

S B

166

FISCAL NOTE

REQUEST:

Revision Date: March 8, 1988
Title: an act relating to administrative regulations, and appeals . . .
Sponsor: Fahrenkamp
Requestor: _____

Agency Affected: Education
BRU: Executive Administration
Components: Commissioner's Office

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		36.0	72.0	75.0	78.0	81.0
TRAVEL		2.0	5.0	5.0	5.5	6.0
CONTRACTUAL		8.0	20.0	21.0	22.0	23.0
SUPPLIES		2.0	2.0	2.0	2.5	3.0
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		48.0	99.0	103.0	108.0	113.0

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUND		46.0	99.0	103.0	108.0	113.0
FEDERAL FUNDS						
OTHER						
TOTAL		46.0	99.0	103.0	108.0	113.0

POSITIONS:

FULL-TIME		2.0	2.0	2.0	2.0	2.0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

See attached analysis.

Prepared by: Robert Davis Phone: 465-2800
Division: Commissioner's Office Date: 3-21-88
Approved by Commissioner: William G. Demmert Date: 3-21-88
Agency: Department of Education

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

FISCAL NOTE
(page 2 of 2)

Bill Version: CSSB No. 166 (03/08/88)
Title: "An Act relating to administrative regulations, adjudications, and appeals; amending Alaska Court Rule of Appellate Procedure 508; and providing for an effective date."

ANALYSIS

Assumptions:

(1) Sec. 9 repealers effective 6/30/89 will require State Board of Education reviews and actions over a six month period prior to that effective date.

(2) Sec. 8 reviews of regulations by the legislative legal services division will require at least two full time Department staff for six months of FY89 for research, analysis and impact assessment of all regulations contained in Title 4, Alaska Administrative Code.

(3) The review process in Sec. 8, and the economic analyses in Sec. 6 would apply to about half the state school districts. By the nature of the data collection related to schools and the types of the analyses required, and in order to sustain the review functions of the State Board of Education contained in AS 44.27.010, a continuing staff capability is required.

Program Summary:

Title 4 AAC contains a mixture of educational standards for programs and staff as well as administrative requirements. The proposed legal and economic analyses will inevitably require analyses of educational impacts. Existing staff will be utilized depending on the subject and requirements for analysis. The efficiency and quality of the workload, and a substantial volume of both informal and formal activities needed to keep school districts and the State Board of Education informed of what is going on will require control and coordination through one individual.

Positions. Administrative Officer I (Range 17-A) @ \$44.0 annually
Clerk-Typist III (Range 8-A) @ 28.2 annually

Other Expenditures. Travel estimate includes centralized meetings with school officials, and to State Board of Education scheduled meeting locations. Contractual estimates are based 75% upon public notice costs related to actions modifying or repealing regulations on a quarterly basis.



ALASKA STATE CHAMBER OF COMMERCE

310 Second Street
Juneau, Alaska 99801
(907) 586-2323

March 22, 1988

The Honorable Bettye Fahrenkamp
Alaska State Senate
P.O. Box V
Juneau, AK 99811

Dear Bettye:

You have asked for our comments on SB 166. The State Chamber supports SB 166 for the following reasons.

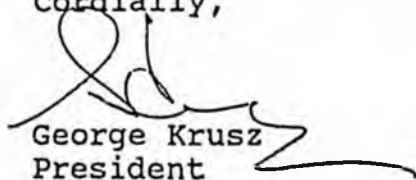
As you are aware, the Executive Branch in Alaska is one of the strongest in the U.S. Many times over the years the Administration has felt free to differ with the legislative intent of laws adopted by the Legislature through interpretation in the form of regulations.

Agencies of State government given such power have occasionally abused their authority to the detriment of development interests. When the Legislature has tried to overturn regulatory interpretations of statutory enactments, the Alaska Supreme Court has sided with the Administration. The Legislature is frequently found with interpretation of law not of their making. A way must be found to permit the Legislature to overturn regulations. SB 166 would be a giant step to ensure that the intent of the Legislature is fulfilled.

SB 166 empowers the Administrative Regulation Review Committee to bird-dog agency compliance with the proposed statutory requirement to undertake an economic analysis of a proposed action on small businesses and small municipalities. It also authorizes the committee to participate as a friend of the court in litigation brought to address the effect of a regulation on small entities.

The legislation furthermore calls upon each agency of the State government to review the existing regulations that have a potential economic effect on small businesses and municipalities for the purpose of determining whether the regulations should continue to be implemented. Each of these mandates will have the effect of forcing the Administration to examine regulations for their economic impact and lay bare for public review how they affect the business community. Accordingly, in our view, this is legislation which would have great merit in any democracy and is sorely needed in Alaska.

Cordially,


George Krusz
President

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99611-0300
PHONE: (907) 465-3600

March 22, 1988

The Honorable Arliss Sturgulewski, Chair
Senate Community and Regional Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: Proposed CS for SB 166
(administrative regulations,
adjudication, and review) --
additional comments, fiscal
note, etc.

Dear Senator Sturgulewski:

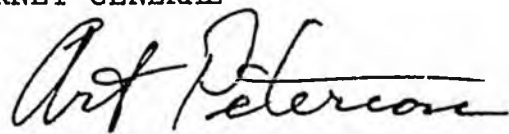
As indicated in my March 18 letter to you on this bill, you will find attached the Department of Law's fiscal note, along with position papers and other commentary from various other state agencies. I hope that you will find this material helpful in your committee's analyses of this bill.

Thank you for this opportunity to comment.

Yours truly,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By:


Arthur H. Peterson
Assistant Attorney General
and Regulations Attorney

AHP:cb

cc w/enc.: Hon. Bettye Fahrenkamp
Alaska State Senate

Bob Evans, Legislative Liaison
Office of the Governor

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: _____
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: CSSB 166 () 5-0798B
An Act relating to admin. regulations...
Sponsor: Senator Fahrenkamp
Requestor: Senator Sturqulewski

Agency Affected: Legislative Affairs Agency
BRU: Legislative Council
Components: Legal Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	130.3	130.3	130.3	130.3	130.3
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	6.2	6.2	6.2	6.2	6.2
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	136.5	136.5	136.5	136.5	136.5

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	136.5	136.5	136.5	136.5	136.5
FEDERAL FUNDS						
OTHER						
TOTAL	0	136.5	136.5	136.5	136.5	136.5

POSITIONS:

FULL-TIME	0	2	2	2	2	2
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	1	1	1	1	1

ANALYSIS : (Attach a separate page if necessary)

CSSB 166 () requires all agencies to submit a regulation or order to the Legislative Legal Services Division for review and to analyze the probable economic effect of the proposed act on small entities. It also requires the Legal Services Division to review all existing regulations before January 1, 1993 and report the results to the Administrative Regulation Review Committee.

Prepared by: Pamela A. Stoops, Manager *Pamela A. Stoops* Phone: 465-3850
Division: Administrative Services Date: 3/22/88

Approved by: Warren Endicott *Warren Endicott* Date: 3/22/88
Executive: Director
Agency: Legislative Affairs Agency

Distribution (by preparer):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION OF FISCAL NOTE FOR CSSB 166 ()

Costs needed to carry out the Legal Services functions are as follows:

Personal Services

Attorney III	Range 23/A	12 months	65,648
Economist I	Range 18/A	12 months	51,181
Secretary	Range 10/A	6 months	13,500

Contractual

Office Space	- 200 square feet	5,184
Phones		<u>1,000</u>

TOTAL COST 136,513

STATE OF ALASKA

DEPT. OF COMMUNITY & REGIONAL AFFAIRS

OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

- P.O. BOX B
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- 949 E. 36TH AVENUE, SUITE 400
ANCHORAGE, ALASKA 99508-4302
PHONE: (907) 563-1073

March 22, 1988

POSITION PAPER

RE: Proposed CS for SB 166

ORIGINAL SPONSOR: Senator Fahrenkamp

Program Effects of Bill:

The major program effects of this bill on the Department of Community and Regional Affairs would result in a greatly complicated administration of programs that are governed by regulation.

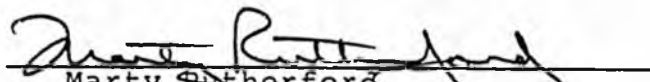
Comments:

Among the programs governed by regulation in this department are the following: Local Boundary Commission, Municipal Lands Trustee, the Senior Citizen and Disabled Veteran Tax Exemption Program, the Senior Citizen and Disabled Veteran Tax Equivalency Program, the State Employment Training Program, The Rural Economic Development Initiative Grant Program, the Energy Conservation Program, the Housing Assistance Loan Fund, the Home Ownership Assistance Program, and the Nonconforming Housing Loan Program. Over the last four years (FY 85 - present), the department has opened with the Department of Law 20 regulation files, representing new adoptions, amendments or repeals of regulations.

The portions of the bill providing for automatic repeal of regulations and legislative disapproval of regulations create a significant danger of program interruption and increased administrative expense. If no action were taken by the legislature to extend the regulations, the department would be faced with the public notice and hearing process on these regulations on an annual basis. This would require a tremendous investment of time and effort on the part of the department. It would mean either a reallocation of staff time away from direct program service delivery and administration, with the consequent reduction in program efficiency, or new staff to meet the new demands. If the legislature were to disapprove a regulation, the possibility of interruption of program services becomes even greater because of the lack of positive guidance provided by such action, with the resultant hardship to program participants.

SB 166
March 22, 1988
Page Two

While the department is sympathetic to the objective of analyzing the impacts of changes in regulations on small entities, and particularly municipalities, other provisions of the bill have the potential for significant negative impact on the department's ability to administer programs and deliver services to its clients. Consequently, the department cannot support this legislation.


Marty Rutherford
Acting Deputy Commissioner

Proposed CSSB 166: "An Act relating to administrative regulations, adjudications, and appeals; amending Alaska Court Rule of Appellate Procedure 508; and providing for an effective date."

The Department of Commerce and Economic Development is charged with the regulation of a number of industries in a manner which balances the encouragement of business growth with the need for consumer protection. In this capacity, the department regulates banking, securities, corporations, 28 occupations through 18 boards and commissions, insurance, loan programs, utilities, the conservation of the oil and gas resources of the state, and commercial trade through the maintenance of weights and measurements standards.

The changes in the proposed committee substitute for SB 166 substantially alter the intent and scope of the original bill. Primary among them is the provision in Section 9 requiring the repeal of all administrative regulations, according to a timetable, for all but one of the boards or commissions falling under the department's centralized licensing statutes as well as the regulations of the department itself.

This repeal is automatic, unless the regulations are "extended by law." The bill does not address how this extension is to be accomplished: by the Legislature's Budget and Audit Committee? by request of the Governor? or by some other means?

The automatic "sunset" of an entire department's or board's regulations is simply too drastic. While the department is supportive of at least one of the intents of this legislation (to analyze the economic impact of regulating decisions on small business) and agrees that more attention ought to be focused on how the state develops a climate favorable to the growth and development of business, a wholesale repeal of administrative regulations is, frankly, throwing the baby out with the bath water. In a number of professions, individuals are required by law to be licensed in order to perform their jobs. Nursing home administrators must be licensed in order for the state to receive federal Medicaid reimbursement.

In the case of regulations adopted by the boards and commissions within the Division of Occupational Licensing, the bill fails to recognize one key factor: the regulations adopted by the boards are proposed and approved by board members (most of them small business persons) to regulate their own professions. The boards contain a balance between licensed professionals providing the technical expertise to self-regulate their professions and lay representation representing consumer interests. It would appear to be a major shift in policy and philosophy if the Legislature were to repeal the regulations that the citizens active in the various professions have developed to regulate themselves. It goes without saying that rarely, if ever, has a board considered adoption of a regulation which negatively impacted the economic well-being of its profession. Indeed, the division and the Department of Law spend a great deal of time and energy making sure that the regulations proposed by the boards are not too protectionist and, thus, subject to antitrust considerations.

The clear advantage of having regulatory boards with a majority of members from each of the regulated industries is to avoid just the kind of over-regulation this bill seems to feel currently exists. To add another level of oversight would appear to defeat a primary purpose of the bill, which is to get government off the backs of the people. Enactment of this legislation would, in fact, add another layer of government.

Another flaw in the decision to repeal all regulations automatically is the total disregard for the struggle many boards, commissions and agencies have gone through to get their regulations adopted. In the case of the Division of Occupational Licensing, one of the biggest frustrations board members have is over the length of time it takes to get their adopted regulations reviewed and formally approved for publication by the Department of Law.

If the division were to inform the members of the boards that all of their hard work were to be thrown out, including the considerable time spent during board meetings discussing needed regulations and in public hearings and debate, the Legislature would certainly discover that the small business persons regulated by these boards are not interested in returning to the days before regulation. Deregulation is not, in and of itself, always a positive move.

Finally, the suggested repeal seems to fly in the face of the work of the sunset process for boards and commissions. The performance audits completed by the Legislative Affairs Agency's audit division have been very successful in addressing problems identified by the Legislature's Budget and Audit Committee. This process has made the boards much more responsive to public concerns, while still providing them with considerable regulatory independence. The sunset process has professionalized the boards and their decision-making process.

The repeal of all regulations contemplated in the committee substitute seems to abrogate all the work of past Legislatures in reviewing the boards. The specific requirements of the performance audit are that it addresses the extent to which a board, commission, or agency or its operation:

1. has operated in the public interests;
2. has been impeded or enhanced by existing statutes and regulations and other policies it has adopted;
3. has recommended statute or regulation changes that are in the public interest; and
4. has encouraged public comment on the effect of its regulations and encouraged public participation in the drafting of its regulations and decisions.

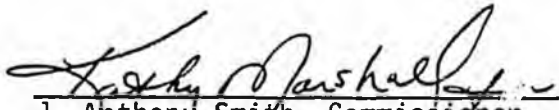
Although the main focus of this position paper is on the dramatic impact the proposed legislation would have on the activities of the Division of Occupational Licensing and its regulatory boards and commissions, other areas of the department would be affected as well.

For example, there are many provisions of regulations in Title 6, regulated by the Division of Banking, Securities, and Corporations, which provide parity for state-chartered financial institutions in competition with federal-chartered institutions. If the state regulations were suddenly repealed, banks would find themselves in violation of federal law, thus, subjecting themselves not only to penalties but also to the disagreeable position of being at a disadvantage in the marketplace.

The securities section also is concerned with the provision in the proposed legislation that would require affirmative action to extend regulations, particularly in regard to regulations governing the Alaska Native Claims Act Corporations on the solicitation of proxies. The absence of the regulations would result in a serious lack of shareholder protection to the largest group of shareholders of Alaska domestic corporations. ANCSA corporations are the only U.S. corporations not governed by the U.S. Securities and Exchange Commission. ANCSA shareholders may exercise control only through the election of directors, as capital stock is not currently alienable. The present regulations were adopted January 4, 1981 in response to the widespread problems associated with the void in the law regarding proxy solicitation.

The Division of Investments has promulgated a number of regulations in conjunction with its loan programs. These regulations clarify or define terms in the statutes, provide the department with a consistent basis for evaluating loan requests equitably, and cover details that are necessary in order to administer the statutes. A number of lending practices have been established by regulation. For example, under the commercial fishing loan program, subjects such as refinancing, assumptions, permit leasing and the loan process itself are dealt with through regulation. These details would be extremely cumbersome to place in statute, yet are such an integral, ongoing part of the program that it would simply not make sense to automatically sunset them. The regulations of the division receive frequent review because, due to the ever changing environments in the industries affected by the loan programs, they are amended fairly often. Amending through regulation is a much faster and easier process than a statutory change.

Again, while the department supports the goal of regulatory flexibility, it is our conviction that the methodology presented in the committee substitute is simply too extreme. Although it is not unreasonable to require agencies to review all regulations every few years, wholesale sunset goes too far. In conclusion, the department is opposed to the bill in its current form.



J. Anthony Smith, Commissioner
Department of Commerce and Economic
Development

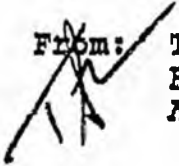
3/22/88
Date

MEMORANDUM

DRAFT

To: Linda Wild
Legislative Liaison
DC&ED

Date: March 22, 1988

 From: Ted Moninski
Executive Director
APUC

Subject: CSSB166

Linda, attached are a few brief paragraphs which represent the Commission's preliminary response to the the above referenced bill. As you are aware, I was unable to review the bill until yesterday and the Commissioners had even less time to consider it. Given that, please accept our comments as a very rough cut at what appears to be a rather substantial piece of legislation. With adequate lead time, I am sure the Commission will be prepared to offer a more comprehensive analysis. Please let me know if this item is subject to further committee action this session. Thanks.

cc. Susan M. Knowles
Chairman, APUC

MAR 22 '88 11:03 APUC 907-263-2155

P.3

COMMENTS ON CSSB 166

The legislation appears to maintain the existing scheme (See AS 42.05.151) whereby the provisions relating to administrative adjudications do not apply to the Commission, whereas the provision relating to regulations does apply to the Commission. Therefore, the sections regarding the award of costs to a prevailing party against the Commission would apparently not apply to the APUC. The provisions regarding the review and repeal of regulations would apply to the Commission.

Section 6 (adding a new section designated AS 44.62.295) and perhaps Section 9, provide for the automatic revocation of existing regulations without normal legislative enactment procedures. In view of State v. A.L.I.V.E. Voluntary, 606 P 2d. 769 (1980), these provisions may violate Article II, Section 14 of the State Constitution.

The proposed statute is not drafted to repeal only those regulations which somehow place a burden on regulated entities. Instead, it would also repeal regulations which the Commission has been required by the legislature to adopt: (rules of practice and procedure, AS 42.05.151(b)); regulations which save cost, for example, by providing guidance to regulated entities regarding information they must file with the Commission to obtain a rate increase; regulations which were adopted by the Commission in compliance with the specific recommendations of the sunset review procedure (Electric Service and Safety Standards); regulations which were adopted to reduce regulatory requirements for small entities (Simplified rate procedures for electric cooperatives, AS 42.05.381(e)). Enactment of the proposed legislation with the potential for a blanket revocation of existing regulations could result in confusion and a greater burden to all involved.

The proposed statute would create an additional layer of state review with unnecessary associated costs. Existing procedures already provide affected utilities, pipeline carriers and other interested parties sufficient opportunity to comment on proposed regulations before those regulations are adopted. The Commission gives full consideration to the impact on these entities before regulations are adopted, and in many cases regulations have been drafted to apply only to companies greater than a certain size.

The APUC is subject to a rather unique accountability requirement in that the cost burden, if any, imposed by its regulations must eventually come back before the Commission for approval prior to becoming part of the utility rates paid by consumers. This process creates an internal incentive to control the cost implications of new regulations. In addition, the Commission typically provides a transitional period and staff assistance to facilitate the requirements associated with new regulations.

MAR 22 '88 11:05 AM IC 907-263-2155

P.4

Given the highly technical and integrated nature of utility regulation, any further substantive review by an agency or committee less familiar with the particular area being regulated will be inefficient, costly, and unproductive.

MEMORANDUM

State of Alaska

TO:

Arthur H. Peterson
Assistant Attorney General
Department of Law

DATE:

March 22, 1988

FILE NO:

TELEPHONE NO:

THRU:

SUBJECT:

Proposed
CS SB 166

FROM:

Tom Hawkins
for Judith M. Brady
Commissioner

I am writing to briefly spell out this department's position on SB 166, "An Act relating to administrative regulations, adjudications, and appeals; amending Alaska Court Rule of Appellate Procedure 508; and providing for an effective date."

First, the bill's provisions relating to the award of costs and attorney fees allowed prevailing parties in administrative adjudications will have very little impact on the Department of Natural Resources. The department takes this position as very few of our adjudications are conducted under the Administrative Procedures Act (AS 44.62.330 -- 44.62.630). As such, the department maintains a neutral position on this portion of the bill.

Second, the bill's provisions relative to administrative regulations cause this department some concern. Those concerns center on the practicality of dealing with regulations which automatically expire on an annual basis, the fact that regulations are already subject to extensive review by the Department of Law and will be subject to an even more extensive (and time consuming) level of review by the legislative legal services division, the duplication of administrative efforts needed to maintain administrative regulations, the added burden placed upon the legislature in enacting subsequent legislation to "reauthorize" regulations, and the bill's lack of specificity in its requirement for an analysis of the "probable" economic effect of a proposed departmental action.

The department also questions the propriety of the bill's distinction between small businesses, entities, and municipalities and any other size business, entity, and municipality. If the legislature sees value in imposing new regulation-adoption requirements, why are those new requirements not uniformly applicable?

Finally, section 9's provision repealing all regulations of the department on July 1, 1991 will cause havoc with ongoing programs of the department. Nothing in the bill repeals the statutory

obligation underlying the regulations subject to repeal and nothing in the bill relieves the department's obligation to carry out the functions imposed on it by the statutory provisions. If the legislature intends to act in the area of regulatory affairs, it is important that the legislature recognize the fact that a "fix" to one portion of the picture will not necessarily fix the problem. Instead, it might resurrect problems that the regulations subject to the bill's legislative "fix" solved in the first place.

Alaska State Legislature

ARLISS STURGULEWSKI, Chairman
TIM KELLY, Vice Chairman
RICK HALFORD
MIKE SZYMANSKI
FRED ZHAROFF



P. O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4989

Senate Community and Regional Affairs Committee

March 22, 1988

TO: Senate Community and Regional Affairs Committee Members

FROM: Senate C&RA Staff

RE: CS for SB 166 (C&RA) - "An Act relating to administrative regulations, adjudications, and appeals; amending Alaska Court Rule of Appellate Procedure 508; and providing for an effective date."

The committee has previously heard this bill. At today's meeting a representative of the Small Business Administration will testify via teleconference. Art Peterson of the Department of Law will be at today's meeting to testify and a lengthy bill analysis and fiscal note from the Department of Law has been added to the packet. A fiscal note from Legislative Affairs will be available at the meeting.

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to administrative regulations...Appellate Procedure 508..."
Sponsor: Senate C&RA
Requestor: Senate C&RA

Agency Affected: Department of Law
BRU: Legal Services
Components: Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES		228.4	235.3	242.4	249.7	257.2
TRAVEL		4.8	4.9	5.0	5.2	5.4
CONTRACTUAL		21.3	21.9	22.6	23.3	24.0
SUPPLIES		16.8	11.1	11.4	11.7	12.1
EQUIPMENT		28.0	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS		100.0	103.0	106.1	109.3	112.6
MISCELLANEOUS						
TOTAL OPERATING		399.3	376.2	387.5	399.2	411.3
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		399.3	376.2	387.5	399.2	411.3
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		4.0	4.0	4.0	4.0	4.0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see the attached analysis.

Prepared by: Richard I. Pegues, Director Phone: 465-3672
Division: Administrative Services Date: March 21, 1988
Richard I. Pegues /FOR/
Approved by Commissioner: Grace Berg Schaible, Atty. Gen. Date: March 21, 1988
Agency: Department of Law

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 166 (C&RA)

The committee substitute for SB 166 amends AS 09.60, AS 24.20, and AS 44.62 by changing existing statutes and adding new sections to these statutes that provide for the payment of fees and costs to prevailing parties in administrative adjudications, other than state agencies, and that provide for the review and expiration of all new administrative regulations, and the review and repeal of all existing administrative regulations, unless the legislature postpones repeal or extends the regulations by law.

The department's fiscal analysis of the bill, which is discussed at some length below, indicates that certain of the bill's sections will have considerable impact on the Department of Law.

Sections 1 and 2 provide that a court award costs and fees to a prevailing party in a judicial review of an administrative adjudication, other than a state agency, based upon the prevailing market rate for the kind and quality of services furnished. The bill provides two restrictions to prevailing market rates. One, a prevailing party could not be compensated for an expert witness at a rate that exceeds the highest rate of compensation that is paid by the state agency for expert witnesses. Because a single state agency may employ multiple expert witnesses for different purposes, at widely varying rates of compensation, this provision should be further restricted to provide that the rate to be compensated not exceed the highest rate of compensation that is paid by the state agency for expert witnesses for a like or similar service. Two, attorney or agent fees in excess of \$75 an hour could not be awarded unless the state agency determines by regulation that an increase in the cost of living or a special factor, including the limited availability of qualified attorneys or agents for the adjudication involved, justifies a higher fee. Of the approximately 2,300 active attorneys currently licensed to practice law in the state, about 100 of these practitioners frequently appear at consequential agency adjudications, representing the largest effort in terms of the hours and the cost devoted to the practice of administrative law. And although many other practitioners also handle less important adjudications, the limited availability of qualified attorneys special factor could nearly always be present in serious adjudications that require larger blocks of attorney time. Experienced administrative law attorneys currently charge between \$125 an hour and \$170 an hour.

The state is currently subject to paying costs and fees to prevailing parties in any court action it brings, and in court actions brought against the state, including appeals from administrative adjudications, as provided by Rules 79 and 82 of the Rules of Civil Procedure. Such costs and fees are, however, limited to the Rule 82 fee schedule, or in the absence of a readily determined monetary value, the "reasonable cost" method. Currently, the state may also seek costs and fees, under the existing rules, when it is the prevailing party in a judicial

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 156 (C&RA)

review of an administrative adjudication. Sections 1 and 2 would radically change the method by which the state pays costs and fees to a prevailing party in a judicial review of an administrative adjudication, and these sections would also prohibit the state from collecting costs and fees when it is the prevailing party. Section 7 similarly extends payment of costs and fees to a prevailing party in an agency administrative adjudication, other than a state agency, on the same terms as provided for in Section 2.

At present, state law does not provide for the award of attorney's fees and costs to those who prevail in administrative adjudications. From a policy perspective, it may well be appropriate if some limited allowance for costs and attorney's fees was provided in these proceedings. Any such provision, however, should treat all litigants equally, insofar as the award of such costs is concerned.

The use of the "reasonable cost" standard under Civil Rule 82 represents the fairest method of apportioning litigation expenses where the parties in a dispute have litigated on a good faith basis. Civil Rule 82 recognizes that a party doesn't usually prevail totally, it requires a justification of the expenses being claimed, and it considers the good faith nature of an unsuccessful party's claim or defense. Using this standard, a prevailing party is typically awarded about one-half of its justified actual expenses. If bad faith on the part of the unsuccessful party can be shown, the prevailing party could be awarded all of its justified expenses. The purpose of Civil Rule 82 is to compensate a prevailing party for costs of litigation without placing such a heavy burden on the unsuccessful party as to discourage access to the courts. The department does not believe that application of this rule at the court level (i.e. in appeals of administrative decisions) should be disturbed. Also, if costs and fees are to be awardable at the agency level in administrative adjudications, it seems the principles of Civil Rule 82 should also be utilized.

Treatment of the state in a manner less equal than the other parties to a dispute, under the principles of Civil Rule 82, at either the court or agency level, will not only subject the state to substantially higher claims for costs and fees, but it may also have the undesired effect of establishing a separate disadvantaged class of litigant, of which the state will be the only member. Moreover, the bill may inadvertently set up the state as a "deep pocket" by encouraging unmeritorious or questionable claims on a contingent fee basis.

It can be expected that the number of administrative adjudications and subsequent judicial reviews, that the state must defend, will increase without state access to Civil Rule 82 and the protection it affords against frivolous actions. Unfortunately, the bill may well be

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 166 (C&RA)

read by some as a signal that the state resides on a one-way street where it must pay, but need not be paid. Consequently, if awards of costs and fees are to be allowed in those administrative proceedings covered by the bill, the department believes they should be determined on the basis of the principles of Civil Rule 82 and should be available to all prevailing parties, including the state. The department strongly urges that prevailing market rates, or actual costs, be allowed only in those cases where a hearing officer or other official makes a clear finding that a party's claim was without merit. And it also supports continuation of the application of Civil Rule 82 to the payment of costs and fees to prevailing parties in judicial reviews of agency administrative adjudications.

Both Section 2 and Section 7 provide that a party seeking costs and fees must simply allege that the position of the agency was not substantially justified, without having to offer proof or evidence to substantiate such an allegation. Moreover, the bill's requirement that a court or hearing officer shall award fees and other expenses to a prevailing party, unless they find that the position of the agency was substantially justified, will cause additional litigation as attorneys for both sides argue over the appropriateness of an agency's position. Likewise, additional litigation will occur as disputes arise over the setting of costs and fees at administrative adjudications. During FY 1987 the department participated in 152 administrative proceedings that would be covered under the bill. The number of attorney hours the department devoted to this effort was equivalent to the time of 1.9 attorneys, or 2,810 hours. The department believes this provision could easily cause administrative adjudication litigation to increase by as much as 100% because of the risk-free environment it provides for potential litigants.

The department carefully screens agency complaints before deciding to initiate proceedings or before advising another agency to initiate proceedings. As a consequence, the state prevails in approximately 80% of the administrative adjudications that it brings. The department's costs in these proceedings range from a few hundred dollars for a simple adjudication to many thousands of dollars for a major adjudication. During FY 1987, the department's total attorney/staff cost for these proceedings was approximately \$235,000. Because of case backlogs, which have substantially reduced the amount of time that the department would otherwise have spent on these matters, and because Sections 2 and 7 will encourage additional litigation, it is estimated that private litigant attorney fees may increase to over \$500,000. If private parties continue to prevail at their current rate, the annual cost to the state could be about \$100,000 or 20% of the amount that private parties will probably pay in fees and expenses each year in administrative adjudications covered by the bill. Depending on the area of the law, state attorney costs are 30% to 50% lower than the private

CONTINUATION of FISCAL NOTE ANALYSIS

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bar in terms of salary and the time required (or available) to litigate these matters. Consequently, the department believes that the \$100,000 estimate for fees and expenses is very conservative.

Any increase in litigation will also increase the attorney staff time that the department will have to devote to administration adjudications. At this juncture, the department cannot accurately predict what the cost for its increased staff time may be. Therefore the cost of this likely increase is not included in this fiscal note analysis. However, if increased litigation caused by this bill becomes substantial (equivalent to one or more attorneys), it may become necessary to request additional funds later.

Section 3 amends AS 24.20.460 to give the Administrative Regulation Review Committee the additional power to petition the court for permission to appear as amicus curiae in an action brought under AS 44.62.300 to address the effect of the regulation on small entities. This provision will have some impact on the department as its attorneys respond to amicus pleadings, but this impact cannot be predicted and the impact is not anticipated to be sufficient enough to warrant fiscal note costs.

Section 4 will not have a direct fiscal impact on the department.

Section 5 provides that agencies twice-yearly publish an agenda that describes regulations that they expect to propose or adopt that are likely to have a significant economic effect on a substantial number of small entities. This provision will not have an impact on the Department of Law, but it may have an impact on other agencies.

Section 6 provides for the expiration of a regulation or order of repeal adopted between October 1 and September 30 on July 1 of the following year unless the legislature postpones its repeal by law. Section 6 also provides for a thorough economic analysis and review of affected regulations on the part of the legal services division of the Legislative Affairs Agency, including the type and number of small entities affected, identification of less costly means of achieving the purpose of the regulations, and the identification of other regulations that may duplicate, overlap, or conflict with the regulation or order.

To the extent that the legislature's legal services division is adequately staffed to carryout these reviews, the Department of Law anticipates that it will require the full-time services of one attorney and the part-time services of one paraprofessional, plus part-time secretarial support, to represent and advise agencies during this new legislative review process, as the agencies explain and justify their need for the regulations they adopt or repeal each year.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 166 (C&RA)

The department reviews and assists other agencies to draft, adopt and repeal as many as 150 separate regulations projects each year. Some of these regulations are simple one-line repeals and some are quite comprehensive administrative law totalling perhaps 80 or 90 pages, each. During FY 1987, the department's attorneys and paraprofessionals spent 3,427 hours working on regulations. Thus the time already being spent annually on regulations equals 2.3 attorney/paraprofessional years, without adding an entirely separate review process. The department cautions that if the legislature's division of legal services annual review of regulations is not done as carefully as agency sunset reviews, the Department of Law's costs will be substantially higher than those shown in this fiscal note.

Section 8 directs the legislature's legal services division to undertake a comprehensive four and one-half year economic analysis of all of the state's existing regulations to, among other things, determine their lawfulness, continued need, complexity, economic effect on small entities, and to determine whether regulations should be continued without change or be amended or repealed to minimize significant economic impact. This provision, by itself, will not have an impact on the Department of Law unless it is read in conjunction with Section 9, which is discussed below.

Under Section 9, nearly all of the state's regulations would be repealed on a staggered basis over a four-year period, beginning on June 30, 1989, unless extended by law. This massive sunset provision will have a considerable fiscal impact on the Department of Law as it will be necessary to represent and advise agencies in explaining and justifying the legality, need, usefulness, and appropriateness of agency regulations that are required for the day-to-day operations of many state government programs. The department believes that the full-time services of one attorney and the part-time services of a paraprofessional, plus part-time secretarial support, will be required to see to it that government operations continue uninterrupted.

Once again, the department cautions that its fiscal impact estimate is premised on the assumption that the legislative review of state regulations under the bill will be carried out as seriously and carefully as agency sunset review. Even the inadvertent repeal of certain regulations could have disastrous impact on some programs. For instance, the lack of commercial fishing or subsistence regulations could force the unintended closure of commercial and sports fishing and hunting for an entire season. Likewise, the absence of state regulations in regulatory areas shared by the federal government, such as coastal management and environmental protection, could result in federal usurpation of state control in these areas. Any of these events would cause an immediate and dramatic increase in the department's litigation costs, as it attempts to undo the damage in the courts.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 166 (C&RA)

Fiscal Analysis Summary (FY 89)

	<u>Sec. 7 Fees & Expenses</u>	<u>Sec. 6 Atty IV</u>	<u>Sec. 9 Atty IV</u>	<u>Sec. 6/9 Assoc. Atty II</u>	<u>Sec. 6/9 Legal Sec'y I</u>	<u>TOTAL</u>
Per. Svcs.		72.0	72.0	52.9	31.5	228.4
Travel		2.4	2.4	-0-	-0-	4.8
Contr.		5.7	5.7	5.7	4.2	21.3
Supplies		4.5	4.5	4.5	3.3	16.8
Equip.		6.5	6.5	6.5	8.5	28.0
Judgments	100.0					100.0
TOTAL	100.0	91.1	91.1	69.6	47.5	399.3

Costs after FY 89 include a 3% annual inflation factor, less one-time start-up costs.

Position Title Attorney IV		No. of Positions 1	Range/Step 24A	Barg. Unit PX	
Time Status PFT	Staff Months 12	Location Juneau		Election District 4	
Type of Expenditure		Justification			
		<p>This position is needed to advise and represent agencies in the annual review of all state regulations adopted or reviewed in the preceeding year that would be required by Section 6, of CSSB 166 (C&RA). A wide variety of regulations will be subject to review that deal with often complex areas such as resources, transportation, public assistance, taxation, commerce, public utilities, child protection, public safety, mental health, custody of prisoners, the environment, and development. An Attorney IV will be required because of the substantive areas of law that will be subject to the annual review.</p>			
1	2				3
Salary	56,244				
Benefits	15,713				
Premium Pay					
Other					
Total Personal Services					71,957
Travel					2,400
Contractual					5,700
Commodities					4,500
Equipment					6,500
Other					
Total Cost		91,057			
Funding Source for Total Cost					
Federal Receipts	1002				
G. F. Match	1003				
General Fund	1004	91,057			
GF Program Receipts	1005				
Other					

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Position Title Attorney IV		No. of Positions 1	Range/Step 24A	Barg. Unit PX	
Time Status PFT	Staff Months 12	Location Juneau		Election District 4	
Type of Expenditure		Justification			
Amount		<p>This position is needed to advise and represent agencies in the four-year review and repeal of nearly all of the state's administration regulations that would be required by Section 9 of CSSB 166 (C&RA). Both an enormous number and an enormous variety of regulations will be subject to review and repeal. These regulations deal with often complex areas such as resources, transportation, public health and public assistance, taxation, commerce, public utilities, child protection, public safety, mental health, custody of prisoners, the environment, and development. An Attorney IV will be required because of the substantive areas of law that will be subject to review and repeal.</p>			
1	2				3
Salary	56,244				
Benefits	15,713				
Premium Pay					
Other					
Total Personal Services					71,957
Travel					2,400
Contractual					5,700
Commodities					4,500
Equipment		6,500			
Other					
Total Cost		91,057			
Funding Source for Total Cost					
Federal Receipts	1002				
G. F. Match	1003				
General Fund	1004	91,057			
GF Program Receipts	1005				
Other					

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Position Title Associate Attorney II		No. of Positions 1	Range/Step 19A	Barg. Unit PX	
Time Status PFT	Staff Months 12	Location Juneau		Election District 4	
Type of Expenditure		Justification			
Amount		<p>This position is needed to assist the two Attorney IV's, who will handle both the annual review of new regulations and the four-year review of all existing regulations in the state's administrative code. The position will handle executive branch review of routine, less complex regulations, independently, and assist the two attorneys with the review of more complex regulations. Use of this advanced level paraprofessional is appropriate for this work and far more cost efficient than adding a third attorney for the review process.</p>			
1	2				3
Salary	40,236				
Benefits	12,633				
Premium Pay					
Other					
Total Personal Services					52,869
Travel					-0-
Contractual					5,700
Commodities					4,500
Equipment		6,500			
Other					
Total Cost		69,569			
Funding Source for Total Cost					
Federal Receipts	1002				
G. F. Match	1003				
General Fund	1004	69,569			
GF Program Receipts	1005				
Other					

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Position Title Legal Secretary I		No. of Positions 1	Range/Step 10B	Barg. Unit GGU
Time Status PFT	Staff Months 12	Location Juneau		Election District 4
Justification				
This position is needed to provide legal secretarial services to the two attorneys and the paraprofessional associate attorney who will be needed to represent and assist agencies in the annual and four-year multi-part review and repeal of nearly all of the state's administrative code. This position will handle typing, filing and communications on behalf of the attorneys and paraprofessionals, including final bill drafts and regulations drafts.				
Type of Expenditure		Amount		
1	2	3		
Salary	22,716			
Benefits	8,749			
Premium Pay				
Other				
Total Personal Services		31,465		
Travel		-0-		
Contractual		4,200		
Commodities		3,300		
Equipment		8,500		
Other				
Total Cost		47,465		
Funding Source for Total Cost				
Federal Receipts	1002			
G. F. Match	1003			
General Fund	1004	47,465		
GF Program Receipts	1005			
Other				

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STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

March 18, 1988

The Honorable Arliss Sturgulewski, Chair
Senate Community and Regional Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: Proposed committee substitute
for SB 166 (administrative
regulations, adjudications,
etc.)

Dear Senator Sturgulewski:

Your assistant, McKie Campbell, has asked, on your behalf, for Department of Law comments on this proposed committee substitute. The version I will be commenting on is a 14-page one that we received March 8. McKie has also furnished us copies of Senator Bettye Fahrenkamp's two memos of that date to you.

I have not discussed this bill, either the original version or this proposed committee substitute, with the governor, and my comments should not necessarily be construed as the Administration's position. However, as McKie and I have discussed, I expect to furnish you with position papers and fiscal notes from this department and some other state agencies. It is possible that you have already received some directly from other agencies. We have not requested a fiscal note from the Legislative Affairs Agency, but the additional costs to it as a result of this bill (especially secs. 6 and 8) would be substantial, too.

As you know, the proposed committee substitute would make a number of profound changes in the way the state deals with administrative regulations and administrative adjudications and appeals. Before supporting any change in the law, especially such fundamental ones as proposed in this bill, we would like to be able to identify the problem in the current law and would like to feel assured that the proposal is a good solution to that problem. In other words, what is broken that needs fixing, and is the repair worth the cost? Is the solution tailored to a particular problem, or is it a wholesale revamping of the procedures and policies enacted by prior legislatures? If the latter, why?

Notwithstanding generalized complaints about there being "too many" regulations, and notwithstanding possible legislative disagreement with the policy expressed in a particular regulation or adjudication, I am not aware of any particular problem

stemming from the absence of the proposals in this bill. In addition, it is not at all clear that there will be any public benefit derived from the changes that will cost a great deal to implement. I cannot support this bill.

Here are some quick section-by-section comments:

Section 1:

The current AS 09.60.010 provides for the Alaska Supreme Court to adopt rules regarding the award of costs and attorney fees to the prevailing party in a civil action. The court has implemented this provision in Rule 82, Rules of Civil Procedure, and Rule 508, Rules of Appellate Procedure. The only change made by sec. 1 of the bill is to provide that the court's authority is limited by the provisions that the bill's sec. 2 would add. This amendment would stand or fall with the provisions of sec. 2.

Section 2:

As described in one of Senator Fahrenkamp's March 8, 1988 memos to you, the proposed subsec. (b) for AS 09.60.010 directs a court to award to a prevailing party, other than the state, the fees and expenses incurred, unless the state agency's position "was substantially justified or special circumstances would make the award unjust." This applies only to the judicial review of the agency's adjudication.

Although this subsection provides certain limits on the amount of fees that may be awarded, and, under the language quoted in the preceding paragraph, an important area for the exercise of judicial discretion, it has a major, fundamental defect. A state agency is not given a comparable opportunity for an award of costs and attorney fees.

As Senator Fahrenkamp's other March 8 memo to you indicates, this provision is intended to put small businesses on an equal footing with large businesses. The opportunity to recoup the costs of an appeal is supposed to encourage a small business to take an appeal from an administrative adjudication in the same situation in which a better-financed large business might do so. However, it presents two major problems: (1) it encourages protracted litigation, with increased

attorney and other costs to the state, because the challenger has "nothing to lose" since the state agency will not be able to recoup its costs from the challenger if the state agency wins in court; and (2) by providing this unique benefit to someone challenging an agency's adjudication in order to promote his or her own interest, the general interests of the public will be subordinated to a private interest. Public money will pay the bill. The basic concept is one-sided and unfair.

The proposed subsec. (c) sets the time limit and certain requirements for seeking an award of costs and attorney fees. Among the requirements is one that specifies that the application for the award must allege that the agency's position was not "substantially justified." More than just an allegation should be required. Obviously, the party seeking the award will allege whatever seems to be required. However, normally in submitting a bill of costs it is necessary to present a justification for what is sought. In this context, it would be appropriate to require the applicant to submit evidence (if any) that the agency's position was not substantially justified.

Subsection (d) is a worthwhile provision, given this whole arrangement, that allows the judge some latitude, based on the conduct of the party applying for the award.

Subsection (e) merely provides for the supreme court to set procedures.

Subsection (f) defines certain terms. The definition of "agency" is a bit troublesome in that it includes a reference to the agency's "failure to act." Under the Alaska Administrative Procedure Act, the failure to act is not considered an adjudication, and, as provided in the proposed subsec. (b), it is adjudications that are the subject of all of the proposed subsections. An agency might deny an application or refuse to issue a permit, for example, but that decision is not a "failure to act." It is not appropriate to include, by way of the definition, agency conduct that is not covered by the basic substantive provision of the statute.

Subsection (f) also defines "fees and other

expenses," a term that is consistently used in the proposed material. However, the existing statute (AS 09.60.010, which would become subsec. (a)) uses the more traditional "costs" and "attorney fees," and it might be better to use consistent terminology throughout the statute and the court rules. The definition of "final judgment" is also troublesome in that it refers to such a judgment not being appealable. However, normally one cannot appeal until one has a final judgment. See Rule 202, Rules of Appellate Procedure. The definition of "position of the agency" presents the same problem as the definition of "agency," discussed above.

Section 3:

This section merely adds to the powers of the Administrative Regulation Review Committee the power to petition the court for permission to appear as amicus curiae, or "friend of the court," in certain actions. The effect of this is to cause the state agency and its attorneys to respond to whatever action might be taken or motions and briefs that might be filed by the amicus. While providing for the Administrative Regulation Review Committee to appear as an amicus is not necessarily a bad idea, there will be very definite and substantial costs associated with it. The committee will, of course, incur its own costs and attorney fees, and the state agency's response will require additional attorney fees and costs. It is impossible to estimate with precision what the grand total will be.

Section 4:

This section amends AS 44.62.030 in two ways, one that appears to be merely a change in language style, and one that is a profound but confusing substantive change. I don't think that the change from "no regulation adopted is valid or effective" to read "a regulation adopted is void" does anything beyond stating in a positive rather than negative way the effect of a regulation's failure to meet that statute's standard for validity.

However, the proposed new last sentence is not a good idea. It prohibits treating a regulation as within an agency's statutory authority solely on the grounds that it is not contrary to a statute. First of all, existing AS 44.62.020 requires that the regulation

be "within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." And existing AS 44.62.030 (the first sentence of the proposed amended version) requires that the regulation be "reasonably necessary to carry out the purpose of the statute" in addition to being consistent with it. Thus, there are at least four statutory criteria that every regulation must meet. No regulation will be found valid "solely" because there is no contrary statute.

Secondly, in that the existence of statutory authority is one of the four basic criteria, the absence of a statute contrary to the regulation is relevant to the consistency criterion, not to the authority one. The question of the absence of a contrary statute simply will not arise in connection with the search for statutory authority. The proposed sentence achieves nothing, but causes confusion among the four basic criteria. One wonders what the specific situation giving rise to such a provision as proposed in sec. 4 could have been.

Section 5:

This section of the bill would add a new statute (AS 44.62.177) to require that each agency publish twice a year a "regulatory flexibility agenda." The need for this is certainly questionable, especially since an agency is not bound by it (see the proposed AS 44.62.177(b)). Under the current AS 44.62.190, an agency is required to give a broad distribution (and, for legislators to some extent, duplicate and triplicate distribution) of the notice of proposed regulation adoption, at least 30 days before the adoption. It is not clear that, in addition to the currently required saturation notice, this regulatory agenda would provide anything more than a time-consuming irritant to each regulation-adopting agency.

Moreover, the language of the provision itself presents problems. For example, there is no definition of the "significant economic effect on" the "substantial number" of small entities that this agenda is suppose to cover. And, when the statute speaks of the effect that the proposed regulation is "likely to have," it does not say when. Is the statute referring to an immediate effect or some effect spread over a

substantial period of time? In subsec. (c), we are given a definition of "small entity," with a cross-reference to AS 44.62.295, proposed in sec. 6 of this bill. That statute's definition, in turn, refers to two other definitions ("small business" and "small municipality") that specify numbers that might not be appropriate for the Alaska context.

Section 6:

Section 6 proposes addition of a new statute (AS 44.62.295) that would provide for the automatic expiration of new regulations. (Cf. sec. 9 of the bill, regarding existing regulations.) This section merits vigorous opposition.

The proposed statute's caption, incidentally, refers only to the expiration of regulations. However, buried in the statute are numerous provisions on an economic analysis. This other feature should be reflected in the caption.

First of all, subsec. (a) imposes on the legislature itself (even with its "120-day" session limit), as well as on the various executive-branch agencies, another sunset burden. Under subsec. (a), if a regulation is adopted or repealed between October 1 and September 30, that adoption or repeal is "repealed" on "July 1 of the following year unless the legislature postpones its repeal by law." That means that important programs, which everybody agrees are essential to some aspect of the well-being of the people or resources of the state, could automatically and unintentionally come to a halt, which they would do in the absence of essential regulations.

Consider for a moment just the quantity of regulations involved. For the past 11 fiscal years, the Department of Law has averaged 155 regulations project assignments per year (with a high of 181 in 1978 and a low of 127 in 1979 and 1986), and we are up to 115 already this fiscal year. Each of those projects could range from a one-line repealer to an 89-page, single-space comprehensive revision of the "aid to families with dependant children" regulations.

Next, consider the specific wording of subsec. (a). Under the current provisions of the Alaska

Administrative Procedure Act, a regulation (including an order of repeal) does not take effect when it is adopted (except for "emergency regulations"). It takes effect 30 days after filing by the lieutenant governor, and the lieutenant governor cannot file a regulation until the Attorney General's Office has given it a legal review and approved it. Sometimes there is a several-month gap between the adoption and the effective date. This proposed statute probably should not use the word "adopted."

Also, one wonders what the intent was with the language about October 1 and September 30. For example, a regulation adopted on December 31 of some year would be "repealed" six months and a day later, whereas a regulation adopted on January 1 (ignoring, for the moment, that that would be a holiday) would not be repealed until one year and six months later. Does that make sense?

And, if a regulation is repealed, say, on November 15, and the legislature does not postpone the repeal of that repeal, the repeal will be repealed the following July 1. Does that mean that the original regulation springs back into effect (which would be contrary to AS 01.10.100(c)'s provision regarding the repeal of statutes)? This question is not answered by subsec. (g), which speaks only of the effect of passage of a bill repealing a regulation.

If the legislature fails to postpone the automatic repeal of a regulation, what is the agency to do? May it readopt that regulation? May it adopt a different regulation on the same point? How is it to know?

This is a very strange subsection.

The proposed AS 44.62.295(b) requires agencies to submit their adopted regulations to the legal services division of the Legislative Affairs Agency (described in the bill as the "legislative legal services division"). (Incidentally, so far as I know, there is no other statutory reference to the divisions of the Legislative Affairs Agency, and, to maintain administrative flexibility, it is probably a good idea to delete that reference here.) This subsection also imposes upon that division the duties of reviewing each regulation (1) to determine whether it is within the adopting

agency's regulation-making (which ought to be "regulation-adopting" to be consistent with the Administrative Procedure Act) authority, and whether it is authorized by law, and (2) to analyze the probable economic effect of the proposed action on small businesses and small municipalities.

Agencies are required to submit their regulations within 20 days after they are submitted to the lieutenant governor, but no deadline is imposed upon the Legislative Affairs Agency for its review.

To the extent of its review to determine regulation-adopting authority, the legal services division would be duplicating the work of the Department of Law under existing AS 44.62.060. One wonders about the necessity of that duplication. It is potentially troublesome in that it could inspire a private litigant, for his or her own personal gain, to pit one part of the government against another.

To the extent that subsec. (b) requires the legal services division to analyze the probable economic effect of a regulation, I see no problem with the basic idea. Certainly, "legislative oversight of the administration of statutes" is a valuable part of our three-branch system of government. (Incidentally, when referring to the "probable economic effect," the bill still refers to the "proposed action"; however, under this subsection the regulation is not submitted to the legal services division until "within 20 days after" it is submitted to the lieutenant governor. I.e., it is no longer a "proposed" action, and this wording should be changed.)

I cannot, of course, speak for the Legislative Affairs Agency, but I would think that the duties imposed on it by this bill are not realistic. Although most executive-branch agencies would rather have the Legislative Affairs Agency staff provide this economic analysis than have to do it themselves, many of the terms in the proposed statute are vague, the accuracy of the analysis is going to be questionable, and the value of the effort might not be worth the cost.

The proposed subsec. (c), setting out the requirements for the analysis, includes such considerations as "the types and numbers of small entities that will

probably be affected by the regulation." "Small entity" is defined in subsec. (k) in a way that does not look appropriate for the Alaska context. For example, a "small municipality," one of the kinds of small entity, is a municipality with 10,000 or fewer persons. That would cover just about every one except Anchorage, Fairbanks, and Juneau. In addition, how is the Legislative Affairs Agency staff to assess the probability? And what is the time context for determining that probability? I.e., "affect" when? Then, para. 2 requires consideration of the "probable economic effect" of a regulation on the probably affected entities. Some effects will be obvious, but many will depend upon the way in which the entity attempts to satisfy a requirement and whether the entity is one that is efficiently run or not efficiently run. How is the Legislative Affairs Agency going to determine that? The division's staff's review of the reasons for a regulation, the identification of alternatives, and the identification of possible duplicative or conflicting provisions might be helpful to the agencies involved. ("(a)" on page 6, line 10, should read "(b).")

Subsection (d) simply provides for the legal services division to give a regulation a clean bill of health.

Subsection (e) sensibly, given this whole arrangement, allows an agency to consider "a series of closely related regulations" (e.g., an entire chapter of new sections on a subject, along with some relevant, incidental amendments to old sections) as one regulation for the purposes of this statute.

Subsection (f) requires the Administrative Regulation Review Committee to report to the legislature. The report is to include any "proposed legislation." The assumption clearly appears to be that the legislation will be of the "disapproval" sort -- not the sort that will provide guidance and policy direction, through substantive amendments that set limitations, resolve ambiguities, and fill gaps in existing legislation. As has been said so many times before, this purely negative kind of legislation is of little value, either to the people of this state generally or to the agency involved in trying to execute a particular statutory program.

In subsec. (g), the reference to the "remaining portion" of a regulation, a portion of which is disapproved, retaining "its character as an administrative regulation" is not clear. What else would it be? Is the intent simply to say that the portion of a regulation that is not disapproved is still valid?

In addition, the last sentence of subsec. (g) poses two problems: (1) its reference to "repealing a regulation or disapproving an order" is not consistent with subsec. (a), under which both regulations and orders of repeal are "repealed on July 1 of the following year." How do these two subsections relate to each other? Simply as two independent ways of getting rid of a regulation? Should the terminology in both provisions be made consistent? (2) Being a statement of a negative condition, perhaps it doesn't matter much, but it is not always going to be clear what a "predecessor regulation" is. If it is in the same location and on the same subject, the answer is easy; but, the more remote the location and the less directly on point the other provision is, the more difficult is the answer. This could cause confusion when an agency is trying to salvage its program with other regulations.

I don't know what subsec. (h) means. The reference to publication in the Alaska Administrative Register makes one wonder whether the Alaska Administrative Code was intended, and, if so, why any such reference is necessary. Clearly, if an agency whose regulations are covered by the Administrative Procedure Act adopts regulations, they will end up being published in the Alaska Administrative Code. But, even more importantly, if the "action taken by the legislature" is merely a disapproval, how is the agency going to know how to "revise its regulations to conform" to that legislative action? This is one of the fundamental problems with this whole disapproval idea. To the extent that an executive-branch agency is prevented from performing its constitutional responsibility to execute a statutory program -- something that administrative regulations provide an essential tool for -- such an arrangement raises serious separation-of-powers constitutional problems.

Subsection (i) says that an agency "may not readopt a regulation or order of repeal that was

disapproved under this section." Does that include a regulation or order of appeal that was itself "repealed" automatically under subsec. (a)? Does "readopt" mean verbatim? In other words, if an agency makes a minor change in a regulation that has been disapproved under this section, may it then adopt the modified version as a new regulation under its existing statutory authority? Again, one can see that the internal relationship of this statute's provisions puts each agency in a quandary as to what it may or may not do. This would be very difficult to implement.

Subsection (j) provides a little exemption for certain agency "rules" or "general statements of policy." An exemption is a good idea, but it might be better if this exemption were to conform to the definition of "regulation" in existing AS 44.62.640(a)(3).

Subsection (k) is the definition section, to which I have referred a couple of times above. These definitions should be analyzed closely. I am not in a position to determine whether it is realistic to define a "small business" as one with annual gross sales of \$2,000,000 or less. To me, that seems much too high.

Section 7:

Section 7 proposes adding a new statute, AS 44.62.515, that is a counterpart to the new subsections added by sec. 2 of the bill. Whereas that section deals with costs and attorney fees on appeal from an agency's administrative adjudication, this section deals with the costs and attorney fees incurred in connection with that adjudication itself.

Except for the last sentence of subsec. (a), all of subsecs. (d), (f), (g), and (h), and some minor wording variations, this section parallels sec. 2 of this bill. My comments, above, regarding that section also apply to this section. In addition, the one-sided unfairness of this whole arrangement is further emphasized by subsec. (h), which prohibits the court from modifying a determination of fees and costs at the agency level unless that initial determination was unsupported by substantial evidence. The state agency still is not eligible to receive any costs or attorney fees when its position is upheld by the hearing officer.

and there is evidence that the opponent had no legitimate basis for his or her side of the case. (I am certainly not suggesting that, in routine cases in which an agency's position prevails and an application for some privilege or whatever is denied, the applicant should be forced to pay the agency's costs. But this bill contains no provision for an agency to be awarded costs in recognition of unusual circumstances.)

Section 8:

Section 8, a temporary law section, requires the Legislative Affairs Agency's legal services division to review all existing regulations and report back to the Administrative Regulation Review Committee. The initial deadline, subject to extension, is January 1, 1993. It is curious that, under sec. 9, the automatic repeal of existing regulations begins in 1989, with the cycle completed in 1992. Is the automatic repeal to operate independently of the Legislative Affairs Agency's review?

This section states the purposes of the review and requires certain factors to be considered in conducting a review. Having a legislative review is a good idea. That's what the Administrative Regulation Review Committee was created to provide. But if the review is only going to result in recommendations for disapprovals then the function will be largely useless and the public and the agencies ill served.

Section 9:

This section sets out a schedule for the automatic repeal of virtually all existing state administrative regulations. It is a wholesale "sunset" provision. It is not a good idea.

Incidentally, the period on line 2 of page 12 should be a colon, and one wonders why the termination date on line 4, page 12, is June 30, whereas the termination date on line 23 and the corresponding dates on the next page are July 1.

While review and analysis of regulations are worthwhile, the automatic termination of regulations is not. As mentioned earlier, administrative regulations merely constitute one of the tools an agency uses in

performing its constitutional and statutory responsibilities. The Alaska Supreme Court, in a growing line of cases, has made clear to agencies just how essential regulations are. They provide the rules of the game, and help avoid arbitrary agency action.

Under the Alaska Administrative Procedure Act, regulations are adopted through a democratic process. As mentioned above, there is saturation public notice and there is the opportunity for public comment. That includes comment by legislators. Many legislators have told me that they do not read the public notices they receive. Oddly, that is said not in the way of a confession, but as an assertion as to something that is wrong with the entire system. I cannot agree that that is a defect in the system. If there is the opportunity for heading off problems or ascertaining legislative intent during the adoption process, that's when it should be done, not at some later, arbitrary termination date.

A "sunset" date can result in unintended termination of a regulation. The effect of that can be the termination of a program. And that just might not be a program that everybody hates. It might be one that everybody loves and agrees is essential to the people or resources of the state.

Moreover, the costs of preparing for a sunset review of an agency's entire set of regulations will be substantial. Although most agencies work regularly with their regulations, because they use them in their day-to-day administration of their functions, a comprehensive review and preparation of material to avoid the termination and to persuade the legislature to extend the date requires a significant commitment of time and money. I will leave to the individual agencies the presentation of specific examples to illustrate just how undesirable such a system would be. If the extension is to be automatic, and the legislature and agencies are going to give the procedure a pro forma approach, then there is no point in having this provision. If the extension is only to be made after a thorough analysis, then the burden will be as I have mentioned.

It must be emphasized that when a program is shut down, it is not only the administrative agency that is affected, but also the members of the public who have

been relying on the affected regulations and program. Curiously, the bill does not provide for public participation when these regulations automatically terminate. Under the Alaska Administrative Procedure Act, as I have indicated, when a regulation is adopted or repealed, public notice and opportunity for making comment are required.

It must be remembered that regulations are not all "bad" or burdensome. Although many of them impose obligations on individuals, there are usually other individuals who benefit from those provisions. Many regulations govern the relationship between competing interests and between different segments of the public. And, of course, many regulations specify the procedures for getting some benefit from the state. The automatic and silent expiration of such regulations cannot be said to be for the public good.

Will regulations that have survived termination under proposed AS 44.62.295 (in sec. 6 of this bill) be immediately subject to termination again under this section?

I should also mention that, while the Department of Law has relatively few regulations of its own, it participates with all other agencies in the adoption of their regulations. This requires another huge commitment of staff time. Additional Department of Law staff would be required. There is no way around it.

Sections 10, 11, 13, and 14:

These sections contain various applicability and effective-date provisions. The effective-date sections (13 and 14) do not deal with secs. 6 and 11 (the latter of which, itself, refers to sec. 6), so the 90-day effective-date provision of art. II, sec. 18, of the Alaska Constitution will apply. Section 6, you will recall, is the one proposing the new statute on the expiration of regulations and the economic analysis of regulations.

Section 12:

Section 12 sets out the statement of changes in a court rule, as required by Rule 39(e), Uniform Rules of the Alaska State Legislature. However, contrary to the

explanation given at page 5 of one of Senator Fahrenkamp's March 8 memos to you, this section of the bill does not give "the reason" for changing the court rule. Although this approach to changing a court rule has been used many times before, it would be better to actually amend the appropriate rule (or rules) itself -- a method that has also been used many times. Legislative change of a court rule is authorized by art. IV, sec. 15, of the Alaska Constitution, with a two-thirds vote of each house of the legislature. Express amendment of the appropriate rule itself would avoid any uncertainty as to the relationship between the rule and the statute that merely has the "effect of changing" the appropriate rule.

CONCLUSION


All in all, this bill raises numerous questions and issues -- from relatively minor, technical ones to fundamental, constitutional ones. It creates substantial burdens on government agencies -- both legislative and executive -- while not providing any readily discernible public benefit. Its cost would be significant.

I would be happy to discuss each provision of the bill with you at greater length, if you wish. Despite the length of this letter, the comments above do not provide a comprehensive review of all of the issues presented by this bill.

Yours truly,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By:


Arthur H. Peterson
Assistant Attorney General
and Regulations Attorney

AHP:dml:cb

cc: Hon. Bettie Fahrenkamp
Alaska State Senate

Bob Evans, Legislative Liaison
Office of the Governor

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ARLISS STURGULEWSKI, Chairman
TIM KELLY, Vice Chairman
RICK HALFORD
MIKE SZYMANSKI
FRED ZHAROFF



P. O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4989

Senate Community and Regional Affairs Committee

March 8, 1988

TO: Senate Community and Regional Affairs Committee Members

FROM: Senate C&RA Staff *NEH*

RE: CS for SB 16. - "An Act relating to administrative regulations, adjudications, and appeals; amending Alaska Statute Rule of Appellate Procedure 508; and providing for an effective date."

This bill is an extensive rewrite of the way the state handles regulations. It is not expected that this bill will pass out today. Instead, today's meeting is intended to give the committee a first look at the bill and provide comments to the sponsor.

Senator Fahrenkamp will be at the meeting to explain the bill. Art Peterson, from the Department Law, is taking the lead on this bill for the administration. He will also be at the meeting and will comment on the bill.

Enclosed in this packet is a proposed CS drafted by the sponsor and a cover memo. A sectional analysis by the sponsor will be available at the meeting.

Because the CS was delivered today, there are no formal position papers or fiscal notes prepared yet but these will be available at the next hearing on this bill.

Alaska State Legislature

SENATOR BETTYE FAHRENKAMP
CHAIRMAN, LEGISLATIVE COUNCIL
CHAIRMAN, OIL AND GAS COMMITTEE
515 7TH AVENUE, SUITE 130
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Senate

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M E M O R A N D U M

To: Senator Arliss Sturgulewski
Chairman, Senate Community & Regional Affairs Committee

From: Senator *Bf* Bettye Fahrenkamp

Date: March 8, 1988

Subject: Senate Bill 166

"An Act relating to administrative regulations, adjudications, and appeals; amending Alaska Court Rule of Appellate Procedure 508; EFD."

The committee substitute for SB 166 addresses three major areas:

- 1) Provides for legislative oversight and annulment of regulations, based on a law passed by the Colorado legislature;
- 2) Incorporates provisions of the Small Business Administration's "Equal Access to Justice" act by requiring that a party who successfully challenges a state regulation or its interpretation will receive costs and attorney's fees;
- 3) Sets up what the SBA refers to as "regulatory flexibility", by requiring that LAA Legal Services review all regulations for their economic impact on small businesses and make a report to the Administrative Regulation Review Committee.

Regulatory Oversight

Legislative oversight of regulations is accomplished by charging Legal Services with the review of all regulations adopted by the state during the course of a year, examining the regulations to determine whether they are within the adopting agency's regulation-making authority and whether they are authorized by law. At the same time, Legal Services will analyze the probable economic effect of the proposed action on small businesses and small municipalities. Legal Services then reports its findings to the Administrative Regulation Review Committee.

The committee then reviews the findings and reports the committee's recommendations and proposed legislation to the legislature. The bill shall indicate what portion of a regulation or order of repeal is disapproved. A significant change to current practice is that any regulation adopted during the course of the year is repealed on July 1, unless the legislature postpones its repeal by law.

Equal Access to Justice (EAJ)

The Small Business Administration has recommended adoption of an EAJ provision in order to put small businesses on an equal footing with large businesses in the matter of challenging regulations or their interpretation.

On a federal level, they have found that small businesses are unlikely to challenge the government in such matters because of limited financial resources with which to pay attorneys or to tie up management's time. Larger businesses tend to have staff attorneys or others to pursue unfair interpretations of laws or regulations. While a small business may sometimes be awarded its costs and attorney's fees should a challenge be settled by a court, the SBA found that often the federal government would wait until just before the court was due to settle a disagreement and would then correct its course of action in favor of the small business. Because the action was changed before the actual final hearing, small businesses were not being reimbursed for the costs, thus reducing the likelihood that a small business would bring a challenge in the first place.

According to the bill drafter, writing the EAJ clause to protect just small businesses "may present equal protection problems under the Alaska Constitution because it may unconstitutionally discriminate between classes of persons." Therefore, the version of the EAJ in this bill provides that any entity--be it a small business, large business, or an individual--that successfully challenges a regulation will be awarded its costs and attorney's fees, unless there is a substantiated reason not to make such an award.

Regulatory Flexibility

Again based on recommendations by the SBA, incorporated into this bill is a provision that all regulations will be reviewed for their economic impact on small businesses. If Legal Services determines that a regulation or order will have a significant economic impact on small businesses, it will elaborate on the effect and identify whether there are less costly or intrusive means of achieving the purpose of the regulation or order.

In addition, in order to allow small businesses time to respond to proposed regulations, the bill requires that each agency shall publish in the Alaska Administrative Journal a regulatory flexibility agenda which 1) describes the subject area of a regulation that the agency expects to propose that is likely to have a significant economic impact on small entities, and 2) summarizes the nature of the proposed regulation and an approximate schedule for completing action on the regulation.

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

March 7, 1988

The Honorable Arliss Sturgulewski, Chair
Senate Community and Regional Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: Proposed sponsor substitute
for SB 166 (administrative
regulations)

Dear Senator Sturgulewski:

McKie Campbell, of your staff, very kindly dropped off at my office this morning a copy of a January 18, 1988 memorandum from Legislative Counsel Theresa Bannister to Senator Betty Fahrenkamp covering a copy of a draft bill by Senator Fahrenkamp. McKie mentioned that it is his understanding that the draft bill is to be prepared as a sponsor substitute for Senator Fahrenkamp's SB 166. McKie also mentioned that your Community and Regional Affairs Committee would be taking up this bill tomorrow. That was the first that I had heard of this proposed substitute bill and of your committee's consideration of it.

McKie mentioned that the committee would be interested in comments from my office on the proposed 16-page substitute bill. However, with such short notice, I could not do it justice. I request that you hold the bill over, and I will attempt to give you my comments as soon as possible.

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By:


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Assistant Attorney General

AHP:cb

cc: Hon. Betty Fahrenkamp
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Bob Evans, Legislative Liaison
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March 8, 1988

TO: Senate Community and Regional Affairs Committee Members

FROM: Senate C&RA Staff *NEK*

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Senate

MEMORANDUM

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Chairman, Senate Community & Regional Affairs Committee

From: Senator Bettye Fahrenkamp

Date: March 8, 1988

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ATTORNEY GENERAL

By:


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cc: Hon. Betty Fahrenkamp
Alaska State Senate

Bob Evans, Legislative Liaison
Office of the Governor

1 IN THE SENATE

2 CS FOR SENATE BILL NO. 166 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to administrative regulations,
7 adjudications, and appeals; amending Alaska Court
8 Rule of Appellate Procedure 508; and providing for an
9 effective date."

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

11 * Section 1. AS 09.60.010 is amended to read:

12 Sec. 09.60.010. COSTS AND ATTORNEY FEES ALLOWED PREVAILING
13 PARTY. Except as otherwise provided by this section, the [THE] su-
14 preme court shall determine by rule or order the costs, if any, that
15 may be allowed a prevailing party in a civil action. Unless specif-
16 ically authorized by statute or by agreement between the parties,
17 attorney fees may not be awarded to a party in a civil action for
18 personal injury, death or property damage related to or arising out of
19 fault, as defined in AS 09.17.900, unless the civil action is con-
20 tested without trial, or fully contested as determined by the court.

21 * Sec. 2. AS 09.60.010 is amended by adding new subsections to read:

22 (b) A court that reviews an administrative adjudication shall
23 award to the prevailing party other than the state agency the fees and
24 other expenses incurred by the party in connection with the judicial
25 review unless the court finds that the position of the state agency
26 was substantially justified or that special circumstances make the
27 award unjust. The amount of fees awarded under this subsection shall
28 be based on the prevailing market rates for the kind and quality of
29 the services furnished, except that

1 (1) an expert witness may not be compensated at a rate that
2 exceeds the highest rate of compensation that is paid by the state
3 agency for expert witnesses; and

4 (2) attorney or agent fees in excess of \$75 an hour may not
5 be awarded unless the state agency determines by regulation that an
6 increase in the cost of living or a special factor, including the
7 limited availability of qualified attorneys or agents for the adjudi-
8 cation involved, justifies a higher fee.

9 (c) A party seeking an award of fees and other expenses under
10 (b) of this section shall submit an application for the fees and other
11 expenses to the court within 30 days after the final judgment in the
12 judicial review. The application must

13 (1) show that the party is a prevailing party and is eligi-
14 ble to receive an award under this section;

15 (2) state the amount sought, including an itemized state-
16 ment from each attorney, agent, and expert witness representing or
17 appearing on behalf of the party stating the actual time expended and
18 the rate at which the fees and other expenses were computed; and

19 (3) allege that the position of the agency was not substan-
20 tially justified.

21 (d) The court may reduce or deny an award authorized under (b)
22 of this section to the extent that during the course of the judicial
23 review the party applying for the award engaged in conduct that unduly
24 and unreasonably protracted the final resolution of the review.

25 (e) The supreme court shall determine by rule or order the
26 procedures for the submission and consideration of applications for an
27 award of fees and other expenses under (b) of this section.

28 (f) In (b) - (f) of this section

29 (1) "administrative adjudication" means an adjudication

1 under AS 44.62.330 - 44.62.630;

2 (2) "agency" means the agency whose action or failure to
3 act is the subject of the judicial review that is covered by (b) of
4 this section;

5 (3) "fees and other expenses" includes the reasonable

6 (A) expenses of expert witnesses;

7 (B) cost of a study, analysis, engineering report,
8 test, or project that is found by the agency to be necessary for
9 the preparation of the party's case; and

10 (C) attorney or agent fees;

11 (4) "final judgment" means a judgment that is final and not
12 appealable, including an order of settlement;

13 (5) "position of the agency" means, in addition to the
14 position taken by the agency in the judicial review, the action or
15 failure of the agency to act that is the basis for the administrative
16 adjudication.

17 * Sec. 3. AS 24.20.460 is amended to read:

18 Sec. 24.20.460. POWERS. The Administrative Regulation Review
19 Committee has the following powers:

20 (1) to organize and adopt rules for the conduct of its
21 business;

22 (2) to hold public hearings;

23 (3) to require all state officials and agencies of state
24 government to give full cooperation to the committee or its staff in
25 assembling and furnishing requested information;

26 (4) to examine all administrative regulations to determine
27 if they properly implement legislative intent;

28 (5) to make recommendations for legislative annulment of
29 administrative regulations under AS 44.62.320;

1 (6) to prepare and distribute reports, memoranda, or other
2 materials;

3 (7) to promote needed revision or repeal of regulations
4 that have been adopted by state departments and agencies and, when the
5 committee determines a regulation should be repealed or amended, to
6 introduce a bill that would enact a statute that would supersede or
7 nullify the regulation;

8 (8) to investigate findings that are transmitted to the
9 committee by a standing committee in accordance with AS 24.05.182 and,
10 as appropriate, to either introduce a bill annulling the regulation or
11 exercise the committee's power to suspend the effectiveness of the
12 regulation in accordance with AS 24.20.445;

13 (9) to petition the court for permission to appear as
14 amicus curiae in an action brought under AS 44.62.300 to address the
15 effect of the regulation on small entities.

16 * Sec. 4. AS 44.62.030 is amended to read:

17 Sec. 44.62.030. CONSISTENCY BETWEEN REGULATION AND STATUTE. If,
18 by express or implied terms of a statute, a state agency has authority
19 to adopt regulations to implement, interpret, make specific or other-
20 wise carry out the provisions of the statute, a [NO] regulation adopt-
21 ed is void [VALID OR EFFECTIVE] unless consistent with the statute and
22 reasonably necessary to carry out the purpose of the statute. A
23 regulation may not be considered to be within the statutory authority
24 and jurisdiction of an agency solely because the regulation is not
25 contrary to the specific provisions of a statute.

26 * Sec. 5. AS 44.62 is amended by adding a new section to article 3 to
27 read:

28 Sec. 44.62.177. REGULATORY AGENDA. (a) During the months of
29 January and July of each year, each agency shall publish in the Alaska

Administrative Journal a regulatory flexibility agenda that

(1) describes briefly the subject area of a regulation that the agency expects to propose or adopt that is likely to have a significant economic effect on a substantial number of small entities;

(2) summarizes the nature of a proposed regulation under each subject area listed under (1) of this subsection, the objectives and legal basis for the proposed regulation, and an approximate schedule for completing action on each regulation for which the agency has issued a notice of proposed regulation-making; and

(3) contains the name and telephone number of an agency official knowledgeable about the items listed in (1) of this subsection.

(b) An agency may consider or act on a matter not included in a regulatory flexibility agenda. An agency may decline to consider or act on a matter listed in the agenda. The agency shall state why it is declining to act on the matter. An agency may not refuse to consider or adopt a regulation solely because the proposed regulation was not included in the agency's regulatory agenda.

(c) In this section, "small entity" has the meaning given in AS 44.62.295.

* Sec. 6. AS 44.62 is amended by adding a new section to read:

ARTICLE 5. LEGISLATIVE REVIEW.

Sec. 44.62.295. EXPIRATION OF REGULATIONS. (a) A regulation or order of repeal adopted between October 1 and September 30 is repealed on July 1 of the following year unless the legislature postpones its repeal by law.

(b) Within 20 days after submitting a regulation or order of repeal to the lieutenant governor under AS 44.62.040, the adopting agency shall submit the regulation or order to the legislative legal

1 services division in the form and manner prescribed by the Administra-
2 tive Regulation Review Committee. A regulation or order that is not
3 submitted to the division within the 20 days is void. The staff of
4 the division shall review the regulation or order to determine whether
5 it is within the adopting agency's regulation-making authority and
6 whether it is authorized by law. The staff of the division shall also
7 analyze the probable economic effect of the proposed action on small
8 businesses and small municipalities. The staff shall report to the
9 committee.

10 (c) The economic analysis required by (a) of this section must

11 (1) consider the types and numbers of small entities that
12 will probably be affected by the regulation or order, including the
13 types that will bear the costs of the regulation or order and those
14 that will benefit from it;

15 (2) consider the probable economic effect of the regulation
16 or order, both as to kind and amount, upon the affected entities;

17 (3) review the reasons for the regulation or order in light
18 of the probable economic effect on small entities;

19 (4) identify whether there are less costly or less intru-
20 sive means of achieving the purpose of the regulation or order;

21 (5) identify, to the extent practicable, relevant regula-
22 tions that may duplicate, overlap, or conflict with the regulation or
23 order.

24 (d) If the legislative legal services division determines that a
25 regulation or order will not have a significant economic effect on a
26 substantial number of small entities, the division shall include in
27 its report under (b) of this section a succinct statement explaining
28 the reasons for the determination.

29 (e) An agency may consider a series of closely related

1 regulations or orders as one regulation or order for the purposes of
2 the economic analysis required by (b) of this section.

3 (f) The Administrative Regulation Review Committee shall review
4 the regulations, orders, and staff memorandum and shall report the
5 committee's recommendations and proposed legislation to the legisla-
6 ture by the 10th day of the next legislative session. If the commit-
7 tee proposes legislation, that legislation shall be introduced in each
8 house of the legislature. A bill shall indicate what portion of a
9 regulation or order of repeal is disapproved.

10 (g) If a portion of a regulation or order is disapproved, the
11 remaining portion retains its character as an administrative regula-
12 tion or order of repeal. Rejection of a bill of disapproval or post-
13 ponement of the repeal of a regulation or order of repeal does not
14 constitute legislative approval of a regulation or order of repeal.
15 Passage of a bill repealing a regulation or disapproving an order of
16 repeal does not revive a predecessor regulation unless the bill speci-
17 fically provides otherwise.

18 (h) Each agency shall revise its regulations to conform with the
19 action taken by the legislature for publication in the Alaska Adminis-
20 trative Register.

21 (i) An agency may not readopt a regulation or order of repeal
22 that was disapproved under this section unless the agency has been
23 granted authority to adopt the regulation or order by subsequent
24 statute, the state constitution, or by a judicial determination that
25 the statutory authority exists. A regulation or order of repeal
26 adopted contrary to this subsection is void.

27 (j) This section does not apply to rules of agency organization
28 or general statements of policy that are not intended to be binding as
29 regulations.

1 (k) In this section

2 (1) "small business" means a business corporation or a
3 nonprofit corporation, a partnership, or a sole proprietorship, that
4 is licensed in the state and transacts business in the state and

5 (A) employs 20 or fewer employees in the state ex-
6 cluding seasonal employees; or

7 (B) has annual gross sales, or value of services
8 provided, of \$2,000,000 or less;

9 (2) "small entity" means a small business or small munic-
10 ipality;

11 (3) "small municipality" means a municipality with a popu-
12 lation of 10,000 or fewer persons.

13 * Sec. 7. AS 44.62 is amended by adding a new section to read:

14 Sec. 44.62.515. FEES AND COSTS. (a) An agency that conducts an
15 administrative adjudication under AS 44.62.330 - 44.62.630 shall award
16 to the prevailing party other than the agency the fees and other
17 expenses incurred by the party in connection with the adjudication,
18 unless the hearing officer finds that the position of the agency was
19 substantially justified or that special circumstances make the award
20 unjust. Whether or not the position of the agency was substantially
21 justified shall be determined on the basis of the administrative
22 record as a whole that is made in the administrative adjudication for
23 which the fees and other expenses are sought.

24 (b) The amount of fees awarded under this section shall be based
25 on the prevailing market rates for the kind and quality of the ser-
26 vices furnished, except that

27 (1) an expert witness may not be compensated at a rate in
28 excess of the highest rate of compensation that is paid by the agency
29 involved; and

1 (2) attorney or agent fees in excess of \$75 an hour may not
2 be awarded unless the agency determines by regulation that an increase
3 in the cost of living or a special factor, including the limited
4 availability of qualified attorneys or agents for the adjudication
5 involved, justifies a higher fee;

6 (c) A party seeking an award of fees and other expenses shall,
7 within 30 days of receipt of the final decision in the administrative
8 adjudication, submit to the agency an application that

9 (1) shows that the party is the prevailing party and is
10 eligible to receive an award under this section;

11 (2) states the amount sought, including an itemized state-
12 ment from each attorney, agent, and expert witness representing or
13 appearing on behalf of the party stating the actual time expended and
14 the rate at which the fees and other expenses were computed; and

15 (3) alleges that the position of the agency was not sub-
16 stantially justified.

17 (d) When the agency appeals under AS 44.62.560 the underlying
18 merits of an administrative adjudication, the decision on an applica-
19 tion for fees and other expenses in connection with the administrative
20 adjudication may not be made under this section until a final judgment
21 is rendered by the court on the appeal.

22 (e) The hearing officer may reduce or deny an award authorized
23 under (a) of this section to the extent that during the course of the
24 administrative adjudication, the party applying for the award engaged
25 in conduct that unduly and unreasonably protracted the final resolu-
26 tion of the adjudication.

27 (f) The decision of the hearing officer under this section shall
28 be made a part of the record containing the final decision of the
29 agency and must include written findings and conclusions indicating

1 the basis for the award.

2 (g) Each agency shall establish by regulation adopted under this
3 chapter uniform procedures for the submission and consideration of
4 applications for an award of fees and other expenses under this sec-
5 tion.

6 (h) If the determination of fees and other expenses made under
7 (a) of this section is appealed, the court may not modify the deter-
8 mination of fees and other expenses unless the court finds that the
9 failure to make an award of fees and other expenses or the calculation
10 of the amount of the award was unsupported by substantial evidence.

11 (i) In this section

12 (1) "administrative adjudication" means an adjudication
13 under AS 44.62.330 - 44.62.630;

14 (2) "fees and other expenses" includes the reasonable

15 (A) expenses of expert witnesses;

16 (B) cost of a study, analysis, engineering report,
17 test, or project that is found by the agency to be necessary for
18 the preparation of the party's case; and

19 (C) attorney or agent fees;

20 (3) "final judgment" means a judgment that is final and not
21 appealable, including an order of settlement;

22 (4) "position of the agency" means, in addition to the
23 position taken by the agency in the administrative adjudication, the
24 action or failure of the agency to act that is the basis for the
25 administrative adjudication.

26 * Sec. 8. REVIEW OF EXISTING REGULATIONS (a) Before January 1, 1993,
27 the legislative legal services division shall review the regulations adopt-
28 ed by each agency and in effect as of July 1, 1988, and shall report the
29 results of the review to the Administrative Regulation Review Committee.

1 If the division determines that completion of the review of existing regu-
2 lations is not feasible by January 1, 1993, the division shall certify that
3 fact in writing and may extend the completion date by one year.

4 (b) The purposes of the review required under (a) of this section are
5 to determine whether the regulations

6 (1) are within the agency's regulation-making authority;

7 (2) are authorized by law;

8 (3) have or will have a significant economic effect upon a
9 substantial number of small entities, and if so, whether the regulations
10 should be continued without change or should be amended or repealed to
11 minimize the significant effect.

12 (c) In reviewing regulations under (b)(3) of this section, the agency
13 shall consider the

14 (1) continued need for the regulation;

15 (2) nature of complaints or comments received concerning the
16 regulation from the public;

17 (3) complexity of the regulation;

18 (4) extent to which the regulation overlaps, duplicates, or
19 conflicts with other state regulations, and, to the extent feasible, with
20 federal and local governmental regulations; and

21 (5) length of time since the regulation has been evaluated or
22 the degree to which technology, economic conditions, or other factors have
23 changed in the area affected by the regulation.

24 (d) In this section

25 (1) "agency" has the meaning given "state agency" in AS 44.62.-
26 640(a);

27 (2) "small entity" has the meaning given in AS 44.62.295, as
28 enacted by sec. 6 of this Act.

29 * Sec. 9. REPEAL OF REGULATIONS. (a) Unless extended by law, all of

1 the regulations of the following boards, commissions, and departments are
2 repealed on the dates specified in this section.

3 (1) The regulations of the following boards, commissions, and
4 departments are repealed on June 30, 1989:

5 (A) Board of Pharmacy (AS 08.80.010);

6 (B) Board of Veterinary Examiners (AS 08.98.010);

7 (C) State Physical Therapy and Occupational Therapy Board
8 (AS 08.84.010);

9 (D) Board of Barbers and Hairdressers (AS 08.13.010);

10 (E) Board of Governors of the Alaska Bar Association
11 (AS 08.08.040);

12 (F) Board of Parole (AS 33.16.020);

13 (G) Alaska Public Utilities Commission (AS 42.05.010);

14 (H) Alaska Code Revision Commission (AS 24.20.075);

15 (I) Older Alaskans Commission (AS 44.21.200);

16 (J) Council on Domestic Violence and Sexual Assault
17 (AS 18.66.010);

18 (K) Special Education Service Agency (AS 14.30.600);

19 (L) Department of Education;

20 (M) Department of Community and Regional Affairs; and

21 (N) Department of Military Affairs.

22 (2) The regulations of the following boards, commissions, and
23 departments are repealed on July 1, 1990:

24 (A) Board of Nursing Home Administrators (AS 08.70.010);

25 (B) Alcoholic Beverage Control Board (AS 04.06.010);

26 (C) Alaska State Fire Commission;

27 (D) Department of Health and Social Services;

28 (E) Department of Commerce and Economic Development;

29 (F) Department of Revenue;

1 (G) Department of Labor; and

2 (H) Office of the Governor.

3 (3) The regulations of the following boards, commissions, and
4 departments are repealed on July 1, 1991:

5 (A) Board of Nursing (AS 08.68.010);

6 (B) Board of Psychologist and Psychological Associate
7 Examiners (AS 08.86.010);

8 (C) State Medical Board (AS 08.64.010);

9 (D) Board of Marine Pilots (AS 08.62.010);

10 (E) Real Estate Commission (AS 08.88.011);

11 (F) Department of Natural Resources;

12 (G) Department of Fish and Game;

13 (H) Department of Environmental Conservation;

14 (I) Department of Transportation and Public Facilities; and

15 (J) Office of the Lieutenant Governor.

16 (4) The regulations of the following boards, commissions, and
17 agencies are repealed on July 1, 1992:

18 (A) Board of Chiropractic Examiners (AS 08.20.010);

19 (B) Board of Examiners in Optometry (AS 08.72.010);

20 (C) Board of Dispensing Opticians (AS 08.71.010);

21 (D) Board of Dental Examiners (AS 08.36.010);

22 (E) State Board of Registration of Architects, Engineers,
23 and Land Surveyors (AS 08.48.011);

24 (F) Board of Public Accountancy (AS 08.04.010);

25 (G) Guide Board (AS 08.54.010);

26 (H) Department of Administration;

27 (I) Department of Public Safety;

28 (J) Department of Corrections;

29 (K) Department of Law; and

(L) Office of the Ombudsman.

1
2 (b) The postponement of the repeal of a regulation under this section
3 does not constitute legislative approval of the regulation and is not
4 admissible in court as evidence of legislative intent.

5 * Sec. 10. Sections 1, 2, and 7 of this Act apply to administrative
6 adjudications and judicial reviews that are pending or that begin on or
7 after the effective date of secs. 1, 2, and 7 of this Act.

8 * Sec. 11. AS 44.62.295, enacted by sec. 6 of this Act, applies to
9 regulations adopted after September 30, 1988.

10 * Sec. 12. AS 09.60.010, as amended by secs. 1 and 2 of this Act,
11 amends Alaska Court Rule of Appellate Procedure 508 by changing the re-
12 quirements for the award of costs and attorney fees to prevailing parties
13 in appeals from administrative adjudications under AS 44.62.

14 * Sec. 13. Sections 1, 2, 4, 7, 9, 10, and 12 of this Act take effect
15 immediately under AS 01.10.070(c).

16 * Sec. 14. Sections 3, 5, and 8 of this Act take effect July 1, 1988.
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Alaska State Legislature

SENATOR BETTYE FAHRENKAMP
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Senate

M E M O R A N D U M

TO: Senator Arliss Sturgulewski, Chairman
Senate Community & Regional Affairs Committee

FROM: Senator Bettye Fahrenkamp

DATE: March 8, 1988

RE: Sectional analysis of proposed CS for SB166

Section 1. AS 09.60.010 COSTS AND ATTORNEY FEES ALLOWED PREVAILING PARTY

Amended to except sec. 2 of the bill from the present statutory provision on the award of court costs and attorney fees.

Section 2. AS 09.60.010

Sec. 09.60.010(b) directs a court reviewing an agency's administrative adjudication to award a non-state prevailing party the fees and other expenses incurred for the judicial review unless the agency's position was substantially justified or special circumstances would make the award unjust. With two exceptions, the amount of fees is based on prevailing market rates.

Sec. 09.60.010(c) establishes the procedure for a party to apply for an award of fees and other expenses under this section.

Sec. 09.60.010(d) allows a court to reduce or deny an award under this section to the extent the prevailing party unduly and unreasonably protracted the adjudication.

Sec. 09.60.010(e) directs the supreme court to establish the procedures for the award of fees and other expenses under this section.

Sec. 09.60.010(f) is the definition section.

Section 3. AS 24.20.460 POWERS

Gives the Administrative Regulation Review Committee the additional power, in an action reviewing a regulation under AS 44.62.300, to petition the court to be allowed to address the effect of the regulation on small entities.

Section 4. AS 44.62.030 CONSISTENCY BETWEEN REGULATION AND STATUTE

Declares that a regulation is not within the statutory authority and jurisdiction of an agency just because it isn't contrary to the specific provisions of a statute.

Section 5. AS 44.62 ADMINISTRATIVE PROCEDURE ACT

New Section 44.62.177 Regulatory Agenda is added. Subsection (a) requires an agency each year to publish in the Alaska Administrative Journal during the months of January and July a regulatory flexibility agenda that meets certain listed criteria.

Sec. 44.62.177(b) allows an agency to consider or act on a matter not included in a regulatory flexibility agenda, and to decline to consider or act on a matter listed in the agenda, but the agency must indicate why it declines to act on the matter. Prohibits an agency from refusing to consider or adopt a regulation just because it wasn't included in the regulatory agenda.

Sec. 44.62.177(c) defines "small entity" for the section.

Section 6. AS 44.62 ADMINISTRATIVE PROCEDURE ACT. New section-- Article 5, LEGISLATIVE REVIEW--is added.

Sec. 44.62.295 EXPIRATION OF REGULATIONS. New subsection (a) establishes the repeal date for a regulation or order of repeal unless the legislature postpones the repeal by law.

Sec. 44.62.295(b) directs an adopting agency to submit the regulation or order of repeal to the legislative legal services

division within a given time and in a form and manner prescribed by the Administrative Regulation Review Committee. If not timely submitted the regulation or order is void. Directs the division to review and report on the regulation or order to determine whether it is within the adopting agency's authority and whether authorized by law. The staff shall also analyze the probable economic effect of the proposed action on small businesses and small municipalities.

Sec. 44.62.295(c) Provides criteria for the analysis.

Sec. 44.62.295(d) establishes the procedure to be followed if the legal services division determines a regulation will not have a significant economic effect on a substantial number of small entities.

Sec. 44.62.295(e) allows the division to treat a series of closely related regulations as one regulation for the purposes of this section.

Sec. 44.62.295(f) directs the Administrative Regulation Review Committee to review and report by a certain date to the Legislature on the regulations, orders, and staff memorandum. Directs the Committee to introduce its proposed legislation, if any, in each house of the legislature and directs that a bill is to indicate what portion of regulation or order of repeal is disapproved.

Sec. 44.62.295(g) indicates the effect on a regulation or order of repeal (1) of disapproval of a portion, and (2) of a rejection of a bill of disapproval or postponement of the repeal. Indicates that the passage of a bill repealing a regulation or disapproval of an order of repeal does not revive a predecessor regulation unless the bill specifies otherwise.

Sec. 44.62.295(h) directs an agency to revise its regulations to conform with the action taken by the legislature for publication in the Alaska Administrative Register.

Sec. 44.62.295(i) prohibits an agency from readopting a regulation or order of repeal disapproved under this section unless authorized by subsequent statute or the state constitution, or unless a court determines that the authority exists. Indicates that a regulation or order of repeal adopted contrary to this subsection is void.

Sec. 44.62.295(j) says that this section does not apply to rules of agency organization or general statements of policy that are not intended to be binding as regulations.

Sec. 44.62.295(k) provides the definitions for this section.

Section 7. AS 44.62 ADMINISTRATIVE PROCEDURE ACT

Sec. 44.62.515 Fees and Costs. New subsection (a) directs an agency conducting an administrative adjudication under AS 44.62.330 - 44.62.630 to award a prevailing party other than the agency the fees and other expenses incurred for the adjudication unless the agency's position was substantially justified or special circumstances would make the award unjust. Requires the determination of substantial justification to be based on the administrative record as a whole.

Sec. 44.62.515(b) establishes, with two exceptions, that the amount of the fees awarded is based on prevailing market rates.

Sec. 44.62.515(c) establishes the application procedure for a party to apply for an award of fees and other expenses under this section.

Sec. 44.62.515(d) prohibits, until a final court decision is received on the appeal, a decision on an award under this section during an agency appeal of the merits of an administrative adjudication.

Sec. 44.62.515(e) allows the court to reduce or deny an award authorized under this section to the extent the prevailing party unduly and unreasonably protracted the adjudication.

Sec. 44.62.515(f) directs the hearing officer's decision under this section to be made a part of the record containing the agency's final decision, and to include written findings and conclusions indicating the basis of the award.

Sec. 44.62.515(g) directs each agency to establish uniform procedures for the submission and consideration of applications for awards under this section.

Sec. 44.62.515(h) prohibits the court from modifying the determination of fees and expenses unless the failure to make an award or the calculation of the amount of the award was unsupported by substantial evidence.

Sec. 44.62.515(i) provides the definitions for the Section.

Section 8. REVIEW OF EXISTING REGULATIONS

Sec. 8(a) directs the legal services division to review before January 1, 1993, the regulations adopted by each agency and in effect as of July 1, 1988, and report the results of the review to the Administrative Regulation Review Committee. The review completion date may be extended by one year under certain conditions and by following certain procedures.

Section 8(b) sets out the purpose of the review, to determine whether the regulations are within the agency's rule-making authority, are authorized by law, and whether they have or will have a significant economic effect upon a substantial number of small entities.

Sec. 8(c) lists the items to be considered by legal services in making the regulation review required by this section.

Sec. 8(d) provides definitions for "agency" and "small entity" for the section.

Sec. 9 REPEAL OF REGULATIONS.

Sec. 9(a) directs that, unless extended by law, the regulations of each listed agency are repealed on the date listed for the agency in the section.

Sec. 9(b) states that postponement of the repeal of a regulation under this section does not constitute legislative approval of the regulation, and is not admissible in court as evidence of legislative intent.

Section 10 establishes to which administrative adjudications and judicial reviews sections 1,2, and 7 apply.

Section 11 establishes to which regulations sec. 6 does not apply.

Section 12 indicates that the amendments to AS 09.60.010 in secs. 1 and 2 of this bill amend Alaska Court Rule of Appellate Procedure 508 and gives the reason.

Section 13 provides an immediate effective date for secs. 1, 2, 4, 7, 9, 10, and 12.

Section 14 provides that secs. 3, 5, and 8 take effect July 1, 1988.