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COMMITTEE REPORT

HOUSE

6/1  
1981

5/21/81

FURTHER:

(5)

Date: \_\_\_\_\_

Mr. Speaker:

The Committee on STATE AFFAIRS has had CSSSSE 5(JW)

"An Act relating to the effectiveness of administrative regulations."

under consideration and reports it back as follows:

- do pass  do not pass
- do pass with <sup>140</sup>attached amendments(s)  same title
- replace with CS for STATE AFFAIRS  new title
- and recommends do pass
- AND attaches a "Letter of Intent"  New Fiscal Note
- reports it back without recommendation
- referred to the \_\_\_\_\_ Committee

MEMBERS SIGNING  
DO PASS

MEMBERS HAVING  
OTHER RECOMMENDATIONS:

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CHAIRMAN

# STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL  
JUNEAU, ALASKA 99811  
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May 29, 1981

The Honorable Mike Miller  
Chairman  
State Affairs Committee  
House of Representatives  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 99811

Re: CSSSSB 5 (Jud) -- "Effectiveness of  
Administrative Regulations"

Dear Mike:

I would like to briefly state the Department of Law's opposition to this bill. It is three-fold:

- A. constitutional problems
- B. policy problems
- C. technical problems in section 3.

It is easy to discern some legislators' frustration regarding administrative regulations. It is not so easy, however, to pinpoint the cause of that frustration or the nature of the problem which is intended to be addressed by bills such as this one.

In testifying before the Senate Judiciary Committee, Senator Fahrenkamp, the prime sponsor of this bill, stated that she has three basic reasons for its introduction: (1) she believes that not all regulations accurately implement the intent of the legislature; (2) she believes that there are too many regulations; and (3) she believes that some regulations exceed the authority granted the adopting agency.

(1) As to intent: first of all, it is usually difficult to determine legislative intent. There are few committee reports, and committee files and tapes have been difficult to use. Secondly, under current provisions in the Administrative Procedure Act, the legislature has plenty of opportunity to participate in the regulation-adopting process, in order to assure that legislative intent is in fact being implemented. Thirdly, if the legislature does not agree with a decision of an executive agency as to what the probable intent of the legislature was when enacting the enabling

legislation, the legislature certainly may enact amendatory legislation, establishing guidelines, stating prohibitions, or setting out some limits on the exercise of the agency's authority.

Through all the discussions and hearings on this and related bills over the past few years, I have not been able to determine exactly why any legislator feels that the current system is not adequate to assure the implementation of the legislative intent behind a statute. The legislature controls the language of the enabling legislation. It also controls the content of the legislative journals. It has access to executive agency personnel. AS 44.62.190(a)(6) assures that all individual legislators and the Legislative Affairs Agency are sent advance notice of proposed regulations. And AS 44.62.220 sets out the right to petition for a change in the regulations. It must also be remembered that not all legislators will agree among themselves as to the intent of a particular statute. And the current legislature might not agree with the intent of an earlier legislature.

(2) As to quantity: there may well be legislative and public concern that there are too many administrative regulations. But the public is also concerned that there are too many statutes. Most people do not make the technical, legal distinction between statutes and administrative regulations when objecting to the degree of governmental control over their activities. Regulations are a crucial element in helping an agency avoid being arbitrary. Any effort to cut down on the number of administrative regulations should be done on a discriminating basis, not by means of a shotgun approach. Decisions must be made as to which ones are unnecessary. CSSSSB 5 (Jud) does not make that sort of necessary discrimination. It just lets Time do the work.

3. As to authority: any question of the authority given an agency to adopt an administrative regulation is a matter for the courts. The legislature passes the laws, the executive branch executes them, and the judicial branch decides disputes concerning them. Among the disputes involving the laws are those that challenge the validity of an administrative regulation as one exceeding the authority of the adopting agency. A system which usurps the judicial function in this regard is probably invalid. See Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th CCA, 1980).

That last paragraphs alludes to the constitutional problem which concerns us. In CSSSSB 5 (Jud), the legislature would be establishing a system which would prevent the executive branch from exercising its discretion and executing the laws. It imposes an unreasonable delay and, since bills often fail to pass for reasons quite apart from their merit, it institutionalizes a system for completely preventing an executive agency from executing the law. Administrative regulations constitute a crucial element in the implementation of any program or function. Many supreme court decisions have ruled that agency action taken in the absence of necessary administrative regulations is in fact invalid. The failure of a regulation-approving bill to pass would afford the responsible agency no guidance as to the appropriate implementation of the statute and thus its efforts under the constitution to "execute the laws" would be frustrated.

Whether or not a court would rule that this bill is unconstitutional, we believe that it is bad policy. Many functions of the state government require prompt action to be taken. This may or may not necessitate emergency regulations. The bill does not generally exempt emergency regulations, nor would it allow for making emergency regulations permanent. But even when there is not a true "emergency," it is often necessary to adopt regular regulations expeditiously. I believe that various state agencies will testify before your committee with regard to the problems they would encounter in specific programs if this bill were to become law.

Section 3 of the bill partially exempts a regulation adopted as an emergency regulation under the authority of a law enacted by this session of the legislature. However, considering the number of laws likely to be passed by this legislature and the number currently on the books, the probability that an emergency will arise under existing law rather than new law is extremely high. Thus, the bill prevents an executive agency from dealing with a true emergency situation under current law. This point has been made at earlier stages of this bill's consideration, yet sec. 3 has not been changed to deal with it. It is difficult to understand what it intended by it and what the legislature would expect an agency faced with that kind of problem to do.

Honorable Mike Miller

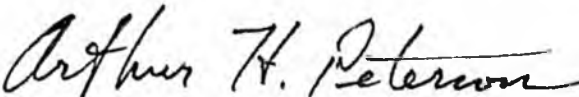
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May 29, 1981

Thank you for your consideration of these comments.

Yours truly,

WILSON L. CONDON  
ATTORNEY GENERAL

By:   
Arthur H. Peterson  
Assistant Attorney General  
and Regulations Attorney

AHP:cb

cc: Keith Specking  
Legislative Assistant  
Governor's Office