HB
426

HOUSE COMMITTEE REPORT

(5)
Date Referred: January 19, 1990 FURTHER REFERRALS:
STATE AFFAIRS

Date of Committee Action: 2/20/90

The COMMUNITY & REGIONAL AFFAIRS Committee considered: HB 426

HOUSE BILL NO. 426 PUBLICATION OF PROPOSED REGULATORY ACTION

"An Act relating to the notice requirements for adopting, amending, or repealing a regulation."

RECOMMENDATIONS:
[X] be replaced with CSHB 426 (C&RA) [X] the same title [ ] a new title
[ ] have attached amendment(s)
[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the ________ Committee

ADOPTS: ________ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
10 [X] fiscal impact X
5 [X] zero fiscal note
1 [X] zero with analysis

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s)
[ ] zero fiscal note(s)
[ ] zero fn/analysis

SIGNING DO PASS:
Eileen P. MacLean
Richard Foster
Cheri Davis
Eugene M. Kubina

SIGNING:
(Check approp. column)

	Do Not Pass	No Rec	Amend

Eileen P MacLean
Chairman's Signature

JAN 2? 1990

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

M E M O R A N D U M   January 23, 1990

SUBJECT: Sectional summary of HB 426

TO: Representative George Jacko

FROM: Theresa L. Bannister
Legislative Counsel

You have requested a sectional summary of the above described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1 requires that a notice of the adoption, amendment, or repeal of a regulation be published in a local publication in a community, in addition to any other publication requirements, if the proposed adoption, amendment, or repeal will significantly affect the community and if there is a local publication that is distributed on a regular basis in the community. Defines "community".

If I may be of further assistance, please advise.

TLB:pl
WKP1/035

House of Representatives

While in Session:
Box V
Juneau, Alaska 99811
(907) 465-4942

P.O. Box 47001
Pedro Bay, Alaska 99647
(907) 850-2208

Chair
Special Committee on Foreign Trac
Vice Chair
Resources Committee
Member
Health, Education &
Social Services Committee

Rep. George Jacko, Jr.

MEMORANDUM

TO: Representative Eileen MacLean
Chair of Community & Regional Affairs

FROM: Representative George Jacko, Jr.

DATE: January 22, 1990

SUBJECT: Hearing For House Bill 426

I respectfully request a hearing be scheduled for House Bill 426, "An Act relating to the notice requirements for adopting, amending, or repealing a regulation." The legislation addresses a current and ongoing problem with the distribution of public notices. If the notices will have a significant impact on the communities, it mandates that they be published in a locally distributed paper. It does not limit their current distribution.

House Bill 426 was drafted in response to some constituent concerns. A discrepancy in the current system allows Public Notices to be published in a paper of general circulation, but not necessarily in the locally distributed newspaper of the community affected. House Bill 426 mandates a change, making the distribution of public notice more equitable.

Thank you for your consideration of this matter.

GJ/eij

JUL 2? 1989

Please respond by fax to 563-0208 by Monday noon with your comments for quotation. (you may recall that this is the matter you were asked to do something about last year)

Rural Alaskans Hurt by Legal Loophole

What do a stolen Aleut child, a shipwreck which releases oil that fouls set net sites, the theft of money from a rural borough, and foreclosures in rural Alaska that no one hears about until their land is lost all have in common? The answer is that each was a story in rural Alaska recently and each occurred as a result of big city lawyers using a gaping loophole in Alaska's public notice requirements to take advantage of the residents of rural Alaska.

Alaska law requires that public notice be given before children can be adopted, property foreclosed, contracts let, and damage claims settled. But, unlike most states, Alaska merely requires that the notice be posted in a public place and published in a newspaper of general circulation. It does not require that the notices reach the people whom they will affect.

The public place most often chosen is a bulletin board in a public building. But the public building can be in Anchorage or Seattle or Houston or some other place where there is little or no chance of any rural resident ever seeing it. The same is true of a newspaper of "general circulation". All newspapers in the United States are legally in general circulation so all newspapers in the United States qualify as a place to publish legal nloices related to rural Alaska. Thus the required legal notice about adopting a village baby or setting a deadline to file oil spill claims might be published in Anchorage or Boston or someplace elsewhere where rural relatives and fishermen are almost certain never to see it.

Many rural newspapers, of course, pursue such information and see that the rural public gets it. But the lawyers are presently able to get around that also. Consider the case of the the AOYAGI MARU which went aground at Lost Harbor (near Akutan) on November 16, 1988. On the 29th of June of this year the ship's attorney filed a notice in Federal Court giving Akutan residents and anyone else who says they were damaged by the grounding and resulting spill until Wednesday August 2 to file claims. But they did not publish the required public notice in the back pages of the classified section of the *Anchorage Daily News* until Friday July 28, five days before the deadline to file claims.

Anyone familiar with rural Alaska will note that the local newspaper, in this case the *Aleutian Eagle*, is a weekly as are most rural Alaska papers. It comes out on Friday. Thus the lawyers hired by the ship owners to minimize the claims from rural Alaska just happened to publish the notice both where no rural residents would see it and when it would be too late for the local newspaper to find it and warn its readers.

Similar obscure events come to mind such as the Bristol Bay Borough's recent tax foreclosure notices being published in Anchorage because our attorney "has always done it that way" to the successful defense of some of the North Slope Borough Indictments on the basis that the contracts were not secret and illegal even though no one in the Borough knew about them because public notices were published in Seattle.

This has been going on for a long time . A few weeks ago a poignant reunion occurred between a young native woman and the surviving members of her family. She had been taken from her village as an infant and finally ended up with a non-native family thousands of miles away. They published an adoption notice, apparently in Boston, which her family never saw or heard about. Then her adopted parents led her to believe that she was an Athabascan instead of an Aleut in order to keep her from finding her brothers and sisters. Years later, someone finally admitted she was an Aleut and she began the long search of finding her native family, and succeeded. "We have been searching for you for twenty five years," said an emotional uncle.

Legislators and former legislators say they are appalled that Alaska's anti-rural public notice practices have been allowed to continue. They say that Alaska should require that the ~~notices be~~ given locally as is required in most other states and promised to do something about during the next legislative session.

Said ....

Papers: Aleutian Eagle, Bristol Bay News, East Aleutian Advocate, Borough Post, Valdez Pioneer, Barrow Sun, All Alaska Weekly . (not in Alaska Commercial Fisherman)

JAN 1 5 1990

Alaska Newspaper Association

c/o P.O. Box 798
Wrangell, AK 99929
907/874-2301
FAX: 907/874-2303

FOUNDING MEMBERS
Incorporated Dec 6, 1980

ROBERT B. ATWOOD
The Anchorage Times

KATHERINE FANNING
Anchorage Daily News

LOREN STEWART
Cheechako News, Kenai

MAX SWEARINGEN
Peninsula Clarion, Kenai

GLEN COBB
The Frontiersman, Palmer

TOM GIBBONEY
Homer News

JIM C. MARTIN
Alaska Journal of Commerce

O. KENT STURGIS
Fairbanks Daily News Miner

LEW WILLIAMS
Ketchikan Daily News

CARL SAMPSON
Juneau Empire

TOM SNAPP
All-Alaska Weekly

Honorable Rep George Jacko Jr. 112
Box V
Juneau, Alaska 99811

Dear Representative Jacko:

As president of the Alaska Newspaper Association I wanted to comment on your proposed House bill concerning published notices for agency actions. I am pleased to see that someone is putting such a requirement into law. Too often our members find that actions are not announced to the public affected by those actions. In addition, we find that statewide actions (which affect everyone) are noticed in only one or two large daily newspapers (Juneau and Anchorage) and the rest of the state doesn't hear about the plan until it begins affecting their lives.

When your proposed bill says that an action "significantly affecting a community" must be subject to public notice, does that include statewide actions? For example, if a department promulgates a regulation that applies statewide, does a public notice have to be published in every single newspaper statewide? Or, does your requirement apply only when a proposed action applies just to one town? Unless statewide public notices are required, I imagine your requirement would have limited application. For example, I think it would be extremely rare that the Department of health and Social Services would promulgate a regulation that applies only to Wrangell.

Thank you for seeking our opinion on your proposed legislation.

Sincerely yours,

Ann D. Kirkwood, President

THE DELTA PAPER

TriDelta, Inc.

Loretta Nistler, Editor
Patti Dull, Advertising
Christopher Brann, Printer

P.O. Box 988
Delta Junction
Alaska 99737

January 31, 1990

Rep. George Jacko Jr.
House of Representatives
Juneau, Alaska FAX #463-5661

Dear Rep. Jacko,

We apologize for the delay in replying to your FAX message of January 11.

The Delta Paper would like to go on record as favoring your proposed change in statute (Section 1. AS 44.62.190).

We have long felt that publication of notices in major cities' newspapers is not always the best way to get the information to the general public.

For instance, DCRA is currently proposing changes in regulations governing day care assistance. Our LIO sent us a copy of the notice and asked that we cut or edit the information and publish what we could in re: the upcoming teleconference. The information I got from the LIO indicates that the notice is being advertised in an Anchorage paper, the Fairbanks paper, the Juneau Empire, one other I've forgotten, and the Tundra Drums. None of these is circulated widely in this community, though some people do get the Fairbanks paper. I called DCRA, was told (politely) that they could not afford to publish in all papers (it would probably cost millions) and that notices had been sent to those in this community who would be affected. The local LIO staff person says interested locals have not received personal notification.

Generally ad rates are less costly in smaller, community newspapers. I think it could be done for less than "millions".

Please keep us posted on the progress of your bill. (And thanks for asking our opinion!)

Cordially,

Loretta Nistler
Editor
The Delta Paper (Serving the entire Delta Junction - Fort Greely area)

Article 4. Committees.

Section
180. Committees
182. Review of administrative regulations by standing committees of the legislature

Section
184. Termination of interim committee membership

Sec. 24.05.180. Committees. (a) Each house shall have standing committees to facilitate the transaction of business in accordance with the rules of the legislature. The rules may provide for the appointment of special committees, as needed, by the presiding officer of each house. The legislature shall provide for the use of joint committees to facilitate and expedite business.

(b) *Repealed by § 7 ch 100 SLA 1963.* (§ 20 ch 157 SLA 1959; am § 1 ch 143 SLA 1961; am § 7 ch 100 SLA 1963)

Collateral references. — 72 Am. Jur. 2d, States, Territories, and Dependencies, §§ 50-54.

81A C.J.S., § 55.

Sec. 24.05.182. Review of administrative regulations by standing committees of the legislature. (a) A standing committee of the legislature furnished notice of a proposed action under AS 44.62.190 shall review the proposed regulation, amendment of a regulation, or repeal of a regulation before the date the regulation is scheduled by the department or agency to be adopted, amended, or repealed.

(b) A standing committee conducting a review of a regulation under (a) of this section shall determine whether the regulation properly implements legislative intent.

(c) A standing committee shall conduct preliminary reviews under this section while the legislature is in session and during the interim between legislative sessions.

(d) If a standing committee determines that a regulation, amendment to a regulation, or repeal of a regulation does not properly implement legislative intent, the standing committee's findings shall be transmitted to the Administrative Regulation Review Committee. (§ 4 ch 1 SLA 1982)

Revisor's notes. — Enacted as AS 24.99.001. Renumbered as AS 24.37.010 in 1982. Renumbered again in 1985.

CHAPTER 4.

PUBLIC NOTICE

A. Procedure:

As stated in Chapter 2 of this manual, AS 44.62.190 requires that the adopting agency give notice of the proposed adoption of regulations. (It is advisable for the agency to consult the Department of Law for help in drafting the notice.) Subsection (a) of that section provides:

> (a) At least 30 days before the adoption, amendment, or repeal of a regulation, notice of the proposed action shall be
>
> [(1) published in the newspaper of general circulation, or trade or industry publication, that the state agency prescribes and in the Alaska Administrative Journal;]
>
> (2) mailed to every person who has filed a request for notice of proposed action with the state agency;
>
> (3) if the agency is within a department, mailed or delivered to the commissioner of the department;
>
> (4) when appropriate in the judgment of the agency, (A) mailed to a person or group of persons whom the agency believes is interested in the proposed action, and (B) published in the additional form and manner the state agency prescribes;
>
> (5) furnished the Department of Law together with a copy of the proposed regulation, amendment, or order of repeal for the department's use in preparing the opinion required after adoption and before filing by AS 44.62.060;
>
> (6) furnished to all incumbent State of Alaska legislators and the Legislative Affairs Agency;
>
> (7) furnished to the standing committee of each house of the legislature having legislative jurisdiction over the subject matter treated by the regulation under the Uniform Rules of the Alaska State Legislature, together with a copy of the proposed regulation, amendment, or order of

repeal for the committee's use in conducting the review authorized by AS 24.05.182;

(8) furnished to the staff of the Administrative Regulation Review Committee.

Observe, first of all, that this statute requires notice 30 days before adoption -- not before the public hearing. (For some agencies, adoption will occur at the hearing, but, for most of them, it will not.) Nevertheless, it is recommended that, to assure adequate notice and preparation time, there be at least 30 days' notice before the hearing (or written comment deadline). This interpretation is expressly set out in the California APA; see Cal. Gov. Code sec. 11346.4(a). The shorter the amount of notice time, the more difficult it will be to defend the adoption in court if the regulation is challenged. Absent an emergency (in which case the emergency regulation procedures probably should be followed) it would be extremely difficult to defend anything less than 10 days to two weeks. Remember, the notice requirement is primarily for the benefit of the public, not merely the convenience of the agency. Since our APA does not expressly answer the question, it is necessary to determine the length of time that would be "reasonable" to allow the public time to prepare for a legislative type of hearing. Some programs might be subject to additional requirements under federal law.

Second, this statute requires in paragraph (1) that the notice be published in the newspaper or trade journal that the agency prescribes. It does not require publication in more than one. Nevertheless, it is recommended that the adopting agency not rely on this minimal requirement. See Moore v. State, 553 P.2d 8, 21 -- 22 (Alaska 1976), for discussion of "general circulation." Some newspapers in this state now have a separate heading in their classified ad section for "Regulations" or "Notices/Regulations." In addition, press releases and more eye-catching ads might be useful in trying to assure public awareness of proposed regulations. Although the Moore case provides some guidance in interpreting the statute's term, "general circulation," it is often simply good policy to include additional publicity in some of the more remote areas such as Kodiak, Bristol Bay, the Aleutians, Barrow, Petersburg, etc. Consider a press release for local papers and radio and television stations.

Third, paragraph (1) does not specify the number of times the notice must be published. Literally, one publication would suffice. But again, it is recommended that this minimal requirement not be interpreted as a maximum.

Fourth, paragraph (1) was amended by sec. 3, ch. 59, SLA 1985 to require publication in the Alaska Administrative Journal. Under AS 44.62.175(a) (enacted by sec. 2, ch. 59, SLA 1985), the lieutenant governor is to publish the journal weekly. This means that the adopting agency must anticipate the journal's

publication schedule when setting up its own adoption schedule. Contact the lieutenant governor's office for instructions.

Fifth, although paragraphs (6) -- (8) provide for some redundancy, the legislature, by its enactment of ch. 1, SLA 1982 even over the governor's veto, has clearly indicated that it wants that redundancy. Furnishing notice just to the Legislative Affairs Agency or just to each incumbent legislator is not sufficient. Notices to the Legislative Affairs Agency should be sent to its executive director, at P.O. Box Y, Juneau, Alaska 99811. During legislative sessions (January -- May of each year, plus occasional special sessions), notices to legislators should be sent to them individually, at P.O. Box V, Juneau, Alaska 99811. When the legislature is not in session, get the legislators' addresses from the Directory of State Officials, published twice a year by the Legislative Affairs Agency. To determine the appropriate standing committee of the Alaska Senate and House of Representatives, refer to Appendix Q of this manual which sets out Rule 20, Uniform Rules of the Alaska State Legislature, describing committee jurisdiction; then send notice to the chair of that committee in both the Senate and the House, using the P.O. Box V address. For the Administrative Regulation Review Committee, send notice to the staff of that committee, also using the P.O. Box V address.

Remember, the objective of publishing this notice is reasonably to assure that the public is notified. Each agency must consider the adequacy of publication on a case-by-case basis, depending upon such things as the significance of the regulation, the areas and people and industries covered by it, prior expressions of public interest, and other relevant factors.

In Kenai Peninsula Fisherman's Cooperative Ass'n, Inc. v. State, 628 P.2d 897, 908 (Alaska 1981), the Alaska Supreme Court stated that

> The purpose of the notice and hearing provisions of the APA is twofold. First, it gives notice to interested parties of proposed agency actions which may affect their interests. Next, it gives the administrative agency the opportunity to receive information and comments from those interested parties on its proposed action. [Footnote omitted.]

In addition, AS 44.62.175(a)(7) requires the lieutenant governor to publish in the Alaska Administrative Journal (AAJ) "the text or a summary of the text of a regulation or order of repeal of a regulation for which notice is given under AS 44.-62.190(a)."

To help assure that the public is appropriately informed and is not surprised by the taking of effect of a regulation for which notice was published long ago, a one-year stale-

ness rule-of-thumb is applied. I.e., if a year or more has elapsed between the time the original notice was published and the time the regulation will take effect, a supplemental notice should be published. If a year has passed by the time the agency adopts a regulation, it should publish a supplemental notice. It should not expect that the Department of Law will be able to review and approve the project immediately upon the agency's adoption.

This one-year rule, which is not in the Alaska APA, is somewhat flexible, taking into account the nature and significance of the regulation. A shorter period possibly should apply to a controversial, important regulation affecting a great number of people. In sec. 3-106(b) of its 1981 revision of the Model State Administrative Procedure Act, the National Conference of Commissioners on Uniform State Laws has recommended a generally applicable six-month rule, measuring from the later of publication of notice or end of oral proceedings to the date of adoption. Cf. Cal. Gov. Code sec. 11346.4(b), providing a one-year rule, measuring from publication of notice to submission of the adopted regulation to the Office of Administrative Law for review (sec. 11343(a)).

Essentially, this staleness rule is part of the expression of the policy against "secret law." As Professor Arthur Bonfield has mentioned,

> nothing is more pernicious than a system in which the operative principles employed to settle the rights of individuals are kept hidden from them.

Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 785 (1975). His article also briefly discusses the Iowa staleness rule; id. at 857 -- 858. Also see Bonfield, State Administrative Rule Making (Little, Brown and Company, 1986), sec. 6.6.2, regarding time for adoption of regulations. An unreasonable delay in adoption and effective date has the effect of masking the new law from the public. Depending upon various circumstances, such as the amount of public interest shown in or the significance of a particular project, this effect could be mitigated by a supplemental notice mentioning that the regulation was adopted and stating its effective date. The Alaska APA does not provide express direction in this situation.

Sometimes it will be necessary or advisable to publish a supplemental or corrected notice. In the text of such a notice, be sure to mention its relationship to the earlier one and make clear what the difference (i.e., the supplementation or correction) is. For example, the additional notice might extend the comment period or set a new date for an oral hearing, or it might correct an error in the original notice. Having the caption describe the notice as supplemental, etc., is also helpful. A

supplemental notice should be distributed in the same manner as the original notice. Also, if the final version of a regulation is significantly different from the version originally distributed, it is advisable to publish an additional after-the-fact notice describing the change (subject to budgeting considerations).

B. Content:

AS 44.62.200 deals with the contents of the notice. In that section, (a)(1) requires "a statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation." Since most actual "adoptions" occur quietly in the office of the head of the agency, by his or her simply signing an adoption order, this statute has been interpreted as referring to the time and place of the public hearing or deadline and address for written comment.

Paragraph (a)(2) requires a reference to the statutory authority, and (a)(3) requires "an informative summary of the proposed subject of agency action." When amending AS 44.62.-200(a)(3) in 1970, the House Judiciary Committee stated in part (1970 House Jour. 916 -- 918):

* * * *

> . . . Two objectives must be borne in mind when dealing with a notice requirement for administrative regulations: (1) the need to give the public reasonable notice of agency action; and (2) the need to allow some administrative flexibility. The committee substitute attempts to meet these objectives, providing some guidance for the agencies and protection of the public.
>
> By way of example, the committee believes that notice by an agency that it is going to consider regulations setting a limit on bear in a particular area of the state should be sufficient to support agency action setting any limit, or no limits, in that area. Similarly, notice that the agency will consider a regulation opening the fishing season on a particular date is sufficient notice to support any date, since the subject matter of the regulation (opening the season) remains the same. . . .
>
> The committee recognizes the difficulty in maintaining the balance between generality and specificity in writing notices which give members of the public sufficient information to decide whether their interests could be affected by the agency action and thus whether to make their opinions known to the agency. It would appear that almost

> any statutory language, short of a provision that omits a notice requirement altogether or one that requires the notice to contain the regulation verbatim, will necessitate an administrative decision on an issue such as the content of "reasonable notice."

* * * *

At the same time that paragraph (3) was amended, the legislature enacted AS 44.62.200(b) to read:

> (b) A regulation that is adopted, amended or repealed may vary in content from the summary specified in (a)(3) of this section if the subject matter of the regulation remains the same and the original notice was written so as to assure that members of the public are reasonably notified of the proposed subject of agency action in order for them to determine whether their interests could be affected by agency action on that subject.

The 1970 House Judiciary Committee report is consistent with and expands upon a 1959 Opinion of the Attorney General -- No. 26. However, since the statute in effect at the time that that opinion was written provided for "the express terms" <u>or</u> an informative summary, the portion of that opinion that discusses the appropriateness of setting out the express terms of a proposed regulation is no longer applicable. As a general rule, it is recommended that the express terms <u>not</u> be set out in the notice because they could be unduly restrictive if the adopting agency wants to change substantially the original proposed version after receiving public testimony at the hearing. (The California Court of Appeal rejected such a limitation on an agency, however, in applying the "express terms or an informative summary" requirement, so long as the subject of the regulation is the same. <u>Schenley Affiliated Brands Corp. v. Kirby</u>, App., 98 Cal. Rptr. 609, 621 [1971]. Nevertheless, it is better to avoid the argument altogether.)

The informative summary of proposed action should not just give the citation of the regulation being adopted, amended, or repealed. A citation can be helpful, but it should always be accompanied by a description. Citations of existing provisions must be used with caution, however. Depending upon the accompanying description and upon whether a member of the public could reasonably determine whether his or her interests would be affected, a citation could actually be misleading if the agency wants to amend a different provision as its final act on the matter. In other words, if the description is not adequate, the citation could be unduly restrictive. That would mean starting over.

For new regulations, the informative summary should describe their substance. For amendments of existing regulations, the summary should describe the CHANGE being made, relating it to the substance of the existing text. This applies to notices for emergency regulations as well as to regular regulations.

For repealers, describe the provisions being repealed. Don't just cite them, and don't just give a one- or two-word identifier. In 1988, the legislature passed CSSB 384(Jud), sec. 3 of which would have amended the notice requirement of AS 44.-62.200(a)(3) as follows:

> (3) an informative summary of the proposed subject of agency action and of the action's intended effect on persons subject to the action; the summary must include a description of the substance of each repealed regulation or group of related regulations and a description of the intended effect of the repeal.

(The underlined wording is the material that would have been added by the 1988 amendment.) The governor vetoed the bill, but not because he objected to its sec. 3. In his June 9, 1988 veto message, he stated "I do not disagree with the intent of sec. 3 of the bill" and "I will be instructing all of my departments and agencies to begin implementing this change in the public notice process." 1988 Senate Jour. 3857.

Expanding upon the governor's statement, his chief of staff distributed to the cabinet members an August 15, 1988 memo suggesting that all agencies observe the following guidelines:

(1) All descriptive summaries of proposed changes should include statements that describe:

-- what is being changed
-- how it is being changed
-- why it is being changed.

(2) If a regulation is being repealed, don't simply cite the regulation number. Describe the regulation and provide a statement of why it should be repealed.

(3) Keep your audience in mind and don't use technical jargon or other terms not generally understood by the public. Remember the purpose of these notices is to inform the public. That requires clear and effective communication.

Points (1) and (2) in the chief of staff's list are consistent with the Alaska Supreme Court's suggestion that an agency's regulation-adoption record "should at least explain the reasons for the agency's action." Johns v. Commercial Fisheries

Entry Comm'n, 758 P.2d 1256, 1261 (Alaska 1988). That part of the record assists the court in its review function.

In Kingery v. Chapple, 504 P.2d 831 (Alaska 1972), our supreme court held that a notice that included the language "other equipment -- including mirrors, windshields, . . . motorcycle and scooter requirements concerning goggles, face shields, helmets, handlebars and standards for [those items]" was a valid informative summary of regulations requiring mirrors, windshields, goggles, face shields, and helmets, setting standards for them, and specifying the ! ght of handlebars. Id. at 834. That language appeared in a general notice of a comprehensive revision of rules of the road.

In State v. First National Bank of Anchorage, 660 P.2d 406 (Alaska 1982), the court held that a notice that identified (by number and heading) the statute being implemented and then listed the headings of the six articles of regulations being adopted was sufficient under AS 44.62.200(a)(3). In support of its ruling, the court cited the legislative history of AS 44.62.-200, including the 1970 House Judiciary Committee report quoted above. The court noted that "it is clear that the legislature intended that the 'informative summary' requirement be liberally construed." Id. at 425, n.32. However, there has been legislative objection to notices that rely on mere headings to convey the informative summary. It would be wise to write a better description than the court has held (minimally) acceptable, as indicated in the chief of staff's memo quoted above.

In addition, in the Kenai Peninsula Fisherman's Cooperative case, the court observed in a footnote that a notice that mentioned setting fishing season dates was not adequate to cover adoption of a long-term management policy for Upper Cook Inlet, even though implementation of the policy would affect fishing season dates. In other words, the policy covered more than those dates -- subjects of which the public was not reasonably notified. 628 P.2d 897, 906, n.21.

In Chevron U.S.A., Inc. v. LeResche, 663 P.2d 923, 929 -- 930 (Alaska 1983), the court upheld oil and gas exploration regulations that were challenged for, among other things, differing from the draft that was available when notice of the proposed adoption was published. In addition to a chapter numbering change, the final regulations added to a requirement for submission of initially processed geophysical exploration information a requirement that subsequently processed information also be submitted. Relying in part on AS 44.62.200(b), the court held that this addition was valid. "[T]he subject matter remains the same: submission of test data." Id. at 930.

Paragraph (a)(4) of AS 44.62.200 is merely a reminder that there might be other statutes that require some additional point to be covered in the notice. Paragraph (a)(5), enacted in 1980, requires inclusion of a summary of the fiscal information

prepared under AS 44.62.195; see Chapter 18 and Appendices A and B of this manual.

Notice with regard to emergency regulations will be discussed below in Chapter 5.

When preparing a notice, the drafter should imagine standing in the shoes of a member of the public -- especially that portion of the public being regulated -- and anticipate that person's interest and concern.

SAMPLES OF NOTICE INTRODUCTIONS AND INFORMATIVE SUMMARIES, BASED ON THE FORMS IN APPENDICES A AND B, TO PROVIDE SOME GUIDANCE IN VARIOUS SITUATIONS:

I. Adoption of new material only:

(A) Notice is given that the Alaska Public Utilities Commission, under the authority of AS 42.05.151, AS 42.05.311, and 42.05.321, proposes to adopt regulations in Title 03 of the Alaska Administrative Code, dealing with joint use of electric and telephone utility equipment and facilities by cable television (CATV) utilities,* as follows:

The proposed regulations would add a new Article 5 to 3 AAC 52, relating to CATV joint use of electrical and telephone utility facilities. The sections are made applicable to all electric, telephone, and CATV utilities in the state, regardless of whether the utilities are regulated or are exempt from the commission's general regulatory powers. The proposed regulations encourage the affected utilities to agree to terms for joint use, and indicate that the commission will generally not exercise its authority to order joint use and determine the terms of joint use, as long as the utilities appear to be acting consistent with the policies underlying AS 42.05. If the commission sets rates for joint use of utility-owned poles or conduits, the rates will equal the additional costs of modifications or additions necessitated by the joint use, and an annual rate equal to the total cost of a pole or conduit multiplied by the ratio of the space occupied by the CATV facilities to the total usable space on the pole or the conduit.

Unless the utilities submit studies indicating that other figures are appropriate, the commission will presume that the occupied space for a CATV pole attachment is one foot, and that the total usable space on a pole is 13.5 feet. The commission will consider the following elements of cost

to the owning utility: depreciation, taxes, return on investment, maintenance, and administrative expense. The owning utility's cost calculation shall be based on the investment in its pole or conduit accounts, divided by the number of poles or the number of feet of conduit in service.

The regulations also set out a procedure for resolving joint-use disputes and require final resolution within 360 days after the filing of a complaint.

* Department of Law File No. 993-86-0026; Commission Docket No. R-85-002.

[[[Although the adopting agency will not always know the Department of Law file number at the time notice is published, it is a good idea to include it in the notice when it is known. This practice will facilitate accurate filing and responding to public inquiries.]]]

(B) Notice is given that the State Board of Education, under the authority of AS 14.07.060, proposes to adopt a regulation in Title 4, Chapter 05, of the Alaska Administrative Code, dealing with local education, to clarify a term used in the statutes, as follows:

4 AAC 05.020 is proposed to be amended by adding a new paragraph, defining "education" to include the process of formal training at a facility that . . . .

(C) Notice is given that the Department of Labor, under the authority of AS 23.10.360, proposes to adopt a regulation in Title 8 of the Alaska Administrative Code, dealing with Employment of Minors, to implement AS 23.-10.325 -- AS 23.10.370 as follows:

amend 8 AAC 05 by adding a new section to prohibit the employment of children under 18 as canvassers, peddlers, solicitors for door-to-door contributions, or as "outside salesmen" (as that term is defined in 8 AAC 15.910(10)) in house-to-house sales.

This proposed prohibition would apply only where an employee-employer relationship exists, and would not affect individuals engaged in the activity of a nonprofit religious, charitable, educational, or service organization where an employee-employer relationship does not exist and where services rendered to the organization are on a volunteer basis. This prohibition is proposed to avoid the exploitation and abuse of minor

workers that has been experienced in these occupations in Alaska and across the country.

II. Adoption of new with amendment of old material:

(D) Following notice such as in Example A, above, something like the following could be added, just above the file and docket numbers:

> In addition, 3 AAC 50.100(a), dealing with the application and purpose of regulatory policy standards, is proposed to be amended to include a reference to telephone utilities, in light of the new material proposed for 3 AAC 52, as described above.

III. Repeal of old material:

(E) Notice is given that the Department of Health and Social Services, under the authority of AS 18.07.101, proposes to repeal 7 AAC 07.080(f), dealing with the final administrative decisions for appeals under the Certificate of Need program. This subsection provides that the decision of a hearing officer will be the final administrative decision regarding the disposition of a matter concerning a certificate of need. To ensure proper program oversight, this repeal is intended to retain final decision-making in the commissioner.

IV. Repeal of old with adoption of new material:

(F) Notice is given that the division of insurance, under the authority of AS 21.06.090, proposes to repeal and adopt the following regulations in Title 3 of the Alaska Administrative Code, dealing with agents, brokers, solicitors, and adjusters:

1. 3 AAC 23.050, PRODUCING GENERAL AGENTS, is repealed. This regulation required licensed general agents to secure an agent's license if they wished to act as a producing agent for the same or another insurer. This regulation has been superseded by the amendment of AS 21.09.280(b), which grants that authority to the general agent without having to apply for an additional license.

2. 3 AAC 23.070 is a new section which codifies a one-year period as the length of time an insurance licensing examination score is valid. If licensure is not obtained within that one-year period, the applicant must retest.

3. 3 AAC 23.080 is a new section which requires retesting for any applicant whose prior Alaska

insurance license was revoked for any reason, including nonpayment of annual continuation fees.

V. Miscellaneous amendments:

(G) [[[Following an appropriate introductory paragraph:]]]

Article 3 (7 AAC 50.310 -- 7 AAC 50.620), dealing with licensing of child foster homes is proposed to be amended. The proposed child foster home regulations contain the basic standards of care that foster parents must meet in order to be licensed to care for foster children. Some of the proposed changes include: more direct involvement by the foster parents in a foster child's plan of care; annual foster parent training; new time limit restrictions on emergency and provisional licenses; and a section entitled "Reports" which lists the reports and time frame in which a foster parent must submit the report to a placement agency. The effect of these changes is intended to be to facilitate placement of foster children, while assuring the protection of their best interests.

(H) Notice is given that the Medicaid Rate Commission, under authority vested by AS 47.07.073 and 47.07.180, proposes to amend regulations in 7 AAC 43, dealing with establishment of a rate-setting process for payment of services for medical assistance programs to facilities, to implement AS 47.07, as follows:

1. 7 AAC 43.675(f) is proposed to be amended to clarify commission voting procedures.

2. 7 AAC 43.679(a) is proposed to be amended to reflect Accounting Manual changes.

3. 7 AAC 43.680(j) is proposed to be added to establish a procedure for corrected reports.

4. 7 AAC 43.686(d) is proposed to be amended to further define allowable costs included in determining a prospective rate.

5. 7 AAC 43.691(c), dealing with commission waiver of year-end conformance that is otherwise required by (a) and (b) of that section, is proposed to be repealed.

6. 7 AAC 43.697(j) is proposed to be amended to require electronic recording of commission proceedings.

ette tax program, interpreting and implementing AS 14.07.020(1), AS 14.11.100(b), AS 43.50.140, and AS 43.50.150 as follows:

4 AAC 36.010, related to cigarette tax distribution, is amended by revising the requirement for a separate bank account to a requirement for separate fund accounting.

The necessary accountability requirements can be met without the added workload and expense of maintaining a separate bank account.

VI. Amendment of material adopted by reference; supplemental notice:

(K) SUPPLEMENTAL NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE ALASKA DEPARTMENT OF LABOR

Notice is given that the Alaska Department of Labor, under authority vested by AS 18.60.020, proposes to amend a regulation in Title 8 of the Alaska Administrative Code dealing with occupational safety and health standards, which are adopted by reference, and proposes to adopt and amend safety and health standards in Subchapter 03, Telecommunication Code, dealing with recordkeeping requirements in connection with required employee training, to implement AS 18.60.010 as follows:

1. 8 AAC 61.010 is proposed to be amended to reflect amendments to Subchapter 03, Telecommunication Code, adopted by reference in it.

2. Subchapter 03, Telecommunication Code, is proposed to be amended by requiring employers to prepare and maintain a certification record of all safe practices training that has been provided to employees.

The proposed changes to these regulations provide minimum safety and health requirements for employment and places of employment in the state, and are at least as effective as those promulgated by the U.S. secretary of labor.

This is a SUPPLEMENTAL NOTICE adding to the NOTICE OF PROPOSED CHANGES that was issued on January 4, 1988 concerning these proposed regulation revisions. The SUPPLEMENTAL NOTICE is being issued because the Department of Labor has decided to hold oral hearings on these proposed revisions. The hearings will be held as follows:

. . . .

January 26, 1990

To: Governor Steve Cowper, and
Members of the Sixteenth Legislature

From. DADS AGAINST DISCRIMINATION
Sandy Armstrong, Member
Child Support Subcommittee
FAMILY SUPPORT TASK FORCE

Subj: Child Support for Children:
FAMILY SUPPORT TASK FORCE RECOMMENDATIONS
35 and 36

The central goal of the Family Support Act of 1988 is to enable families to move off public assistance and to stay off welfare rolls. Of all the Family Support Task Force recommendations, the "Pay Family Arrearages First" Recommendations 35 and 36, attached, will contribute the most to the financial independence of fragile post-AFDC families. These two recommendations implemented would mean cash in the hands of between 1,700 and 6,000 custodial families---back child support payments being made by DADS (and Moms).

Child Support Enforcement Division (CSED) has estimated that noncustodial parents are making $1.6 million in back, or arrearage, child support payments annually, over and above the current monthly child support owed. Today, that $1.6 million is going to the State of Alaska first to reimburse public assistance provided to the custodial family, even though "Mom and the Kids" are also owed a back child support bill. Today, that $1.6 million is funding the Public Assistance and Support Enforcement programs, instead of going to the children for their very real support needs that all state officials are fond of "talking" about.

The Childrens Caucus has successfully secured over $20 million to fund much-needed "preventive" childrens programs in the last two sessions. Today, DADS calls on that Caucus to seek full funding for the "Pay Family Arrearages First" Task Force recommendations 35 and 36, so that children get the back support their DADS (and Moms) are paying and so that Public Assistance and Support Enforcement can continue their services at current budget levels.

OREGON HAS BEEN PAYING "FAMILIES FIRST" FOR THE PAST TWO YEARS!!! In a year of high oil prices, an estimated state budget surplus of $50 million, in a very wealthy state, DADS maintains that there is no excuse whatever for not paying Family Arrearages First.

The Governor did not put funding for "Family Arrearages First" Recommendations 35 and 36 in his budget. The state agencies, who agreed to these two recommendations in the Task Force, did not request funding to implement Recommendations 35 and 36 in their budget requests. DADS AGAINST DISCRIMINATION respectfully insists that the Sixteenth Legislature - Second Session give child support that is being paid to the children first!

FAMILY SUPPORT TASK FORCE "FAMILY ARREARAGES"
RECOMMENDATIONS 35 and 36 WOULD PAY THE CHILDRENS' BACK CHILD SUPPORT DEBT FIRST, THEN THE STATE DEBT

FACTS	1989	1990	1991
John and Mary get divorced. Mary has custody of the two children.	Mary and children go on Public Assistance. (AFDC) Child Support assigned to the state. (AFDC Regulation)	Mary finds a job and goes off Public Assistance.	Mary still employed.
John ordered to pay Child Support for two children at $300/month.	John enrolls in 2-year retraining program.	John still in school.	John graduates from school, gets a good job.
	No Child Support being paid.	No Child Support being paid.	John starts paying $450/month for Child Support.
	$3,600 back Child Support debt accrues to reimburse Public Assistance.	$3,600 back Child Support debt accrues for Mary and children.	$300 goes to Mary and the children for current monthly Child Support.

Today

35 and 36

* $150 payment towards the back Child Support owed is now going to pay the state debt first.

* CSED estimated that $1.6 million in back Child Support payment being made by non-custodial parents each year, could go to between 1,700 and 6,000 custodial families.

Prepared by: Rob Armstrong, DADS AGAINST DISCRIMINATION

RECOMMENDATION 35:

TO THE EXTENT ALLOWED BY FEDERAL LAW, AND PROVIDED THAT THE LEGISLATURE APPROPRIATES ADEQUATE FUNDS, CSED SHOULD DISTRIBUTE AMOUNTS IN EXCESS OF THE CURRENT MONTH'S CHILD SUPPORT OBLIGATION TO PAYMENT OF ARREARAGES IN THE FOLLOWING ORDER:

(1) First, to the obligee, who is not receiving public assistance, support arrearages accrued after the obligee stopped receiving public assistance;
(2) Second, to the State for unreimbursed public assistance; and
(3) Third, to the obligee, support arrearages which accrued before the obligee received public assistance, and which exceed the amount of public assistance paid to the family.

RECOMMENDATION 36:

THE LEGISLATURE SHOULD APPROPRIATE FUNDS TO MAKE UP THE ESTIMATED $1.6 MILLION SHORTFALL CAUSED BY RECOMMENDATION 35.

Issue

How should child support arrearages collected by the Child Support Enforcement Division in cases involving former AFDC recipients be distributed by the State?

FSA Requirement

Section 122 of the Family Support Act requires that states distribute child support payments and arrearages they collect within time limits to be set forth in federal regulations.

Rationale

On August 4, the federal government issued final regulations establishing the time limits for distribution of child support payments and arrearages, as required under Section 122 of the Family Support Act. Those regulations indicate that the states have discretion to distribute a portion of child support arrearages to the family before satisfying state liens for prior AFDC payments. Before the new regulations were issued, it did not appear that the states had this discretion.

The new regulations address only the question of the timeframes for distribution, and do not directly control the substantive authority of the states to redirect the distribution of child support arrearages to the family. Additional federal regulations specifically addressing the states' substantive authority will be issued in the near future.

Members of the subcommittee expressed a preference for the policy of payment to the family first, to the fullest extent permitted under federal law. These recommendations reflect limitations on that policy imposed by federal law. The subcommittee felt that the fiscal impact on the State was justified by the policies inherent in the Family Support Act of reducing welfare dependence and encouraging the development of stable family ties.

Cost

Recommendation 35 will result in an estimated $1.6 million reduction in child support collections which are currently being applied to the AFDC grant budget. This procedure will also increase administrative expenditures.

Benefit

We believe this fiscal consequence is justified, in order to enable custodial parents to support their children with the child support payments made by the children's other parents, and to assist custodial parents in remaining off public assistance.