

**ALASKA STATE LEGISLATURE
ADMINISTRATIVE REGULATION REVIEW COMMITTEE**

March 11, 2014

11:04 a.m.

MEMBERS PRESENT

Representative Lora Reinbold, Chair
Representative Mike Hawker
Representative Geran Tarr
Senator Gary Stevens

MEMBERS ABSENT

Senator Cathy Giessel, Vice Chair
Senator Hollis French

COMMITTEE CALENDAR

OVERVIEW: REGULATIONS PROCESS AND ADMINISTRATIVE ORDER 266

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

RANDY RUARO, Policy Director/Legal Counsel
Capitol Office
Office of the Governor
Juneau, Alaska

POSITION STATEMENT: Provided information on regulations and Administrative Order 266.

ACTION NARRATIVE

[11:04:12 AM](#)

CHAIR LORA REINBOLD called the Administrative Regulation Review Committee meeting to order at 11:04 a.m. Representatives Tarr and Reinbold and Senator Stevens were present at the call to order. Representative Hawker arrived as the meeting was in progress.

Overview: Regulations Process and Administrative Order 266

11:05:20 AM

CHAIR REINBOLD announced that the only order of business would be a review of the regulations process and Administrative Order 266.

11:05:40 AM

RANDY RUARO, Policy Director/Legal Counsel, Capitol Office, Office of the Governor, appreciated the committee taking an interest in reviewing regulations. He acknowledged that regulations can be tedious and technical, but it is important to have a good understanding of them. Although it seems that regulations continually grow, they are important, he said. He offered to discuss when the state has discretion to not adopt regulations. In particular, he noted, many regulations are the result of federal government action and tied to programs or laws that the state must follow due to the U.S. Constitution. He pointed out that federal law is the supreme law of the land with some rare exceptions, such as when a statute or regulation is found to be unconstitutional or in instances in which the federal agency does not have statutory authority to adopt the regulation. With those few exceptions, federal regulations are a mandate to the states, he said.

MR. RUARO highlighted that currently significant regulatory activity occurs at the federal level, for example, 141 regulation packages have occurred during the three days of January 1-3, 2014. The sheer volume of federal regulation makes it hard to track and difficult to identify the ones that will impact the state. Certainly, state agencies track regulations that impact their operations and the administration comments on regulations under the Administrative Procedures Act (APA), and any legislator or citizen can comment on regulations that have not yet been adopted. For example, one regulation that the administration has been tracking is a federal reinsurance fee, set at \$63 for each health-insurance covered employee for 2014. The regulations are not yet final, but if the fees do apply to the state, municipal, or school district employees, those entities will need to pay the fees by the end of December.

11:10:02 AM

CHAIR REINBOLD asked for further clarification on the purpose of the \$63 fee.

MR. RUARO explained that the \$63 fee is deposited into a treasury account in Washington DC and returned to qualified insurance companies. He offered his belief that the intent is that during the early years of the Patient Protection and Affordable Care Act (PPACA), [often referred to as "Obamacare"], the fees will cover insurers who do not earn a reasonable return on their policy issuances. These insurers would be entitled to receive this fee. Although he is not an expert on it, he characterized the fee as being a moving target because the regulations are not yet final. Still, he reiterated, this provides an example of a federal regulation that the administration is tracking and will continue to follow.

CHAIR REINBOLD requested more information on this specific regulation as it could have a huge impact on the state and municipalities.

MR. RUARO responded that the administration is still evaluating whether the fees will be levied against state health plan participants.

[11:12:07 AM](#)

MR. RUARO related that the statutes broadly define regulation in AS 44.62.640(a)(3) as follows, "regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure"

MR. RUARO pointed out that the broad statutory definition causes a significant number of regulations, noting that numerous state and federal regulations are passed each year. In addition, Alaska has numerous boards and commissions constantly reviewing their requirements and generating regulation changes. A significant number of regulations are generated solely by the Board of Fisheries, the Board of Game, and the Alaska Department of Fish & Game, in particular, since annual openings and closing of seasons and boundary changes are necessary to provide updated information.

MR. RUARO related that state departments have the most discretion in terms of regulations, although they are bound by statutory framework, which is the emphasis of Administrative Order 266 (AO 266). The AO 266 works to address and develop some best practices for commissioners when adopting regulations.

He directed attention to a copy of AO 266 in members' packets and said that AO 266 is broken down along two lines. First, in terms of existing regulations, it can be as simple as asking agencies to review existing regulations to identify regulations that are no longer necessary or are outdated so they can be repealed or updated. In addition, commissioners can review existing regulations for clarity and make them easier to read. The governor wants a strong public process and input from Alaskans affected by regulations, he said.

MR. RUARO said, secondly, in terms of proposed regulations, the AO 266 provides similar guidance to commissioners to review regulations and make suggestions on any impacts to the community.

[11:17:21 AM](#)

MR. RUARO, in terms of what assistance can be provided, advised that any member of the public can petition a state agency to change a regulation. He described the state regulatory process as an open one, although it's likely not used a lot, he said. In terms of federal regulations, the public and legislators can comment to the Alaska congressional delegation. The federal government has a process to [nullify] or stop a regulation by a majority vote. He reported that U.S. Senator Lisa Murkowski tried this approach with Environmental Protection Agency (EPA) regulations. Although she was not successful in her attempt, this process is one that is in place at the federal level. He encouraged members to really participate in the regulations process since it helps improve them. In his experience, when stakeholders and those affected by regulations participate, often good suggestions arise.

[11:19:35 AM](#)

CHAIR REINBOLD commented on a recent House Education Standing Committee meeting during which Commissioner of the Alaska Department of Education and Early Development (EED) did not know whether the state's mandates were fully funded for education. She offered her belief that it is important to know the amount of money the state is expending for federal mandates, especially at a time when the state faces declining revenue. Further, it is important to identify whether the authority stems from state or federal regulation and whether it is fully funded, she said. She pointed out that 20,000 to 30,000 pages of regulation have been issued to implement PPACA. She asked whether the state

must comply or if it has authority to not implement regulations unless it receives funding to do so.

MR. RUARO answered that it depends upon the specific regulation as there may be different legal defenses available or other ways to oppose federal regulation. Certainly, it is difficult to take apart regulations to determine the specific points and mandates that impact Alaska; however, the administration does look for them and pursues actions if the Department of Law agrees that a reasonable challenge can be brought. Ultimately, the federal regulations require a case-by-case review and evaluation, he said.

CHAIR REINBOLD remarked that it seems as though it is necessary to apply the U.S. Constitution, and the state has sovereignty in instances in which regulations don't specifically apply. For example, she pointed out that the PPACA regulations are 30 times as long as the enabling legislation. She asked for further clarification on the number of regulations that have been issued to implement "Obamacare."

MR. RUARO recalled about 350 pages were issued this week on part of the PPACA; however it is an ongoing regulatory process.

CHAIR REINBOLD recalled that the PPACA regulations are over 20,000 pages.

MR. RUARO agreed the regulations are extensive.

[11:23:02 AM](#)

CHAIR REINBOLD returned attention to the regulations promulgated by the Board of Fisheries and the Board of Game. She reported that her community is quite frustrated that the boards don't report to anyone. She acknowledged that the legislature has provided these boards with tremendous power, but she inquired as to whom the boards must report when they adopt regulations.

MR. RUARO related his understanding that the Alaska Board of Fisheries and the Board of Game were established as autonomous, independent boards in Alaska's Constitution. The idea was that these boards would operate outside any influence from the legislature or the governor. At the time, this was viewed as the structure for decisions. He said it is rare that all sides are happy with decisions, particularly with regard to allocations.

[11:24:38 AM](#)

CHAIR REINBOLD suggested that the Commissioner of ADF&G has less power than the boards. She related her understanding that the legislature is limited to either comment, submit a letter to delay action to review the legislative intent, or take a broad vote of the legislature to intervene on regulations. She asked whether there is any way to repeal regulations or if he could recommend any procedure or changes to assist in repealing regulations.

MR. RUARO answered that a statute in the APA allows any Alaskan resident to petition a state agency to change regulations. Outside the petition process, the legislature would need to enact a statutory change as statutes have more authority than regulations.

[11:26:38 AM](#)

CHAIR REINBOLD reviewed a situation in which statute requires one thing, but a court case did not reference the specific statute. She highlighted that the [Board of Fisheries or Game] promulgated regulations that contradicted the statutes; however, the Department of Law supported the department based on a court case. She questioned the power of the courts to do so.

MR. RUARO emphasized that the court has the overall authority to interpret the statutes and to determine whether they are constitutional or not. He assumed if an agency was indicating it was not able to take a different approach due to a court order, then it would likely be correct unless the decision was later overruled. Thus, the judicial branch has the authority to interpret statutes as to constitutionality, he said.

[11:27:55 AM](#)

CHAIR REINBOLD, in reference to her scenario, offered her belief that the specific statute was clear; however, it was not referenced in the court case. She suggested that the court did not take a comprehensive view, but rather it took a selective view. She highlighted this as an area that should be reviewed and addressed.

[11:28:19 AM](#)

SENATOR STEVENS suggested that the best approach is to remove outdated regulations as they confuse things. He referred to

page 2 of AO 266, the second bullet point under existing regulations, which read, "Identify regulations that should be repealed or amended to decrease the burden of fiscal and non-fiscal impacts on the affected public." He asked what the administration is actively doing to accomplish this and whether the legislature receives any report of repealed regulations.

MR. RUARO responded that the governor's office has started such a repeal review process, which he believed was not active prior to the issuance of AO 266. In speaking with Ms. Deborah Behr, the regulations attorney, he found she supports the departments' review of expired regulations since these regulations can stagnate and cause confusion with other regulatory or statutory authority. He characterized identifying regulations that can be repealed as a first step and said the administration will be looking for more outdated regulations in the future.

SENATOR STEVENS suggested that it would be appropriate to receive a report of repealed regulations.

MR. RUARO agreed to do so.

[11:30:15 AM](#)

CHAIR REINBOLD also agreed. She asked for further clarification on how many regulations are passed and repealed each year.

MR. RUARO offered to obtain a list from Ms. Behr and provide it to the committee. He noted that gross numbers can be misleading because a number of regulations reappear each year to reference cites that must be updated, and he gave the example of the building code. He offered to cull out those types of regulations from the ones that are truly discretionary regulations.

CHAIR REINBOLD acknowledged that the committee will appreciate this effort. She noted that many people erroneously believe the legislature promulgates regulations. When the legislature passes a statute to repeal a specific regulation, sometimes more regulations are adopted that again misinterpret the statute. She asked for the effect on regulations if the legislature repeals statutes, in other words, whether the regulations are immediately suspended.

MR. RUARO responded that if a statute expressly repeals regulations then the regulations become invalid and should be taken off the register. In further response to a question, he

said the process to remove them from the register might not be automatic. He related the cleanup effort may not have been undertaken yet or may have missed some regulations.

[11:33:00 AM](#)

CHAIR REINBOLD returned attention to AO 266. She asked for a status report of the findings and any non-compliance.

MR. RUARO reported on AO 266, noting in the initial round, the administration asked departments to review the statutes and regulations to find expired or conflicting regulations. Thus far, the administration has compiled a list of repeals and has submitted them to regulations attorney for processing. He reiterated that the governor's office has taken the initial step and will work on a more in-depth review for amendments to existing statutes and in simplifying regulations. He anticipated that the administration will focus more attention on this effort after the legislative session. In further response to Chair Reinbold, he recalled that the process has identified roughly 20 sets of regulations that could be repealed; however, these regulations are thousands of pages in length. Thus, the goal of AO 266 has been to remove as many outdated regulations as it can, and, in the process, to find other regulations that were missed. He described the regulatory review process as an ongoing one, but anticipated he will become very familiar with the administrative code.

[11:35:08 AM](#)

CHAIR REINBOLD asked what legislators can do to help with the process.

MR. RUARO suggested that when legislators receive constituent complaints about any regulation, they should contact the commissioner with the complaints. At the same time, legislators can advise their constituents that they can petition an agency via the APA to change the regulations. In doing so, it would also create a process for the department or agency to review the regulation with possible changes, he said.

[11:36:44 AM](#)

CHAIR REINBOLD turned to the minimum qualifications of those staff initiating regulations.

MR. RUARO answered that each department has a regulation specialist who is trained on the process and procedures of adopting regulations. These specialists work with the program staff familiar with the program, the director, and the commissioner to develop regulations, in consultation with the Department of Law (DOL).

[11:37:31 AM](#)

CHAIR REINBOLD inquired as to who sets penalties and enforcement for non-compliance.

MR. RUARO answered that the department does if it is not specified in regulation. For example, the authority for clean water rests with the Department of Environmental Conservation.

[11:38:27 AM](#)

CHAIR REINBOLD asked for further clarification on whether each board has authority to promulgate regulations.

MR. RUARO answered that it depends on the enabling statutes as to the board's authority, so one would have to review the entity's statute for the specific authority. He said it is fairly common for boards to have some regulatory authority.

[11:38:59 AM](#)

CHAIR REINBOLD requested a listing of the boards that do not have any oversight once regulations are promulgated.

MR. RUARO responded that most boards have an independent area of expertise and have authority to take action without oversight of the legislature and executive branch. Their actions would still need to comply with statutes and the Alaska Constitution so there is a check and balance from the court system, he said.

CHAIR REINBOLD suggested that many court cases change the intent but are based on a false interpretation or a misinterpretation. She felt this has created a tremendous burden on some individuals or else it results in a back door approach in conflict with statute. She asked whether he has any recommendations to address this issue.

MR. RUARO answered that the remedy is for the legislature to clarify its intent. He agreed, at times, a back and forth between the legislature and the courts ensues, with the

legislature refining its intent in the process. He said it is inherent in a system with co-equal branches of government and the courts.

[11:41:08 AM](#)

CHAIR REINBOLD asked whether he could recommend whether boards and commissions should report back to the legislature.

MR. RUARO answered that some boards already have reporting requirements in statute and certainly the legislature has authority to require or request an annual report.

[11:42:03 AM](#)

CHAIR REINBOLD related that she has sponsored legislation that addresses some of the issues raised today. Her bill is currently before the House Finance Committee, she said. She reiterated her concern with the extensive federal regulations to implement the Patient Protection and Affordable Care Act. She questioned what the legislature can do to help protect jobs, people, and businesses from federal mandates and the effects of these regulations. She requested follow-up on AO 266, including reporting on a list of repealed regulations.

[11:44:46 AM](#)

ADJOURNMENT

There being no further business before the committee, the Administrative Regulation Review Committee meeting was adjourned at 11:45 a.m.