any person can

access the aforementioned database and even subscribe to an automated e-mail notification system as to changes in state government. Mr. Hooley informed the committee that the online public notice system is currently being updated to be more user friendly for the public as well as agency staff.

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The committee took an at-ease from 3:32 p.m. to 3:43 p.m.

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LISA KIRSCH, Attorney, Legislative Legal and Research Services, Legislative Affairs Agency, noted that she shares her 20-hour a week position with Terry Lauterbach. She explained that when notice of regulations is provided for the general public she receives the draft regulations electronically. She informed the committee that thus far she has been able to review all the regulations she receives. However, if a lot of regulations were received at once, there may be a time when she couldn't review all of them. In such a case, she said she would review the priority regulations first. Statute specifies that those regulations based on a new statute or a changed statute are a priority. Review of regulations requested by the Administrative Regulation Review Committee or a standing committee also are a priority. She noted that generally she will perform a more in-depth review of priority regulations. Depending upon how complicated the proposed regulations may be, she may review minutes and talk to agency staff and DOL in order to determine intent. Any conversations and correspondence with the aforementioned people is confidential, per statute, and thus doesn't become part of the public record. If at the end of her review process she finds a constitutional issue or inconsistency with statute, she explained that she will write a memorandum that is distributed to the Administrative Regulation Review Committee, the speaker of the House, and the president of the Senate as well as DOL and whomever she communicated with at the agency level. The memorandum is written even if the agency says it will fix the issue she found through her review because the agency isn't required by statute to comply with her review. However, she noted that she has had really good cooperation from the agencies and DOL. Ms. Kirsch related that she reviews the proposed regulations to ensure they are legal and constitutional, consistent with existing statute, consistent with legislative intent, and the agency has the authority to do what it proposes. She noted that whether the regulations are consistent with legislative intent is a bit of a judgment call.

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CHAIR KELLER inquired as to how often Ms. Kirsch ends up writing a memorandum.

MS. KIRSCH recalled writing 44 memorandums in the last legislature, which is about 20 percent of the total number of packages reviewed.

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CHAIR KELLER remarked that the regulations [review] process has been invisible to him. He then inquired as to the confidential aspect of her communications during the regulations review process.

MS. KIRSCH reiterated that statute allows communication [regarding the memorandum] with members of the Administrative Regulation Review Committee, DOL, and the agency represented. The memorandum is also sent to the president of the Senate and the speaker of the House. She then reminded the committee that any standing committee can request her review of regulations. In such a case, if a memorandum is written, she can only send it to the members of the Administrative Regulation Review Committee, DOL, the agency represented, and the speaker of the House and the president of the Senate. The memorandum can't be sent to the committee members who made the request. She suggested that the aforementioned was likely a drafting issue in the statute. At one point, Ms. Lauterbach wrote a proposed amendment to broaden the language, but no one was interested in doing so. Ms. Kirsch noted that she has never had a request from a standing committee to review regulations. She further noted that her memorandums are an exception to the usual Public Records Act requirements.

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REPRESENTATIVE GUTTENBERG inquired as to what would occur with a law that has conflicts within one statute.

MS. KIRSCH clarified that would go to the revisor of statutes as long as it's not a substantive issue. The revisor can correct things such as typographical errors. She recalled recently reviewing regulations for which there were inconsistent statutory provisions. Ms. Kirsch said that she merely alerts the appropriate parties of problems with regulations.

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MS. KIRSCH, in response to Chair Keller, reiterated that once she writes a memorandum, it is distributed to the earlier specified persons. The distribution list is per statute and provides no discretion as to who to provide the memorandum.

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MS. KIRSCH informed the committee that most of the regulations she reviews come from the Department of Commerce, Community, & Economic Development (DCCED) because that department houses the occupational licensing function. In fact, about 38 percent of the regulations she reviews are from DCCED. About 13 percent of the regulations she reviews are from the Department of Education and Early Development. The Department of Health and Social Services can also produce a large amount of regulations as well. Ms. Kirsch noted that she doesn't review the regulations for the Board of Fisheries or the Board of Game because they have a different regulations process.

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CHAIR KELLER inquired as to how to initiate Ms. Kirsch's review of regulations.

MS. KIRSCH specified that to initiate her review of regulations, the request must be in writing and request review of a matter within the scope of the four items she reviews, as specified earlier. She reiterated that she doesn't review regulations regarding policy matters. She noted that if she faced a large group of priority regulations to review, she might have to say that she couldn't review other regulations and point to the statute that specifies that Legislative Affairs "may review" the regulations in support of that determination.

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ADJOURNMENT

There being no further business before the committee, the Administrative Regulation Review Committee meeting was adjourned at 4:00 p.m.