

**ALASKA STATE LEGISLATURE
ADMINISTRATIVE REGULATION REVIEW COMMITTEE**

March 21, 2013

1:04 p.m.

MEMBERS PRESENT

Representative Lora Reinbold, Chair
Senator Cathy Giessel, Vice Chair
Representative Geran Tarr
Senator Gary Stevens

MEMBERS ABSENT

Representative Mike Hawker
Senator Hollis French

COMMITTEE CALENDAR

REVIEW OF ALASKA'S ADMINISTRATIVE REGULATIONS PROCESS AND
POSSIBLE IMPROVEMENTS

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

DEBORAH BEHR, Chief Assistant Attorney General - Statewide
Section Supervisor
Legislation & Regulations Section
Civil Division (Juneau)
Department of Law
Juneau, Alaska

POSITION STATEMENT: Reviewed Alaska's administrative
regulations process.

TERRI LAUTERBACH, Legislative Counsel
Legal Services
Legislative Research and Legal Services
Legislative Affairs Agency
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Reviewed the legislative regulations review
process.

ACTION NARRATIVE

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CHAIR LORA REINBOLD called the Administrative Regulation Review Committee meeting to order at 1:04 p.m. Representative Reinbold and Senators Giessel and Stevens were present at the call to order. Representative Tarr arrived as the meeting was in progress.

CHAIR REINBOLD began by noting that often the public is not aware that the Alaska Administrative Code (AAC) has the force of law until it impacts their business, profession, or life. Therefore, the goal of this committee is to improve the process by providing more transparent information to the public and communities.

Review of Alaska's Administrative Regulations Process and Possible Improvements

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CHAIR REINBOLD announced that the only order of business would be review of Alaska's Administrative regulations process.

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DEBORAH BEHR, Chief Assistant Attorney General - Statewide Section Supervisor, Legislation & Regulations Section, Civil Division (Juneau), Department of Law, directed attention to the document in the committee packet entitled "Presentation by Department of Law, Regulations Section," which includes a flow chart entitled "Steps in the Regulation Adoption Process" and the statutory definition of "regulation." Ms. Behr related that the first question she receives is regarding what are regulations, many of which she noted come directly from the courts. The statutory definition of regulation is found in the Administrative Procedures Act (APA), AS 44.62.640, which she follows when reviewing regulations and advising agencies. She highlighted that Alaska has probably one of the broadest definitions of regulation in the nation. The broad nature is good for consumers, although it means that many things have to go through the [regulation] process. The definition specifies that a regulation is "every rule, regulation, order, or standard of general application", which means that it's a standard of general use. For instance, if a state agency uses a standard

for a grant program that's not in statute, the standard has to be in regulation or some place so that the public will be aware, have a right to comment, and know that will be applied when grants are awarded. The second standard of the definition of "regulation" specifies that these standards are adopted by the State of Alaska. The definition of "regulation" specifies that the goal of a regulation is "to implement, interpret, or make specific the law enforced or administered by it". Therefore, there must be a state statute that the legislature wanted a state agency to interpret or implement. Ms. Behr highlighted that the legislature provided clear guidance for state agencies when in doubt and regardless of name, a regulation is covered by the definition in AS 44.62.640 when it affects the public or is used by the agency in dealing with the public. Therefore, the definition of "regulation" includes manuals, policies, instructions, guides to enforcement, interpretative bulletins, interpretations, and the like. Furthermore, different language can't be used to avoid or circumvent this chapter. Ms. Behr opined that this is an advantage to the public as they are provided notice and the ability to comment prior to their rights being effected. The only exception is the internal management of a state agency.

MS. BEHR, referring to the flow chart entitled "Steps in the Regulation Adoption Process," noted that it's presented in the order in which a state agency should review and consider it. She further noted that this flow chart is in the Manual of Legislative Drafting and is on the Department of Law's web site. Each step in the regulation process has its own description in the manual. Ms. Behr reminded the committee that the regulation adoption process is a legislative process. The first step in the process is planning and decision making. She pointed out that the state agency can work with the public to develop regulations through workshops. In fact, the legislature has authorized negotiated rule making, such that stakeholders can negotiate regulations. The negotiated rule making has been successful with the more contentious regulations. As mentioned earlier, new projects for most state agencies are generated from statutes, court decisions, or new issues that arise upon the implementation of existing statutes and regulations. Blocks 2-4 of the regulation adoption process is the point at which the agency develops the regulations, the additional notice, and fiscal note. Although an attorney works with the agency, the bulk of the work at this stage is performed by the state agency. She noted that assistance of the attorneys at this stage depends upon access to an attorney or the cost, particularly for the occupational licensing boards. The occupational licensing

boards want to be sure that every hour an attorney is used is for developing regulations because it goes into the base fee of the license. Last year the legislature passed new statute that has resulted in brief descriptions in the notices of regulations in order to provide the public with a snapshot of the regulations. She informed the committee that she provides training for agencies each year.

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MS. BEHR moved on to block 5, which is the publication stage. At this point, the agency publishes notices in a newspaper of general circulation and the Alaska online public notice system. There is also a major mailing list for projects, including distribution to legislators, the Legislative Affairs Agency, and the Administrative Regulation Review Committee. She referred to the aforementioned as the early warning legal review process during which legislative counsel has the opportunity to advise legislators what legal issues may be encompassed in the regulations. The goal of public notice is to encourage public comment, which is considered during the public comment period as noted in block 6. Ms. Behr turned to block 7, which deals with the adoption of regulations. The commissioner has the duty to seriously consider all the comments, then adopt the regulations, and inform the public of the adoption. She highlighted that the legislature has decided that regulations must be adopted in a publicly noticed public meeting of those who the legislature has confirmed on the [relevant] board or commission. In block 7 there is often confusion because existing statutes require state agencies to pay special attention to the cost to private parties while considering comments. Existing statutes also require that the Department of Environmental Conservation (DEC) provide special alternative practical means to accomplish the goal when developing pollution control standards. She then directed attention to block 8, which is when the regulations are submitted to DOL for legal review and approval. Alaska is fortunate in that DOL reviews regulations for legal sufficiency prior to them going on the books. This legal review is very different than the earlier mentioned early warning review by legislative counsel. The early warning review is performed during the public comment period when issues can be addressed. She assured the committee that the memorandums from legislative counsel are reviewed by DOL during its legal review. During this step, block 8, the governor's office conducts its review as well. The legislature included a provision in the Administrative Procedures Act (APA) that allows the governor to review certain regulations for faithful execution of the law and

to review for comments from this committee. The governor's office can delegate the aforementioned to the lieutenant governor's office. However, the sitting governor has chosen not to delegate that job and instead the governor's staff is doing the review. She clarified that this provision for reviewing regulations applies to non-board regulations because boards meet infrequently. Moving on to block 9, the agency attorney reviews the regulations. Upon the [agency attorney] relating to Ms. Behr that the regulations meet the substantive requirements, she reviews the regulations to ensure they all look the same and the language is being used in the same fashion throughout. If a set of regulations is found not to meet the standards, she discusses it with the agency attorney and commissioner regarding the need to fix whatever is necessary prior to becoming a regulation. The aforementioned, she opined, is a powerful consumer-protection tool.

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MS. BEHR continued with block 11, which is when the lieutenant governor's office files the approved regulations unless returned to the state agency by the governor. Regulations typically take effect 30 days after filing, although they can take longer. The lieutenant governor's office also is charged with sending the filed regulations to this committee for its staff to review and sending them to the publisher to be published in the Alaska Administrative Code. Under block 12, state agencies have a duty to notify the public that regulations have been adopted. The agency posts summaries on the Alaska Online Public Notice System. She highlighted that constituents can sign-on to the aforementioned public notice system and get on the mailing list in order to interface with regard to the regulations. She then mentioned that the legislature can hold an oversight hearing on any regulation at any point. Furthermore, every regulation is subject to review by the court system, which uses independent judgment on many of the regulations. Ms. Behr pointed out that there is a petitioning procedure in the APA, which is similar to the initiative process.

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CHAIR REINBOLD related her understanding that between blocks 6 and 7, the state agency can make important changes that have the force of law without additional public comment. She then inquired as to whether there is a boundary as to when additional public [comment/process] should be taken on important changes.

MS. BEHR said that when she teaches this area she encourages folks to review the public notice in terms of what the public was informed would occur and whether the public is going to be surprised. If the public is going to be surprised [by the actions or regulations], then it should probably go out to public [comment] again. Most regulations have some deadline, she noted. Furthermore, the legislature has the ultimate say over any regulation via legislation. The legislation, that is statute, always trumps regulations. Moreover, the commissioners seriously listen at oversight hearings.

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CHAIR REINBOLD questioned whether the committee is interested in having hearings on items such as cost containment of Medicaid and energy issues. She expressed the goal of making Alaska a better place to do business, particularly since she recalls [constituents] saying that the regulations are posing a problem. Therefore, she expressed interest in holding hearings throughout the state in order to hear the needs of the state, particularly where regulations are burdening communities.

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SENATOR STEVENS requested further explanation of the petitioning process.

MS. BEHR reminded the committee that the petition process is in the APA, and thus includes standards that must be followed. Petitions are rare, such that she's seen only 10-12 in the over 20 years she been in the position.

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TERRI LAUTERBACH, Legislative Counsel, Legal Services, Legislative Research and Legal Services, Legislative Affairs Agency, Alaska State Legislature, directed the committee's attention to her March 14, 2013, memorandum. She said in general the review process established in AS 24.20.105 was established in 2004. She highlighted that she doesn't have the authority to say anything about the policy within a regulation. However, sometimes there can be a [question of] legislative intent if the statute isn't clear enough. Ms. Lauterbach emphasized that when she does issue a memo she is merely saying there is a possible legal problem per the statute before her and legal minds can differ. She further emphasized that there has been good faith efforts by the agencies to consult and discuss

with her any of the issues. As long as the legislature provides authority to a department to establish certain standards, that's as far as her review goes. The technical aspect of where the standard is set is a policy choice. Ms. Lauterbach highlighted the statistics in the past three biennia during which 200-240 packets of regulations were proposed each two-year period and they were fairly evenly split between the two years. As mentioned earlier, there are many factors other than state legislation that impact regulations. For example, there can be changes in federal law, program standards, and court decisions. As the memorandum specifies, only one-fifth or so of proposed regulations implement new state legislation, which she attributed to the reason the amount of packets of regulations are so consistent.

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CHAIR REINBOLD inquired as to the process that ensues when a state agency or private business has a problem with an existing regulation.

MS. LAUTERBACH reiterated Ms. Behr's earlier testimony regarding the petition process and the ability to contact a legislator to request a hearing or the introduction of legislation to change the regulation.

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CHAIR REINBOLD inquired as to with whom Ms. Lauterbach communicates when she has a question about a regulation and what actions they take or don't take regarding the communication.

MS. LAUTERBACH clarified that the review process under which she falls is AS 24.21.105, which only allows her to consult with the state agencies that are proposing the regulation. The aforementioned is a confidential process of review that doesn't involve the public. The candid nature of the email exchange she has with the agencies depends upon the confidentiality. The statute would have to be rewritten in order to have any other input involved. She noted that she does consult attorneys in LAA, particularly those who drafted the original legislation. Ms. Lauterbach said she is just advising the legislature.

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SENATOR STEVENS inquired as to how the legislative intent factors into Ms. Lauterbach's regulation review process, particularly in terms of legislative intent versus statute.

MS. LAUTERBACH answered that it depends upon the type of legislative intent as sometimes there is a letter of intent from a committee, an intent section of the legislation, or a letter of intent from the floor. Those all have different levels of importance or usefulness. Ms. Lauterbach stated that statute always takes precedent, no matter the letter of intent. Therefore, if the statute isn't clear enough, nothing in the letter of intent will override what's in the statute. A letter of intent could help if there is vagueness in the statute, but it won't be determinative, she said.

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CHAIR REINBOLD inquired as to how the legislature can improve the regulatory process and identify issues in the community. She noted that she has introduced HB 140, which makes changes such that the agency not only has to [consider] the impacts of the regulations on the agency as well as other agencies, the private sector, and municipalities. The desire is for more transparency and openness in the process. In 2012, Indiana legislation was passed that substantially rewrote their existing regulatory cost-benefit analysis law, which is included in the committee packet along with its fiscal note. She noted that the highlighted material in Indiana's legislation she considers to be universal principles of good regulation policy, including an assessment of the rules effect on Indiana business. Chair Reinbold highlighted the language in Indiana's legislation that says, "The OMB shall make the cost benefit analysis and other related public documents available to interested parties, regulated persons, and nonprofit corporations whose members may be affected by the proposed rule at least thirty (30) days before presenting the cost benefit analysis to the governor and the administrative rules oversight committee under subsection (a)." The aforementioned offers the public the opportunity to read and respond to the cost-benefit analysis. She further highlighted that Indiana's legislation also required the OMB to submit a cost-benefit analysis to the governor and the administrative rules oversight committee not later than six months after the third anniversary of the rule's effective date, which she characterized as a look-back provision. Alaska may want to consider doing the same, she opined. She then highlighted that it was estimated that Indiana's requirements could be [covered] with existing [OMB] resources. In

conclusion, Chair Reinbold summarized that the principles of paying careful attention to the cost to businesses, the cost-benefit analysis, transparency, and the opportunity to comment on costs and benefits are areas this committee may want to consider in Alaska in order to have a more open and transparent regulation process.

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SENATOR GIESSEL inquired as to Ms. Lauterbach's opinion.

MS. LAUTERBACH stated that those principles are a policy call on which she has no opinion. However, she informed the committee that the upfront cost-benefit analysis [in Alaska] is supposed to occur during the public comment period. The look-back provision, she offered, would be new.

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REPRESENTATIVE TARR noted that she has been contacted about recent regulations with regard to pesticide applications and eliminating the associated public process prior to pesticide application on public lands. She related that she has also been contacted regarding Department of Education and Early Development regulations related to boarding schools.

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CHAIR REINBOLD informed the committee that May 15th is the deadline for topics for the next meeting. She concluded the meeting by thanking Ms. Behr and Ms. Lauterbach for their availability.

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ADJOURNMENT

There being no further business before the committee, the Administrative Regulation Review Committee meeting was adjourned at 1:50 p.m.