

HB

308

WALTER J. HICKEL
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 29, 1991

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Speaker Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the notice required for adoption of emergency regulations. This legislation is necessary as a result of a recent court decision, Shepherd v. State, 4FA-90-1514 Civil (March 19, 1991), which held that the process the state has utilized for the adoption of emergency regulations for several years is invalid. The purpose of this legislation is to validate longstanding practice, thereby permitting the state to continue using present practice.

Under AS 44.62.180, an emergency regulation adopted by an agency is submitted to the lieutenant governor, and takes effect upon filing by the lieutenant governor. AS 44.62.250 currently requires notice of the adoption of an emergency regulation to be published within 10 days after "adoption" of the regulation. If notice is not published within that time, the regulation is automatically repealed. The Department of Law has always taken the position that the term "adoption" in this section really refers to the regulation's "effective date," since there would be no point in publishing notice of an emergency regulation that was not in effect and might never take effect. Furthermore, the practical realities of the situation are that it is often impossible to finalize and file an emergency regulation, and ensure that notice of that action is published, within 10 days of a board's action on it.

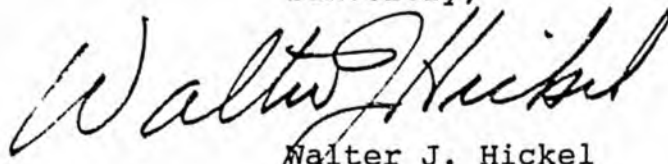
Nevertheless, the superior court held that irrespective of longstanding state practice, the time limits in AS 44.62.250

The Honorable Ben Grussendorf - 2 -

begin running immediately upon a board's taking a vote approving the adoption of an emergency regulation. This decision will cause serious problems for several boards, such as the Boards of Fish and Game, that frequently adopt emergency regulations.

This bill will validate existing practice and longstanding interpretations of the Department of Law with respect to the notice requirement for emergency regulations. I urge your support of this measure.

Sincerely,

A handwritten signature in cursive script, reading "Walter J. Hickel". The signature is written in dark ink and is positioned above the printed name and title.

Walter J. Hickel
Governor

Notice of Adoption of Emergency Regulations

As required by AS 44.62.250, notice is given that under the authority of AS 15.15.010, the Division of Elections adopted the following regulation as an emergency regulation:

6 AAC 27.165:

Establishing the authority of the director to require a voter to verify the physical location of his or her residency by means of attestation in order to qualify to vote in: 1) a municipal incorporation election or 2) a local option election conducted by the division.

This regulation took effect May 1, 1991, immediately upon the filing with the Lieutenant Governor, as provided by AS 44.62.180(3).

This action is not expected to require an increased appropriation.

Copies of the regulation may be obtained by writing to the Director of Elections, P.O. Box AF, Juneau, Alaska 99811-0105.

Notice is also given that the Division of Elections intends to make these regulations permanent under AS 44.62.260, and any person interested in presenting written statements or arguments relevant to the action proposed, may do so. Written statements may be sent to the Director of Elections at the address indicated above, so that they are received not later than June 1, 1991.

DATE: 5/2/91
Juneau, Alaska
AO #91-2060

Charlot Thickstun
Director

**THE FOLLOWING PAGES
WERE TREATED AS A UNIT
IN THE ORIGINAL FILE**



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

MEMORANDUM

TO: All Commissioners
FROM: Walter J. Hickel
Governor
DATE: April 1, 1991
SUBJECT: Procedure after adopting regulations

A handwritten signature in cursive script that reads "Walter J. Hickel".

Currently, after your agencies adopt regulations, the regulations are sent to the Department of Law for a legal review. I would now like adopted regulations to be submitted to the Lieutenant Governor, who will submit the regulation project to the Department of Law for the legal review.

A control file will be set up in the Lieutenant Governor's office and during the time that the Department of Law is preparing their opinion, the Lieutenant Governor will be reviewing the regulations to make sure they meet the following requirements that our administration wishes to implement:

1. Are the regulations procedural. Policy belongs in statutes not regulations.
2. Are they positive not negative. A "can-do" attitude.
3. Are they readable. Regulations should be clear, concise and drafted in lay language so people can understand them.
4. Was the public input taken into account in the final adopted version of the regulations.
5. Was the legislative intent followed through to the regulatory process.
6. Are they necessary. Can government operate just as well without them.
7. Are they consistent with statutes and other regulations.

This change in procedure will allow us to carry out our agenda to be a responsive Administration and to implement our regulatory review program.

Please consider this procedural change effective immediately.

MEMORANDUM

State of Alaska

Department of Law

TO: All Civil Attorneys
Juneau, Anchorage, Fairbanks;
and Chief Prosecutor's Office

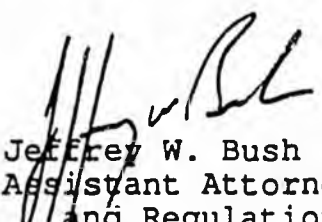
DATE: April 11, 1991

FILE NO:

TEL. NO.: 465-3600

SUBJECT: New procedure for
adoption of regulations

FROM:


Jeffrey W. Bush
Assistant Attorney General
and Regulations Attorney

RECEIVED

APR 12 1991

Effective immediately, there is a new procedure for the adoption, amendment or repeal of administrative regulations, to provide for the review and approval of all regulations projects by the Lieutenant Governor's Office prior to their taking effect. Sara Fisher, an assistant to Mr. Coghill, will be in charge of reviewing all regulations for the Lieutenant Governor. Governor Hickel has directed Mr. Coghill to review all proposed regulations to ensure that they meet the following requirements:

1. Are the regulations procedural. Policy belongs in statutes not regulations.
- * 2. Are they positive not negative. A "can-do" attitude.
3. Are they readable. Regulations should be clear, concise and drafted in lay language so people can understand them.
4. Was the public input taken into account in the final adopted version of the regulations.
5. Was the legislative intent followed through to the regulatory process.
- * 6. Are they necessary. Can government operate just as well without them.
7. Are they consistent with statutes and other regulations.

Memorandum from Governor Hickel to all commissioners, dated April 1, 1991.

To implement the Governor's directive, the following procedure will be used:

1. At the time a regulations project is first opened in our office, a copy of the file opening memorandum will be sent to the Lieutenant Governor's Office, and they will maintain a separate file on each project.

2. Final regulations packages, including public notices and adoption orders, should be sent by the adopting agency directly to the Lieutenant Governor's Office. That office will then make a copy of each package before forwarding the original documents on to us. If you receive a final package directly from an agency, please immediately send it to me; I will then deliver it to the Lieutenant Governor's Office, they will copy it and send it back, and I will then get it back to you.

3. When the final package comes to the Lieutenant Governor's Office, they will begin their review, in conjunction with our legal review. Sara Fisher will contact the assigned attorney and work closely with the attorney in their review. If at any time the Lieutenant Governor's Office determines that a particular regulation or set of regulations should not be adopted, Sara will immediately contact the assigned attorney so that he or she can stop working on the file. Please feel free to contact Sara at any time with questions or comments.

4. Before any regulations project is forwarded to me for final technical review and filing with the Lieutenant Governor, the assigned attorney must get approval for the project from the Lieutenant Governor's Office. The cover memo to me forwarding the file must clearly state that the project has been approved for adoption by Sara Fisher. Absent this statement, the file will be immediately returned to the assigned attorney.

Please contact me if you have any questions.

JWB:cl

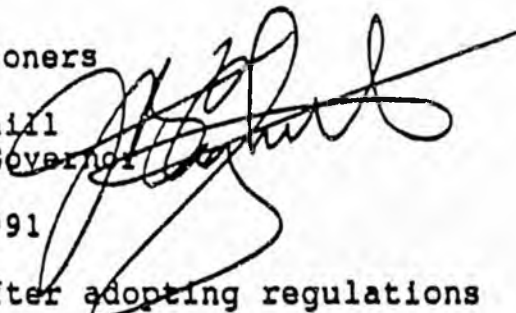
cc: Lt. Gov. John B. (Jack) Coghill



JOHN B. COGHILL
LIEUTENANT GOVERNOR

STATE OF ALASKA
P. O. BOX AA
JUNEAU 99811-0111
(907) 485-3820

MEMORANDUM

TO: All Commissioners
FROM: John B. Coghill
Lieutenant Governor 
DATE: April 11, 1991
SUBJECT: Procedure after adopting regulations

=====

Since the Governor has given his directive to have all agencies submit adopted regulations to my office, I would like to inform you how this will happen.

When adopted regulations are received by my office, we will set up a control file. A copy the regulation project will be kept in my office and the original project will be sent to the Department of Law for legal review. After we receive the project we will notify you of the date it was transmitted to Law. The Department of Law will carry out their normal legal review, while my office will conduct the review as outlined in Governor Hickel's directive (see attached).

The Department of Law has advised me that adopted regulations were sent to them either by mail or courier. I would like to request a department courier deliver all regulation projects to my office. The courier should hand the project directly to Sara Fisher, my special assistant in charge of the regulatory review. If Sara is not available the project should be left with Dennis Burns, the Administrative Code Coordinator. This will ensure the regulation project was properly received by my office.

Your cooperation to start implementing these changes by Monday April 15, 1991 is appreciated. Please contact Sara Fisher if you have any questions.

Coghill receives new regulatory powers

THE ASSOCIATED PRESS

ANCHORAGE - Gov. Walter J. Hickel has given Lt. Gov. Jack Coghill sweeping new powers to block proposed state regulations or order them rewritten.

Lawmakers said the action probably is unconstitutional and will allow special interests to influence Coghill to block laws written by the Legislature.

But Hickel wrote: "This change will allow us to carry out our agenda to be a responsive administration and to implement our regulatory review program."

Hickel made the move unannounced in an April 1 memo sent to his cabinet officers, according to his press secretary, Eric Rehmann.

The memo laid out rules requiring regulations to be positive and to exhibit a "can-do attitude."

It elevates Coghill over commis-

sioners, who previously oversaw regulation-writing.

A regulatory review team will be formed in Coghill's office, Rehmann said.

"I guess Coghill's a regulatory czar now," said Rep. Cliff Davidson, D-Kodiak. "I think the special interests gain and the public process loses."

Coghill will be able to reject or revamp state regulations dealing with oil and gas taxes and royalties, environmental safeguards, and fish and game management, said Davidson, co-chair of the House Resources Committee.

"Only the commissioner of an agency has statutory authority to implement regulations, not the lieutenant governor," said Rep. Fran Ulmer, a Juneau Democrat and attorney. "There isn't a lieutenant gover-

Please turn to Coghill Page 8

Coghill...

Continued from Page 1

nor in the Lower 48 who has this kind of power."

But Hickel maintains he holds executive authority to designate the final arbiter of state regulations, Rehmann said.

"Jack's a statewide elected official and the governor sees this as adding greater democracy to the process," Rehmann said.

Coghill made expansion of the lieutenant governor's power a key plank in his 1990 election campaign.

Some regulations have been mired in the review process for up to three years by commissioners who delegate rule-writing to underlings, Coghill said. Industry and interest groups frequently complain about regulations that unfairly implement new laws, he said.

"It's kind of crazy that you have middle management bureaucracy dictating regulations," Coghill said. "That's why it's important the lieutenant governor be the conscience of the regulatory process."

Coghill said he already has rejected rules written by the Department of Transportation and Public Facilities that would have further restricted travel of long double-trailer

trucks on the Kenai Peninsula. Transportation Commissioner Frank Turpin said the rule would have limited travel of the 110-foot-long trucks to between 7 p.m. and 7 a.m. on weekdays on the Sterling and Seward Highways.

Although the trailer trucks occasionally slow traffic, they did not prompt widespread criticism from Kenai Peninsula legislators and residents, confirming Coghill's action, Turpin said.

"He was right," Turpin said. "We just didn't get a lot of support for the tighter regulations."

Administration sources said Coghill gained his newfound authority after a showdown with Hickel's chief of staff, Max Hodel, in a meeting with Hickel.

Hodel reportedly defended commissioners' rule-writing authority. He could not be reached for comment. Coghill declined to comment but made it clear he now holds the power.

"That's the signature of the governor," Coghill said pointing to the April 1 Hickel memo. "I'll let you be the judge of that."

A regulation is a rule or order springing from one of 15 executive agencies in state government. Regulations are adopted under authority

of statutes, or laws, passed by the Legislature.

Commissioners typically write or oversee the rule-writing process. The rules are then sent to the Department of Law for technical review and then to the lieutenant governor for signature, typically a formality.

The Administrative Procedures Act, which lays out the rules for regulation writing, makes no express provision for the lieutenant governor to assume the authority, said Tam Cook, an attorney for the Legislature.

However, it appears the governor may shift responsibility within the executive branch from the Department of Law to the governor by executive order, which is subject to legislative approval, she said.

Attorney General Charles Cole did not return several phone calls for comment on Hickel's action. Legislators said there has been no executive order from Hickel shifting rule-making responsibility.

In 1989, an attorney general's opinion described the lieutenant governor's regulatory role as largely ceremonial and confined to rule-signing. Then-Lt. Gov. Stephen McAlpine blocked regulations restricting a lottery organization by refusing to sign the rules.

Czar

Continued from page A1

game management, said Davidson, co-chair of the House Resources Committee.

"Only the commissioner of an agency has statutory authority to implement regulations, not the lieutenant governor," said Rep. Fran Ulmer, a Juneau Democrat and attorney. "There isn't a lieutenant governor in the Lower 48 who has this kind of power."

But Hickel maintains he holds executive authority to designate the final arbiter of state regulations, Rehmann said.

"The governor has full authority to delegate to Jack the oversight on this," Rehmann said. "Jack's a statewide elected official and the governor sees this as adding greater democracy to the process."

Coghill made expansion of the lieutenant governor's power a key plank in his 1980 election campaign.

Some regulations have been mired in the review process for up to three years by commissioners who delegate rule-writing to their underlings, Coghill said. Industry and interest groups frequently complain about regulations that unfairly implement newly passed laws, he said.

"It's kind of crazy that you have middle management bureaucracy dictating regulations," Coghill said. "That's why it's important the lieutenant governor be the conscience of the regulatory process."

Coghill said he already has re-

'I guess Coghill's a regulatory czar now. I think the special interests gain and the public process loses.'

— Rep. Cliff Davidson,
D-Kodiak

jected rules written by the Department of Transportation and Public Facilities that would have further restricted travel of long double-trailer trucks on the Kenai Peninsula. Transportation Commissioner Frank Turpin said the rule would have limited travel of the 110-foot-long trucks to between 7 p.m. and 7 a.m. on weekdays on the Sterling and Seward Highways.

Although the trailer trucks occasionally slow traffic, they did not prompt widespread criticism from Kenai Peninsula legislators and residents, confirming Coghill's action, Turpin said.

"He (Coghill) was right," Turpin said. "We just didn't get a lot of support for the tighter regulations."

Administration sources said Coghill gained his newfound authority after a showdown with Hickel's chief of staff, Max Hodel, in a meeting with Hickel.

Hodel reportedly defended commissioners' rule-writing authority. He could not be reached for comment. Coghill declined to comment but made it clear he now holds the power.

"That's the signature of the governor," Coghill said pointing to the April 1 Hickel memo. "I'll let you be the judge of that."

A regulation is a rule or order springing from one of 15 executive agencies in state government. Regulations are adopted under authority of statutes, or laws, passed by the Legislature.

Commissioners typically write or oversee the rule-writing process. The rules are then sent to the Department of Law for technical review and then to the lieutenant governor for signature, typically a formality.

The Administrative Procedures Act, which lays out the rules for regulation writing, makes no express provision for the lieutenant governor to assume the authority, said Tam Cook, an attorney for the Legislature.

However, it appears the governor may shift responsibility within the executive branch from the Department of Law to the governor by executive order, which is subject to legislative approval, she said.

Attorney General Charles Cole did not return several phone calls for comment on Hickel's action. Legislators said there has been no executive order from Hickel shifting rule-making responsibility.

In 1980, an attorney general's opinion described the lieutenant governor's regulatory role as largely ceremonial and confined to rule-signing. Then-Lt. Gov. Stephen McAlpine blocked regulations restricting a lottery organization by refusing to sign the rules.

Coghill wins regulatory 'czar' power

Hickel decision fires up lawmakers

By DAVE PATRICK

TIMES CAPITAL BUREAU

JUNEAU — Gov. Walter J. Hickel has given Lt. Gov. Jack Coghill sweeping new powers to block proposed state regulations or order them rewritten, Eric Rehmann, Hickel's press secretary, confirmed Friday.

Hickel's action elevates Coghill over commissioners who previously oversaw regulation-writing and occurred unannounced in an April 1 memo signed by the governor and sent to his Cabinet officers.

"This change will allow us to carry out our agenda to be a responsive administration and to implement our regulatory review program," Hickel wrote. The memo laid out rules requiring regulations to be positive and to exhibit a "can-do attitude."

A regulatory review team will be formed in Coghill's office,

■ Gov. Hickel opposes funding of abortions

Rehmann said. Lawmakers said it likely unconstitutional to allow special interests to influence Coghill to bludgeon laws written by the Legislature.

"I guess Coghill's a regulatory czar now," said Rep. Cliff Davidson, D-Kodiak. "I think the special interests and the public process. Coghill will now be in a position to reject or revamp any regulations that deal with taxes and royalties. mental safeguards, a
See C-1

ch 120 SLA 1971; am § 1 ch 200 SLA 1972; am § 2 ch 207 SLA 1975; am § 94 ch 218 SLA 1976; am E.O. No. 39, §§ 7, 13 (1977); am E.O. No. 55, § 37 (1984); am E.O. No. 58, § 19 (1984))

Revisor's notes. — Formerly AS 44.15.010. Renumbered in 1980.

NOTES TO DECISIONS

The University of Alaska cannot be allocated among the principal departments now identified under this section. *University of Alaska v. National Aircraft Leasing, Ltd.*, 536 P.2d 121 (Alaska 1975).

The University of Alaska is an instrumentality of the sovereign which enjoys in some limited respects a status which is co-equal rather than subordinate to that of the executive or the legislative arms of government. Therefore, it is not necessarily subject to such allocation under this

section. *University of Alaska v. National Aircraft Leasing, Ltd.*, 536 P.2d 121 (Alaska 1975).

Former Alaska State-Operated School System not a separate principal department of government. — See *Alaska State-Operated School Sys. v. Mueller*, 536 P.2d 99 (Alaska 1975).

Applied in *Granato v. Occhipinti*, 602 P.2d 442 (Alaska 1979).

Cited in *Aspen Exploration Corp. v. Sheffield*, 739 P.2d 150 (Alaska 1987).

Collateral references. — 38 Am. Jur. 2d, Governor, §§ 1 to 15; 63 Am. Jur. 2d, Public Officers and Employees, § 1 et seq;

72 Am. Jur. 2d, States, Territories and Dependencies, §§ 62 to 65.
81A C.J.S., States, §§ 79 to 103.

Sec. 44.17.010. Delegation of functions. The principal executive officer of each state department may assign the functions vested in the department to subordinate officers and employees. (§ 3 ch 64 SLA 1959)

Collateral references. — 1 Am. Jur. 2d, Administrative Law, § 1 et seq.
3 Am. Jur. 2d, Agency, § 68 et seq.

3 C.J.S., Agency, §§ 257 to 267; 73 C.J.S., Public Administrative Law, § 1 et seq.

Sec. 44.17.020. Divisions. The principal executive officer of each department may, with the approval of the governor, establish divisions or other administrative or organization units within the department in the interests of economy and efficiency and in accord with sound administrative principles and practices. (§ 3 ch 64 SLA 1959)

Sec. 44.17.030. Regulations. The principal executive officer of each department may adopt regulations, consistent with law or regulations established by the governor, for

- (1) the administration of the department;
- (2) the conduct of employees;
- (3) the distribution and performance of business; and
- (4) the custody, use, and preservation of the records, documents, and property pertaining to department business. (§ 5 ch 64 SLA 1959)

Issuance of permits for killing of caribou based on verbal instructions to agents held improper. — The issuance of permits for killing of caribou in certain specified areas of the state based on verbal instructions to the permit agents as to the need of individual applicants does not conform to requirements of this chapter. *State v. Tanana Valley Sportsmen's Ass'n*, 583 P.2d 854 (Alaska 1978).

Nothing in this chapter authorizes the Board of Game to impose requirements not contained in written regulations by means of oral instructions to agents. Such verbal additions to regulations involving requirements of substance are unauthorized and unenforceable. *State v. Tanana*

Valley Sportsmen's Ass'n, 583 P.2d 854 (Alaska 1978).

Cited in *Hammond v. Hickel*, 588 P.2d 256 (Alaska 1978); *In re Simpson*, 645 P.2d 1223 (Alaska 1982); *Chevron U.S.A., Inc. v. LeResche*, 663 P.2d 923 (Alaska 1983); *Pan Am. Petroleum Corp. v. Shell Oil Co.*, 455 P.2d 12 (Alaska 1969); *Coghill v. Boucher*, 511 P.2d 1297 (Alaska 1973); *In re Sullivan*, 551 P.2d 531 (Alaska 1976); *Dresser Indus., Inc. v. Alaska Dept of Labor*, 633 P.2d 998 (Alaska 1981); *Wien Air Alaska, Inc. v. Department of Revenue*, 647 P.2d 1087 (Alaska 1982); *Wickersham v. State Com. Fisheries Entry Comm'n*, 680 P.2d 1135 (Alaska 1984).

Collateral references. — 1 and 2 Am. Jur. 2d. Administrative Law, § 1 et seq.

73 C.J.S., Public Administrative Law and Procedure, § 1 et seq.

Article 1. Application and Effect.

Section

- 10. Application to State Organization Act of 1959
- 20. Authority to adopt, administer, or enforce regulations

Section

- 30. Consistency between regulation and statute

Sec. 44.62.010. Application to State Organization Act of 1959. Rule-making power conferred by ch 64 SLA 1959 is subject to this chapter. (§ 2(4) art I (ch 1) ch 143 SLA 1959)

Revisor's notes. — It is not possible to eliminate the reference to ch 64 SLA 1959 in the above section. The rule-making

powers referred to are scattered throughout this revision.

NOTES TO DECISIONS

Cited in *Dayhoff v. Temsco Helicopters, Inc.*, 772 P.2d 1085 (Alaska 1989).

Sec. 44.62.020. Authority to adopt, administer, or enforce regulations. Except for the authority conferred upon the lieutenant governor in AS 44.62.130 — 44.62.170, AS 44.62.010 — 44.62.320 do not confer authority upon or augment the authority of a state agency to adopt, administer, or enforce a regulation. To be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law. (§ 4 art I (ch 1) ch 143 SLA 1959)

NOTES TO DECISIONS

Authorization for regulations. — In determining whether a regulation is authorized by statute the Court of Appeals of Alaska looks to four things: First, the scope of authority conferred by the authorizing statute; second, the extent to which the regulation is in accordance with "standards prescribed by other provisions of law"; third, the extent to which the regulation is consistent with the authorizing statute; and fourth, the extent to which the regulation is reasonably necessary to carry out the purpose of the authorizing statute. *Beran v. State*, 705 P.2d 1280 (Alaska Ct. App. 1985).

Meaning of "in accordance with standards prescribed by other provisions of law." — The words of this section, "in accordance with standards prescribed by other provisions of law," mean nothing more than if standards are prescribed by provisions of law other than those contained in this chapter, then they must be recognized and adhered to. This language does not mean that regulations cannot be validly adopted by an administrative agency "unless" standards have been prescribed. *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585 (Alaska 1960).

In the absence of express statutory authorization a regulation imposing strict liability but providing for punishment by possible imprisonment is not "in accordance with standards prescribed by other provisions of law." *Beran v. State*, 705 P.2d 1280 (Alaska Ct. App. 1985).

Record should give explanation for regulation. — This chapter does not specifically require a decisional statement when an agency promulgates a regula-

tion; however, when an agency promulgates a regulation, the record should at least explain the reasons for the agency's action. *Johns v. Commercial Fisheries Entry Comm'n.* 758 P.2d 1256 (Alaska 1988).

Judicial review of administrative regulation. — Where an administrative regulation has been adopted in accordance with the procedures set forth in the Administrative Procedure Act, and it appears that the legislature has intended to commit to the agency discretion as to the particular matter that forms the subject of the regulation, the supreme court will review the regulation in the following manner: First, it will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, the supreme court will determine whether the regulation is reasonable and not arbitrary. This latter inquiry is proper in the review of any legislative enactment. *Kelly v. Zamarello*, 486 P.2d 906 (Alaska 1971).

Standard of review. — This section and AS 44.62.030 provide guidance as to the standard of review for regulations adopted pursuant to an administrative agency's quasi-legislative rule-making function. *Kelly v. Zamarello*, 486 P.2d 906 (Alaska 1971).

Applied in *State v. Anderson*, 749 P.2d 1342 (Alaska 1988).

Quoted in *State v. Alyeska Pipeline Serv. Co.*, 723 P.2d 76 (Alaska 1986).

Collateral references. — 1 Am. Jur. 2d, Administrative Law, §§ 92 to 97.

73 C.J.S., Public Administrative Law and Procedure, § 87 et seq.

Sec. 44.62.030. Consistency between regulation and statute. If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute. (§ 5 art I (ch 1) ch 143 SLA 1959)

authorized by statute the Court of Appeals of Alaska looks to four things: First, the scope of authority conferred by the authorizing statute; second, the extent to which the regulation is in accordance with "standards prescribed by other provisions of law"; third, the extent to which the regulation is consistent with the authorizing statute; and fourth, the extent to which the regulation is reasonably necessary to carry out the purpose of the authorizing statute. *Beran v. State*, 705 P.2d 1280 (Alaska Ct. App. 1985).

Statute prevails over conflicting regulation. — The statute delegating its law-making power to government agencies to make law through regulations defines the agency's authority to promulgate regulations and thus if there is a conflict between the statute and a regulation, the statute prevails. *Chevron U.S.A., Inc. v. Hammond* (A77-195 Civil), F. Supp. (D. Alaska 1978).

Attorney general could not save provisions of former AS 30.25 from unconstitutionality under Alas. Const., art. IX, § 7, by directing promulgation of regulations inconsistent with statute. — See *Chevron U.S.A., Inc. v. Hammond* (A77-195 Civil), F. Supp. (D. Alaska 1978).

Regulation accorded presumption of validity. — An administrative regulation must be accorded a presumption of validity, and the challenger of the regulation must demonstrate its invalidity. *Union Oil Co. v. State*, 574 P.2d 1266 (Alaska 1978).

Judicial review of administrative

with the provisions of the Administrative Procedure Act, and it appears that the legislature has intended to commit to the agency discretion as to the particular matter that forms the subject of the regulation, the supreme court will review the regulation in the following manner: First, it will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, the court will determine whether the regulation is reasonable and not arbitrary. This latter inquiry is proper in the review of any legislative enactment. *Kelly v. Zamarello*, 486 P.2d 906 (Alaska 1971).

Standard of review. — This section and AS 44.62.020 provide guidance as to the standard of review for regulations adopted pursuant to an administrative agency's quasi-legislative rule-making function. *Kelly v. Zamarello*, 486 P.2d 906 (Alaska 1971).

Regulation invalid under this section. — See *State v. Alyeska Pipeline Serv. Co.*, 723 P.2d 76 (Alaska 1986).

Applied in *State v. Anderson*, 749 P.2d 1342 (Alaska 1988); *State v. Korean Air Lines Co.*, Sup. Ct. Op. No. 3447 (File No. S-2438), P.2d (1989).

Quoted in *Chevron U.S.A., Inc. v. LeResche*, 663 P.2d 923 (Alaska 1983); *Kuhn v. State*, 692 P.2d 261 (Alaska 1983); *State v. Eluska*, 698 P.2d 174 (Alaska Ct. App. 1985).

Article 2. Submission, Filing and Publication of Regulations.

Section

- 40. Submitting regulations
- 50. Style and forms
- 60. Preparation and filing
- 70. Fees
- 80. Endorsement and filing

Section

- 100. Presumptions from filing
- 110. Presumptions from publication
- 120. Voluntary submitting and publication
- 125. Regulations attorney

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

April 19, 1991

SUBJECT: Gubernatorial delegation of regulatory review power to the lieutenant governor (Work Order No. 7-LS1225)

TO: Senator Arliss Sturgulewski

FROM: Theresa L. Bannister *TB*
Legislative Counsel

You have asked whether the governor can delegate to the lieutenant governor the power to review regulations^{1/} as he has done in his April 1, 1991 memo.^{2/}

SHORT ANSWER. In my opinion the governor cannot delegate the power to review regulations to the lieutenant governor as he has done in his April 1, 1991 memo, unless he uses an executive order.

DISCUSSION. This delegation inserts additional steps into the regulation adoption process. At the present time, proposed regulations that have gone through the basic procedures for adoption are sent to the Department of Law ("department") for final legal approval before being submitted to the lieutenant governor for filing under AS 44.62.040, AS 44.62.060. The filing of the lieutenant governor is basically a technical act.^{3/}

However, under the delegation the agencies must submit the regulations they have adopted to the lieutenant governor for his review before sending them to the department for its final review. The lieutenant governor then transmits the regulations to the department. Under the delegation, the approval of the lieutenant governor must be obtained before the department issues its final legal approval.

^{1/}In this memo a reference to "regulations" includes orders of repeal.

^{2/} The scope of the delegation can be more completely understood by reviewing the April 11, 1991, Department of Law memo on this subject.

^{3/}The statutes do not give the lieutenant governor any review power over the regulations that are submitted to him.

Under art. III, sec. 23, of the state constitution the governor is authorized to make changes in the organization of the executive branch or in the assignment of functions among its units that he considers necessary for efficient administration.^{4/} However, if the change requires the force of law, he must use an executive order.

At first glance, the extra steps could be characterized as merely an internal reassignment of executive branch regulation review functions inherent in the regulatory process, a reassignment that does not require more than the memo that was used.

However, the delegation actually conflicts with the statutes governing the adoption of regulations, and the delegation appears to significantly alter the present statutory plan for adopting regulations by adding these particular steps.

The delegation conflicts with AS 44.62.250, which establishes the procedures for adopting emergency regulations. Under that section, the adopting agency is directed to immediately submit a copy of an emergency regulation to the lieutenant governor for filing. Under the delegation, adopted regulations are required to be submitted to the lieutenant governor for his review, not for filing by him.

The delegation also contradicts the responsibilities given to the Department of Law under AS 44.62.125. The lieutenant governor essentially controls when the regulations are transmitted to the department. He also controls whether or not the department can perform its final review of the regulations. Because the lieutenant governor controls when and if the department reviews regulations, it contradicts the affirmative requirement in AS 44.62.125 that the department review regulations.

The scope of the lieutenant governor's review both enlarges and conflicts with the statutory plan. Under the delegation, the lieutenant governor is to review the regulations for such items as being positive, not negative, and for a "can-do" attitude. These criteria are not usually required for the adoption of regulations. If the lieutenant governor bases his disapproval on these items, the disapproval may be

^{4/} This section reads as follows:

Section 23. Reorganization. The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

Senator Arliss Sturgulewski

April 19, 1991

Page 3

considered to conflict with the present statutory plan because it imposes new requirements on regulations beyond those already required.

During the review, the lieutenant governor also must consider whether "public input" has been taken into account in the final adopted version of the regulations. The present statutory plan addresses public review by establishing certain notice and hearing requirements (e.g. AS 44.62.190 and 44.62.210). Once these are satisfied under the present statutory plan, the regulation should be considered to have satisfied any "public input" requirements. Disapproval based on this point may conflict with the statutory plan because it requires more than is required by the statutory plan governing the adoption of regulations.

The timing and potential of the review appear to be significant. Under the present statutory process, by the time the regulation is ready for the final Department of Law approval, the regulation has gone through all of the requirements for the regulation under the statutory system, except for the final department review and submission to the lieutenant governor for technical filing. At that point the regulations have essentially been "adopted" by the agency, but have not become "effective". The addition of the lieutenant governor's general review with the potential for disapproving the regulation at that point appears to alter the established statutory plan for adopting regulations.

Because of these conflicts and alterations force of law is required to make these changes and the governor must use an executive order. Since the adoption of regulations is basically a legislative function delegated to the executive branch, a court is more likely (than when examining traditional executive functions) to hold that the governor cannot make these changes without an executive order. The delegation from the legislature would be more narrowly construed, and the court could more easily find that the changes require the force of law.

In conclusion, although the outcome of a court review cannot be predicted in this situation, it is my opinion that the governor cannot delegate the power to review regulations to the lieutenant governor as he has done in his April 1, 1991 memo, unless he uses an executive order.

If I may be of further assistance, please advise.

TLB:pl
91-279.plm

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM

April 22, 1991

SUBJECT: Executive orders

TO: Representative Max Gruenberg, Jr.

FROM: Tamara Brandt Cook *TBC*
Director

You have informed me that you have a copy of the memorandum written by Terry Bannister on April 19 addressing the issue of whether the Governor may transfer to the Lieutenant Governor the broad regulation review function that the Lieutenant Governor has indicated he intends to exercise. In that memorandum, Terry Bannister concluded that such a transfer would require changes in statute and, therefore, could probably be accomplished only through a executive order. You have questioned whether, even by utilizing an executive order, the transfer could be accomplished. Article III, Sec. 23 of the state constitution provides:

The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

I have found only one case discussing this section of the constitution and it is not particularly on point. (Suber v. Alaska State Bond Committee, 414 P.2d 546 (Alaska 1966) holding the section not implicated where the Commissioner of Commerce created an executive agency to carry out the provisions of legislation when the legislation gave him specific authority to hire staff) However, the section is discussed in the Alaska Constitutional Convention Proceedings (pages 2226-2229) and it appears clear that the delegates viewed this section as providing the Governor the power, as an administrative matter, to reorganize the functions of the executive branch, but not particularly, to enlarge, diminish, or otherwise alter those functions.

NORDALE: I just perhaps could amplify the Committee's thinking a bit on this. We were thinking primarily of laws setting up boards and sort-of sloppy administration, as we have at the present time. Now then, when the governor sees there are too many departments set up functioning by themselves or functioning under boards and there isn't any coordination, he has the right to suggest a reorganization and a different assignment of functions. . . .

LONDBORG: Mr. President, just another word along that line, and I think Mrs. Nordale brought it out quite clear, now the other way would be if the governor wanted some reorganization he would have to go to the legislature and have a bill introduced by somebody or on his own request and that bill would be acted upon to make this necessary change. For instance, deleting a certain board or ceasing its functions and putting it under the single department head or something of that nature, whatever major change he would want he would have to depend upon the legislature to pass that bill and get it into operation. Doing it this way, he sets forth an executive order but it does not become effective until it slips through the next session of the legislature without being voted out by the legislature. I suppose you could call it reverse legislation. The governor makes a new law and if the legislature does not want it done away with, well, then they can let it go through, but I think it runs in line with the strong executive we have where he can set forth his changes and the legislature by being silent on it, in that way they approve of the order. (Constitutional Convention Proceedings, Part III, Page 2229)

So, it appears quite clear that the Governor could move responsibilities regarding the review of regulations from the Department of Law to the Lieutenant Governor through an executive order that would be subject to legislative disapproval. However, what has been proposed in the current situation, involving extensive review of existing regulations as well as a two-tiered review of new regulations involving both the Lieutenant Governor's office the Department of Law, appears to go beyond what may be accomplished through an executive order. Legislation may well be required to accomplish all that is proposed.

TBC:mi
91-074.mai

**THE PRECEDING PAGES
WERE TREATED AS A UNIT
IN THE ORIGINAL FILE**

FISCAL NOTE

No. 1

Version: HB 308

(H) Publish Date: 4/29/91

STATE OF ALASKA
1991 LEGISLATIVE SESSION

Revision Date: 4/17/91

Department Affected: Fish and Game

Title: Timely notice for emergency regulations

BRU: All divisions

Component: All divisions

Sponsor: _____

Requestor: Governor

COMPONENT SERIAL NO.

	4	7	7
--	---	---	---

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
---------	---	---	---	---	---	---

REVENUE	0	0	0	0	0	0
---------	---	---	---	---	---	---

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: No current year impact

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: McKie Campbell

Phone: 465-4100

Division: Commissioner's Office

Date: 4/17/91

Approved by Commissioner: Row Somerville (by ME)

Agency: Fish and Game

Date: 4/17/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

FISCAL NOTE

No. 2

Bill Version: HB 308

(H) Publish Date: 4/29/91

STATE OF ALASKA
1991 LEGISLATIVE SESSION

Revision Date: _____ Department Affected: Department of Law
 Title: "An Act relating to notice of
adoption of emergency regulations..." BRU: Legal Services
 Sponsor: By request of the Governor Component: Operations
 Requestor: Governor's Office COMPONENT SERIAL NO.

		9	3
--	--	---	---

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

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: April 18, 1991
 Approved by Commissioner: Charles E. Cole, Attorney General
 Agency: Department of Law Date: April 18, 1991

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. _____

This bill amends AS 42.62.250 by changing the notice requirements for the adoption of emergency regulation to require that notice of adoption shall be made within five days after filing by the lieutenant governor, instead of within five days after adoption of emergency regulations. This change validates longstanding practice, and it is needed to conform to a recent court decision in Shepard v. State. Approval of the bill will not have a fiscal impact on the Department of Law.

(c) The lieutenant governor shall provide to the Legislative Affairs Agency the text of each issue of the journal in a computer-readable magnetic medium compatible with the legislative data processing system. The Legislative Affairs Agency shall retain the text of each issue of the journal in a computer-readable magnetic medium.

(d) The lieutenant governor shall sell individual copies of and subscriptions to the journal at a price reasonably calculated to offset the cost of publication and distribution. The commissioner of administration shall separately account for money collected under this subsection that the lieutenant governor deposits in the general fund. The annual estimated balance in the account may be used by the legislature to make appropriations to the office of the lieutenant governor to carry out the purposes of this section.

(e) A person may not maintain an action based on publication or lack of publication in the journal.

(f) In this section

(1) "journal" means the Alaska Administrative Journal; and

(2) "publish" means to make available to the public

(A) through the legislative data processing system; and

(B) in printed form. (§ 2 ch 59 SLA 1985; am § 5 ch 87 SLA 1986; am § 48 ch 106 SLA 1986; am § 80 ch 138 SLA 1986; am § 76 ch 14 SLA 1987)

Revisor's notes. — To correct manifest errors in (a)(4) of this section, a reference to AS 46.11.030 was deleted in 1985 because that section was repealed in 1983, and in 1986 a reference to AS 37.05.316 was substituted for a reference to AS 37.05.315(d).

Cross references. — For legislative findings, see § 1, ch. 59, SLA 1985 in the Temporary and Special Acts.

Effect of amendments. — The first 1986 amendment added paragraph (10) of subsection (a).

The second 1986 amendment substituted "AS 36.30.130" for "AS 37.05.230" in paragraph (3) of subsection (a) and deleted "AS 19.10.190; AS 19.40.020; AS 35.15.030; AS 36.98.030; AS 37.05.230" following "18.55.320;" in paragraph (4) of subsection (a).

The third 1986 amendment inserted "individual copies of and" in the first sentence and added the last two sentences in subsection (d).

The 1987 amendment inserted "AS 36.30.210" in subsection (a)(4).

Article 4. Procedure for Adopting Regulations.

Section	Section
180. Effective date	250. Emergency regulations
190. Notice of proposed action	260. Limitation on effective period of emergency regulations
195. Fiscal notes on regulations	270. State policy
200. Contents of notice	280. Purpose of AS 44.62.180 — 44.62.290
210. Public proceedings	290. Limits of the application of AS 44.62.180 — 44.62.290
220. Right to petition	
230. Procedure on petition	
240. Limitation on retroactive action	

Opinions of atto
Department of Labo
designated toxic
stances pursuant to
AS 18.60.105(a) w
the promulgation p

Sec. 44.62.18
filed by the lie
after the date

(1) otherwise
regulation or o
effective on the

(2) it is a reg
agency, in whic
ant governor or

written instrun
order of repeal

(3) it is an e
AS 44.62.250, i
constituting th
ernor, together

which, in that
ant governor o
written instrun

order of repeal
(4) a later da
ment submitte

(§ 3 art IV (cl

Cited in Mukl
Nabors Alaska Dri
(Alaska 1973); M

Sec. 44.62.1:
before the adop
the proposed a

(1) publish
industry publi
Alaska Admin

(2) mailed t
proposed actio

(3) if the ag
commissioner

§ 44.62.175

Legislative Affairs
puter-readable
processing sys-
ct of each issue
ium.
ies of and sub-
ed to offset the
of administra-
er this subsec-
eral fund. The
by the legisla-
ant governor to
publication or

urnal; and
lic
; and
1 87 SLA 1986;
am § 76 ch 14

endment substi-
for "AS 37.05.230"
section (a) and de-
AS 19.40.020; AS
30; AS 37.05.230"
in paragraph (4) of

endment inserted
id" in the first sen-
st two sentences in
ent inserted "AS
on (a)(4).

ations.

ations
ffective period of
lations
S 44.62.180 —
pplication of AS
62.290

§ 44.62.180

STATE GOVERNMENT

§ 44.62.190

Opinions of attorney general. — The Department of Labor can publish its list of designated toxic and hazardous substances pursuant to AS 18.60.030(12) and AS 18.60.105(a) without going through the promulgation proceeding in the Ad-

ministrative Procedure Act. The list is merely a compilation of chemicals and substances from sources already identified by the legislature. July 18, 1984 Op. Att'y Gen.

Sec. 44.62.180. Effective date. A regulation or an order of repeal filed by the lieutenant governor becomes effective on the 30th day after the date of filing unless

(1) otherwise specifically provided by the statute under which the regulation or order of repeal is adopted, in which event it becomes effective on the day prescribed by the statute;

(2) it is a regulation prescribing the organization or procedure of an agency, in which event it becomes effective upon filing by the lieutenant governor or upon a later date specified by the state agency in a written instrument submitted with, or as part of, the regulation or order of repeal;

(3) it is an emergency regulation or order of repeal adopted under AS 44.62.250, in which case the finding and the statement of the facts constituting the emergency shall be submitted to the lieutenant governor, together with the emergency regulation or order of repeal, which, in that event only, becomes effective upon filing by the lieutenant governor or upon a later date specified by the state agency in a written instrument submitted with, or as part of, the regulation or order of repeal;

(4) a later date is prescribed by the state agency in a written instrument submitted with, or as part of, the regulation or order of repeal. (AS 3 art IV (ch 1) ch 143 SLA 1959; am § 7 ch 40 SLA 1969)

NOTES TO DECISIONS

Cited in *Mukluk Freight Lines v. Nabors Alaska Drilling, Inc.*, 516 P.2d 408 (Alaska 1973); *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166 (Alaska 1986).

Sec. 44.62.190. Notice of proposed action. (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.

(b) If the form or manner of notice is prescribed by statute, in addition to the requirements of filing and mailing notice under this chapter, the notice shall be published, posted, mailed, filed or otherwise publicized as prescribed by the statute.

(c) The failure to mail notice to a person as provided in this section does not invalidate an action taken by an agency under AS 44.62.180 — 44.62.290. (§ 5 art IV (ch 1) ch 143 SLA 1959; am § 2 ch 149 SLA 1962; am § 1 ch 3 SLA 1968; am § 16 ch 143 SLA 1968; am § 4 ch 64 SLA 1978; am § 5 ch 1 SLA 1982; am § 3 ch 59 SLA 1985)

Effect of amendments. — The 1985 amendment in paragraph (1) of subsection (a) substituted "that" for "which" and added "and in the Alaska Administrative Journal."

Opinions of attorney general. — There are few cases and little text discussion of the requirements of notice and the sufficiency of notice in proceedings for adoption of rules and regulations. 1959 Op. Att'y Gen., No. 26.

Where a lengthy regulation on one subject is to be proposed the best policy would be to briefly summarize the content and purpose of the regulation. 1959 Op. Att'y Gen., No. 26.

If only a very short regulation is proposed then ordinarily it would be most practicable to set forth the regulation in full. 1959 Op. Att'y Gen., No. 26.

Where a great many regulations are to be promulgated which are of a varied na-

ture, such as fish and game regulations, or oil leasing regulations, then the most practical thing to do would be to give a general listing of the subjects to be covered, a reference to any other existing body of regulations which are being adopted, amended or superseded which might be informative to the particular public or industry concerned (such as a reference to existing regulations of a state agency or department or to existing federal regulations) and a brief listing of any significant changes which are proposed if an existing body of regulations is to be effected. In such case it would be well to indicate that copies of the proposed regulations can be obtained from the agency in order to indicate the agency has done everything reasonably possible to give the public affected by its regulations an opportunity to familiarize itself with the regulations and to prepare itself to submit

its views at th
stitute subst
Administrative
serve the pur
Att'y Gen., No
And when a
ber of proposed
would be safe
agencies of the
the Ohio and f
notice of the a

The rule-ma
ministrative a
bles the legis
a statute. Eac
need for a partic
chosen policies.
the expression c
the proposal; an
of the relevant
decides whether
actment. When
ing is based upo
legislature to
adoption of reg
activity takes c
pect. Under pro
gations of legis
agencies are c
Zamarello, 486

Regulations
missioner of ?
subject to the r
the Administrat
44.62) and must
the procedures s
the required pro
regulations are
adoption, a publ
interested person
to the agency, fil
adopted, with th
the lieutenant go
Kelly v. Zamarel
1971).

Failure to spe
corporating buil
ies of code coul
invalidate regul
Motel, Inc. v. Sv
aff'd on rehearin
1977).

Agency canno
ments to code, et

44.62.190

§ 44.62.190

STATE GOVERNMENT

§ 44.62.190

agency be-

te agency

opy of the
re depart-
and before

s and the

he legisla-
treated by
e Legisla-
dment, or
iew autho-

on Review

ce, in addi-
this chap-
otherwise

his section
§ 44.62.180
h 149 SLA
n § 4 ch. 64
1985)

regulations,
then the only
be to give a
cts to be cov-
ther existing
h are being
rseded which
he particular
ed (such as a
ions of a state
existing fed-
listing of any
re proposed if
tions is to be
uld be well to
proposed regu-
the agency in
v has done ev-
le to give the
lations an op-
self with the
tself to submit

its views at the hearing. This should constitute substantial compliance with the Administrative Procedure Act and would serve the purpose of the act. 1959 Op. Att'y Gen., No. 26.

And when a summary of a large number of proposed regulations is to be used it would be safe for the departments and agencies of the state government to follow the Ohio and federal practice and to give notice of the areas in which regulations

may or may not be promulgated by listing the subject matter to which the proposed rules would relate. 1959 Op. Att'y Gen., No. 26.

Public notice referring only to regulation numbers and subject headings. — See 1959 Op. Att'y Gen., No. 26.

For illustrations of the notice required by this section, see 1959 Op. Att'y Gen., No. 26, Exhibits A, B, C and D.

NOTES TO DECISIONS

The rule-making function of an administrative agency frequently resembles the legislative process of passing a statute. Each entity determines the need for a particular enactment in light of chosen policies; each has procedures for the expression of views upon the merits of the proposal; and each, after consideration of the relevant policies and arguments, decides whether to adopt the proposed enactment. When administrative rule making is based upon clear authority from the legislature to formulate policy in the adoption of regulations, the rule-making activity takes on a quasi-legislative aspect. Under proper standards, such delegations of legislative power to administer agencies are constitutional. *Kelly v. Zamarello*, 486 P.2d 906 (Alaska 1971).

Regulations adopted by the Commissioner of Natural Resources are subject to the rule-making provisions of the Administrative Procedure Act (AS 44.62) and must be adopted according to the procedures set forth therein. Among the required procedures for adoption of regulations are notice of the proposed adoption, a public hearing in which any interested person may submit statements to the agency, filing of the regulation, if adopted, with the secretary of state (now the lieutenant governor), and publication. *Kelly v. Zamarello*, 486 P.2d 906 (Alaska 1971).

Failure to specify in regulation incorporating building code where copies of code could be obtained did not invalidate regulation. *Northern Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176, aff'd on rehearing, 563 P.2d 256 (Alaska 1977).

Agency cannot adopt future amendments to code, etc., by reference. — Ac-

ording to the Legislative Affairs Agency [now Department of Law] drafting manual, an administrative agency may not adopt by reference a code or set of standards from another state, the federal government or a private organization and provide that future amendments as they become effective are being adopted also. *Northern Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176, aff'd on rehearing, 563 P.2d 256 (Alaska 1977).

One reason for the prohibition against delegation of the future law-making power of the state to private groups is that when amendments are adopted by these groups the public does not necessarily receive notice of, or have an opportunity to comment on or criticize, the amendments, as it does when they are adopted by the legislature or promulgated under the Alaska Administrative Procedure Act. *Northern Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176, aff'd on rehearing, 563 P.2d 256 (Alaska 1977).

Clause of regulation incorporating future amendments held severable. — Clause of an administrative regulation incorporating 1955 Uniform Building Code which also incorporated all future amendments of the code was separable from the rest of the administrative regulation, leaving the 1955 Uniform Building Code provisions applicable in a negligence action based on the death of a guest in a motel fire. *Northern Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176, aff'd on rehearing, 563 P.2d 256 (Alaska 1977).

Applied in *Kingery v. Chapple*, 504 P.2d 831 (Alaska 1972).

Stated in *State v. First Nat'l Bank*, 660 P.2d 406 (Alaska 1982).

Cited in *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585 (Alaska 1960).

Sec. 44.62.195. Fiscal notes on regulations. If the adoption, amendment, or repeal of a regulation would require increased appropriations by the state, the department or agency affected shall prepare an estimate of the appropriation increase for the fiscal year following adoption, amendment, or repeal of the regulation and for at least two succeeding fiscal years. (§ 1 ch 16 SLA 1980)

Sec. 44.62.200. Contents of notice. (a) The notice of proposed adoption, amendment, or repeal of a regulation must include:

- (1) a statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation;
- (2) reference to the authority under which the regulation is proposed and a reference to the particular code section or other provisions of law that are being implemented, interpreted, or made specific;
- (3) an informative summary of the proposed subject of agency action;
- (4) other matters prescribed by a statute applicable to the specific agency or to the specific regulation or class of regulations;
- (5) a summary of the fiscal information required to be prepared under AS 44.62.195.

(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.

(c) An agency that issues a notice under this section shall assure that the notice is prepared in a form adequate for publication in the Alaska Administrative Journal. (§ 6 art IV (ch 1) ch 143 SLA 1959; am § 1 ch 185 SLA 1970; am § 2 ch 16 SLA 1980; am § 4 ch 59 SLA 1985)

Effect of amendments. — The 1985 amendment added subsection (c).
Legislative history reports. — For report on ch. 185, SLA 1970 (CSHB 786), see 1970 House Journal, pp. 916 — 918.

NOTES TO DECISIONS

Liberal construction of informative summary requirement. — The legislature intended that the "informative summary" requirement in paragraph (a)(3) be liberally construed. *State v. First Nat'l Bank*, 660 P.2d 406 (Alaska 1982).

Notice of proposed regulations held sufficient. — Notice of Department of Commerce's proposed regulations to implement the Uniform Land Sales Practices Act, AS 34.55, did not violate the

informative summary requirement of paragraph (a)(3) so as to overcome the statutory presumption of validity since the contents of the notice gave members of the public sufficient information to decide whether their interests could be affected by the agency action and thus whether to make their views known to the agency. *State v. First Nat'l Bank*, 660 P.2d 406 (Alaska 1982).

Applied in *Kingery v. Chapple*, 504

P.2d 831 (Alaska 1977).
Inc. v. LeResche, 66 P.2d 831 (Alaska 1983).
 Quoted in *Kenai Peninsula's Coop. Ass'n v. State*, 660 P.2d 406 (Alaska 1981).

Sec. 44.62.210
 time and place of hearing. Any interested person shall be given the opportunity to be heard in writing, with or without oral testimony, if the agency may accept testimony authorized by this section. (b) At a hearing, a representative may appear in person or by telephone. (§ 7 art I)

Effect of amendment in subsection (b). "may accept material in the form of communication in chapter and" in the *Opinions of attorney general* between hearing and AS 44.62.451 between "adjudicative facts." See 1960 Op.

Regulations adopted by commissioner of Natural Resources. subject to the rule-making procedure in the Administrative Code (AS 44.62) and must be a regulation. The required procedure for adoption of regulations is notice and hearing. If a public hearing is held, a public hearing notice shall be filed with the agency, filing of which is required for the regulation to be adopted, with the secretary of the lieutenant governor. *Kelly v. Zamarelli*, 478 P.2d 1071 (Alaska 1971).

Agency cannot add amendments to code, etc., according to the Legislative Manual. In drafting manual, agency may not adopt or set of standards from federal government or

§ 44.62.200

the adoption, increased approval shall prepare year following for at least two

ce of proposed st include proceedings for

gulation is pro- other provisions made specific; t of agency ac-

to the specific lations; to be prepared

ed may vary in s section if the nd the original the public are action in order be affected by

on shall assure olication in the 143 SLA 1959; § 4 ch 59 SLA

70 (CSHB 786), see pp. 916 — 918.

requirement of s to overcome the of validity since ce gave members of ormation to decide s could be affected nd thus whether to wn to the agency. ank, 660 P.2d 406

v. Chapple, 504

§ 44.62.210

STATE GOVERNMENT

§ 44.62.210

P.2d 831 (Alaska 1972); Chevron U.S.A., Inc. v. LeResche, 663 P.2d 923 (Alaska 1983).

Quoted in Kenai Peninsula Fisherman's Coop. Ass'n v. State, 628 P.2d 897 (Alaska 1981).

Stated in State v. Tanana Valley Sportsmen's Ass'n, 583 P.2d 854 (Alaska 1978).

Cited in Bohl v. Sabre Jet Room, Inc., 349 P.2d 585 (Alaska 1960).

Sec. 44.62.210. Public proceedings. (a) On the date and at the time and place designated in the notice the agency shall give each interested person or the person's authorized representative, or both, the opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present them orally. The state agency may accept material presented by any form of communication authorized by this chapter and shall consider all relevant matter presented to it before adopting, amending or repealing a regulation.

(b) At a hearing under this section the agency or its authorized representative may administer oaths or affirmations, and may continue or postpone the hearing to the time and place which it determines. (§ 7 art IV (ch 1) ch 143 SLA 1959; am § 1 ch 54 SLA 1985)

Effect of amendments. — The 1985 amendment in subsection (a) inserted "may accept material presented by any form of communication authorized by this chapter and" in the last sentence.

Opinions of attorney general. — Difference between hearings under this section and AS 44.62.450 and distinction between "adjudicative facts" and "legislative facts." See 1960 Op. Att'y Gen., No. 7.

This article sets forth the procedure which must be followed when an agency exercises its quasi-legislative power but not to quasi-judicial proceedings. 1960 Op. Att'y Gen., No. 7.

Article 8 of this chapter was intended to be applicable to quasi-judicial proceedings. 1960 Op. Att'y Gen., No. 7.

NOTES TO DECISIONS

Regulations adopted by the Commissioner of Natural Resources are subject to the rule-making provisions of the Administrative Procedure Act (AS 14.62) and must be adopted according to the procedures set forth therein. Among the required procedures for adoption of regulations are notice of the proposed adoption, a public hearing in which any interested person may submit statements to the agency, filing of the regulation, if adopted, with the secretary of state (now the lieutenant governor), and publication. *Koily v. Zamarello*, 486 P.2d 906 (Alaska 1971).

Agency cannot adopt future amendments to code, etc., by reference. — According to the Legislative Affairs Agency drafting manual, an administrative agency may not adopt by reference a code or set of standards from another state, the federal government or a private organiza-

tion and provide that future amendments as they become effective are being adopted also. *Northern Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176, aff'd on rehearing, 563 P.2d 256 (Alaska 1977).

One reason for the prohibition against delegation of the future law-making power of the state to private groups is that when amendments are adopted by these groups the public does not necessarily receive notice of, or have an opportunity to comment on or criticize, the amendments, as it does when they are adopted by the legislature or promulgated under the Alaska Administrative Procedure Act. *Northern Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176, aff'd on rehearing, 563 P.2d 256 (Alaska 1977).

Clause of regulation incorporating future amendments held separable. — Clause of an administrative regulation incorporating 1955 Uniform Building Code

which also incorporated all future amendments of the code; was separable from the rest of the administrative regulation, leaving the 1955 Uniform Building Code provisions applicable in a negligence action based on the death of a guest in a motel fire. *Northern Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176, aff'd on rehearing, 563 P.2d 256 (Alaska 1977).

Stated in *State v. Tanana Valley Sportsmen's Ass'n*, 583 P.2d 854 (Alaska 1978).

Cited in *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585 (Alaska 1960); *Johns v. Commercial Fisheries Entry Comm'n.*, 75 P.2d 1256 (Alaska 1988).

Collateral references. — 2 Am. Jur. 2d, Administrative Law, §§ 281, 282. 73 C.J.S. Public Administrative Law and Procedure, §§ 106, 107.

Sec. 44.62.220. Right to petition. Unless the right to petition for adoption of a regulation is restricted by statute to a designated group or the procedure for the petition is prescribed by statute, an interested person may petition an agency for the adoption or repeal of a regulation as provided in AS 44.62.180 — 44.62.290. The petition must state clearly and concisely

- (1) the substance or nature of the regulation, amendment, or repeal requested;
- (2) the reasons for the request;
- (3) reference to the authority of the agency to take the action requested. (§ 8 art IV (ch 1) ch 143 SLA 1959)

NOTES TO DECISIONS

Quoted in *Johns v. Commercial Fisheries Entry Comm'n.* 699 P.2d 334 (Alaska 1985).

Sec. 44.62.230. Procedure on petition. Upon receipt of a petition requesting the adoption, amendment or repeal of a regulation under AS 44.62.180 — 44.62.290, a state agency shall, within 30 days, deny the petition in writing or schedule the matter for public hearing under AS 44.62.190 — 44.62.210. However, if the petition is for an emergency regulation, and the agency finds that an emergency exists, the requirements of AS 44.62.190 — 44.62.210 do not apply, and the agency may submit the regulation to the lieutenant governor immediately after making the finding of emergency and putting the regulation into proper form. (§ 9 art IV (ch 1) ch 143 SLA 1959; am § 1 ch 45 SLA 1969)

NOTES TO DECISIONS

Judicial review. — Even though a legislative enactment providing for agency action may not provide for judicial review, the courts may proceed to review such action where it is alleged that such action constitutes a denial of due process. *Johns v. Commercial Fisheries Entry Comm'n.* 699 P.2d 334 (Alaska 1985).
Writing requirement met. — A letter from the chairman of an agency explain-

ing to a petitioner the agency's denial of the applicant compliance with

Sec. 44.62.240. adopted by an agency regulation has no effect only inconsistent regulation inconsistent with course of conduct in IV (ch 1) ch 143

Applied in *Wien Air* Department of Revenue (Alaska 1982).

Collateral references. 2d, Administrative Law seq.

Sec. 44.62.250. repeal may be adopted by a state agency; material facts that constitute the public peace, of AS 44.62.060 a adoption of emergency regulation a copy of it to the the Alaska Adm the agency shall 44.62.190(a). Fail day automatically; SLA 1959; am § 1 ch 6 SLA 1984)

Quoted in *State Sportsmen's Ass'n*, 5 1978).

§ 44.62.230

Tanana Valley
P.2d 854 (Alaska

re Jet Room, Inc.,
1960); Johns v.
ntry Comm'n, 758
P.2d 334 (Alaska 1985).

Administrative Law
107.

to petition for
designated group
by an interested
party of a regula-
tion must state

repeal, or repeal

the action re-

receipt of a petition
regulation under
within 30 days, deny
a hearing under
if for an emer-
gency exists, the
requirements apply, and the
governor immedi-
ately repeals the regula-
tion. (§ 2(2) art IV (ch 1) ch 143
SLA 1959; am § 1 ch 45
SLA 1969; am § 1 ch 46 SLA 1972; am § 123
ch 6 SLA 1984)

due process. Johns
v. Commercial Fisheries Entry Comm'n,
758 P.2d 334 (Alaska 1985).
Written notice — A letter
from an agency explain-

§ 44.62.240

STATE GOVERNMENT

§ 44.62.250

ing to a petitioner the reasons for the agency's denial of the petition was sufficient compliance with the "writing" re-

quirement of this section. Johns v. Commercial Fisheries Entry Comm'n, 699 P.2d 334 (Alaska 1985).

Sec. 44.62.240. Limitation on retroactive action. If a regulation adopted by an agency under this chapter is primarily legislative, the regulation has prospective effect only. A regulation adopted under this chapter that is primarily an "interpretative regulation" has retroactive effect only if the agency adopting it has adopted no earlier inconsistent regulation and has followed no earlier course of conduct inconsistent with the regulation. Silence or failure to follow any course of conduct is considered earlier inconsistent conduct. (§ 10 art IV (ch 1) ch 143 SLA 1959)

NOTES TO DECISIONS

Applied in Wien Air Alaska, Inc. v. Department of Revenue, 647 P.2d 1087 (Alaska 1982).

Collateral references. — 1 Am. Jur. 2d, Administrative Law, §§ 42 to 45, 69 et seq.

Sec. 44.62.250. Emergency regulations. A regulation or order of repeal may be adopted as an emergency regulation or order of repeal if a state agency makes a written finding, including a statement of the facts that constitute the emergency, that the adoption of the regulation or order of repeal is necessary for the immediate preservation of the public peace, health, safety, or general welfare. The requirements of AS 44.62.060 and 44.62.190 — 44.62.210 do not apply to the initial adoption of emergency regulations; however, upon adoption of an emergency regulation the adopting agency shall immediately submit a copy of it to the lieutenant governor for filing and for publication in the Alaska Administrative Register, and within five days after adoption the agency shall give notice of the adoption in accordance with AS 44.62.190(a). Failure to give the required notice by the end of the 10th day automatically repeals the regulation. (§ 2(2) art IV (ch 1) ch 143 SLA 1959; am § 2 ch 45 SLA 1969; am § 1 ch 46 SLA 1972; am § 123 ch 6 SLA 1984)

NOTES TO DECISIONS

Quoted in State v. Tanana Valley Sportsmen's Ass'n, 583 P.2d 854 (Alaska 1978).

Sec. 44.62.260. Limitation on effective period of emergency regulations. (a) A regulation adopted as an emergency regulation does not remain in effect more than 120 days unless the adopting agency complies with AS 44.62.060 and 44.62.190 — 44.62.210 either before submitting the regulation to the lieutenant governor or during the 120-day period.

(b) Before the expiration of the 120-day period, the agency shall transmit to the lieutenant governor for filing a certification that AS 44.62.060 and 44.62.190 — 44.62.210 were complied with before submitting the regulation to the lieutenant governor, or that the agency complied with those sections within the 120-day period. Failure to so certify repeals the emergency regulation; it may not be renewed or refiled as an emergency regulation. (§ 4 art IV (ch 1) ch 143 SLA 1959; am § 3 ch 45 SLA 1969)

NOTES TO DECISIONS

Stated in *State v. Tanana Valley Sportsmen's Ass'n*, 583 P.2d 854 (Alaska 1978).

Sec. 44.62.270. State policy. It is the state policy that emergencies are held to a minimum and are rarely found to exist. (§ 2(2) art IV (ch 1) ch 143 SLA 1959)

NOTES TO DECISIONS

Quoted in *State v. Tanana Valley Sportsmen's Ass'n*, 583 P.2d 854 (Alaska 1978).

Sec. 44.62.280. Purpose of AS 44.62.180 — 44.62.290. It is the purpose of AS 44.62.180 — 44.62.290 to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in AS 44.62.250, AS 44.62.180 — 44.62.290 apply to the exercise of quasi-legislative power conferred by a statute, but nothing in AS 44.62.180 — 44.62.290 repeals or diminishes additional requirements imposed by the statute. AS 44.62.180 — 44.62.290 are not superseded or modified by subsequent legislation except to the extent that the legislation does so expressly. (§ 1 art IV (ch 1) ch 143 SLA 1959)

Sec. 44.62.290. Limits of the application of AS 44.62.180 — 44.62.290. (a) AS 44.62.180 — 44.62.290 do not apply to a regulation not required to be submitted to the lieutenant governor under AS 44.62.010 — 44.62.320.

(b) Only this section and AS 44.62.180 apply to a regulation that prescribes the organization or procedure of an agency. (§ 2(1) art IV

(ch 1) ch 143 :
1969; am § 4

Collateral ref
2d, Administrative
seq.

Section
300. Judicial rev

Sec. 44.62.:
may get a judi
ing an action f
any other gro
(1) for a s
44.62.320, or
(2) in the c
the ground th
emergency un

Judicial review
tory legislative
the Administrative
this section, whi
provides for decla
a statute of limita
v. State, 553 P.2
Former App. R
plaintiff's request
seeking a judgm
08.54.040(a)(8) w
cause it delegates
Guide Licensing a
out adequate stat
that the regulator
this section were u
they permit arbitra
since judicial
nonadjudicatory le
vided in the Adr
Act under this sect
Guide Licensing &
616 (Alaska 1981
In the past the
departed from a
tion of the st
Coghill v. Boucher
1973).

Standing may
out direct intere
need for review in t

(ch 1) ch 143 SLA 1959; am § 17 ch 143 SLA 1968; am § 8 ch 40 SLA 1969; am § 4 ch 45 SLA 1969)

Collateral references. — 1 Am. Jur. 2d, Administrative Law, §§ 42 to 45, 69 et seq.

Article 5. Judicial Review.

Section

44.62.300. Judicial review of validity

Sec. 44.62.300. Judicial review of validity. An interested person may get a judicial declaration on the validity of a regulation by bringing an action for declaratory relief in the superior court. In addition to any other ground the court may declare the regulation invalid

(1) for a substantial failure to comply with AS 44.62.010 — 44.62.320, or

(2) in the case of an emergency regulation or order of repeal, upon the ground that the facts recited in the statement do not constitute an emergency under AS 44.62.250. (§ 1 art V (ch 1) ch 143 SLA 1959)

NOTES TO DECISIONS

Judicial review from non-adjudicatory legislative action is provided in the Administrative Procedure Act under this section, which section specifically provides for declaratory relief, but not for a statute of limitations on actions. Moore v. State, 553 P.2d 8 (Alaska 1976).

Former App. R. 45 did not apply to a plaintiff's request for declaratory relief resulting in a judgment declaring that AS 44.040(a)(8) was unconstitutional because it delegates authority to the Alaska Game Licensing and Control Board without adequate standards, and declaring that the regulations adopted pursuant to this section were unconstitutional because they permit arbitrary action by the board. Judicial review from non-adjudicatory legislative action is provided in the Administrative Procedure Act under this section. Owsichek v. State, 627 P.2d 1343 (Alaska 1981).

In the past the supreme court has departed from a restrictive interpretation of the standing requirement. Coghill v. Boucher, 511 P.2d 1297 (Alaska 1973).

Standing may be allowed one without direct interest in outcome. — The court's review in certain cases may make

it desirable to allow standing to one whose primary interest is not in the direct outcome of the administrative action, but in its competitive effect on his economic interest. Coghill v. Boucher, 511 P.2d 1297 (Alaska 1973).

"Interested person." — Professional salmon hand troller is "interested" in the number of trolling permits issued, even if he will obtain a permit, since his ability to fish commercially is directly affected by the number of trollers using the fishery. Rutter v. State, 668 P.2d 1343 (Alaska 1983).

Registered voters held "interested persons" to challenge election regulations. — Residents and registered voters held to possess standing as "interested persons" under the Administrative Procedure Act (AS 44.62) to challenge the regulations promulgated by the lieutenant governor under AS 15.15.330, dealing with early counting of election votes. Coghill v. Boucher, 511 P.2d 1297 (Alaska 1973).

Denial of standing to registered voters would have the effect of unduly limiting the possibility of a popular check upon executive control of the election process. Coghill v. Boucher, 511 P.2d 1297 (Alaska 1973).