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FISCAL NOTE

No. 1
 Version: SB 272
 (S) 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
 Component: Operations
 Sponsor: By request of the Governor
 Requestor: Governor's Office COMPONENT SERIAL NO.

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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						
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REVENUE						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME	-0-	changes in <u>CSA 272</u> (RLS)	-0-	-0-
PART-TIME		have no fiscal impact. This		
TEMPORARY		fiscal note is appropriate.		

Estimate of current year impact: _____

5/17/91 date Sam Y. Amur Comte Aide (initial)
 changes in CSA 272 (RLS) have no fiscal impact. This fiscal note is appropriate.
May 15, 1991 date DRS Comte Aide (initial)

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.

FISCAL NOTE

No. 2
 B. /ersion: SR 272
 (S) 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
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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
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REVENUE	0	0	0	0	0	0
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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 sheet if necessary) Changes in CSSB 272 (PLS) have no fiscal impact. This fiscal note is appropriate.
 date 5/19/91 Comte Aide (initial) Tom by Tom

Changes in SR 272 have no fiscal impact. This fiscal note is appropriate.
 date May 15, 91 Comte Aide (initial) W. Rain

Prepared By: McKie Campbell Phone: 465-4100
 Division: Commissioner's Office Date: 4/17/91
 Approved by Commissioner: Row Somerville (by M&A)
 Agency: Fish and Game Date: 4/17/91

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

WALTER J. HICKEL
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 29, 1991

272

The Honorable Richard I. Eliason
President of the Senate
P.O. Box V
Juneau, AK 99811

Dear President Eliason:

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.

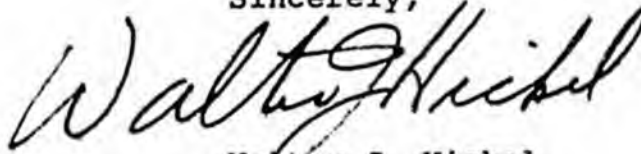
Nevertheless, the superior court held that irrespective of longstanding state practice, the time limits in AS 44.62.250

The Honorable Richard Eliason - 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 that reads "Walter J. Hickel". The signature is written in black ink and is positioned above the printed name.

Walter J. Hickel
Governor

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

1031 W 4th AVENUE SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550
FAX: (907) 276-3697

KEY BANK BUILDING
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

P.O. BOX K— STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

May 17, 1991

The Honorable Dave Donley
Chair
House Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: HB 308 (Notice for Emergency
Regulations)

Dear Rep. Donley:

This letter is to request your assistance in getting this important piece of legislation passed this session. The purpose of this bill is to validate long-standing state practice, which was recently held invalid by the Fairbanks Superior Court in Shepherd v. State, 4FA-90-1514 Civil. This bill was passed out of the House State Affairs Committee this morning; the same bill (with a different title) is currently in Senate Rules, and I anticipate that it will be scheduled for floor action in that body shortly. CSSB 272(RLS). Thus, the House Judiciary Committee is the only committee referral remaining for this legislation. I would therefore ask that you try to either schedule this bill for hearing in your committee as soon as possible or waive referral of this bill.

Enclosed for your reference is a copy of the transmittal letter that outlines the reason that this legislation is necessary. Representative Gruenberg is familiar with this bill and recognizes the importance of getting it passed this session.

I understand that Representative Gruenberg would like to offer an amendment to the bill to clearly indicate that the purpose of this legislation is to validate and affirm existing state practice, so that there can be no question of the validity of regulations currently existing on the books. I would certainly support such an amendment, and I have worked with Representative Gruenberg in preparing that amendment. However, because neither

Hon. Dave Donley, Chair, House Judiciary
Re: HB 308

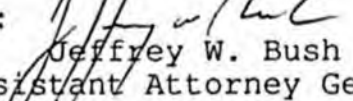
May 17, 1991
Page 2

the bill nor the proposed amendment are controversial, there is no reason to delay either Judiciary Committee action on this bill or waiver of your committee referral.

Please contact me or Representative Gruenberg if we can offer you any further information with respect to this bill.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: 
Jeffrey W. Bush
Assistant Attorney General

JWB:cl

cc: Rep. Max Gruenberg

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

FILED
STATE OF ALASKA
91 MAR 19 PM 1:35
CLERK, TRIAL COURTS
BY _____ DEPUTY

PETE SHEPHERD and JIM BAILY,)
)
 Plaintiffs,)
)
 vs.)
)
 STATE OF ALASKA, Department of)
 Fish and Game, and the Alaska)
 Board of Game,)
)
 Defendants.)

ATTORNEY GENERAL

MAR 20 1991

4TH JUDICIAL DISTRICT
STATE OF ALASKA

Case No. 4FA-90-1514 Civil

MEMORANDUM DECISION AND ORDER

This matter comes before the court on cross-motions by plaintiffs and defendant for partial summary judgment on the issue of the validity of emergency regulations passed by the Board of Game at its July 23 - 25, 1990 meeting. For reasons discussed below, the court holds in favor of plaintiffs that the regulations were subject to the automatic repeal provisions of AS 44.62.250.

The facts related to this issue are undisputed. On July 18 and 19, 1990, the Alaska Board of Game ("Board") gave public notice that it would meet in emergency session beginning on July 25, 1990 "to adopt, amend or repeal" emergency hunting regulations in response to the changes brought about by the Alaska Supreme Court's decision in McDowell v. State, 785 P.2d 1

I certify that on 3-20-91
copies of this order were sent to:
CLERK: [Signature]

AG
Hoigard.

(Alaska 1989).¹ The Board saw two main reasons for promulgating the emergency regulations. First, the regulations had to be changed so that all Alaskans, now eligible for subsistence use of wildlife resources under the McDowell case, would qualify for subsistence use under the regulations. Second, the regulations had to be amended in order to prevent overharvesting of wildlife during the fall 1990 hunting season because of the anticipated increase in the number of subsistence users as a result of the McDowell case.

From July 25 through July 27, 1990, the Board deliberated. On the last day of the meeting, the Board approved certain emergency regulations. These regulations are found in 5 AAC Sec. 82 and Sec. 92.

On August 9, 1990, Norman Cohen, the Deputy Commissioner for the Alaska Department of Fish and Game signed two documents: one entitled a "Finding of Emergency," which contained an "Adoption Order," and another entitled a "Notice of Adoption of Emergency Regulations." On the bottom of the "Finding of Emergency," Lieutenant Governor Stephen McAlpine certified that he filed "the attached regulations" in accordance with AS 44.62 on August 9, 1990.

Bob Larson, the Assistant Executive Director of the

¹ In McDowell, the Alaska Supreme Court held that the rural preference provision of the 1986 Alaska subsistence law violated article VIII of the Alaska Constitution.

Division of Boards of the Alaska Department of Fish and Game ("ADF&G") stated that "it has always been the practice of the Department to wait until after a board meeting to prepare the adoption order and the notice of adoption of regulations." Larson asserts that pursuant to the "Alaska Board of Game Delegation of Authority to Adopt Emergency Regulations, #87-42C-GB," dated November 18, 1987, ADF&G has the authority to put proposals adopted by the Board, (drafted in general, conceptual language), into actual regulatory language and to make any technical corrections necessary to carry out the Board's action and intent.

The State provides several Affidavits of Publication to show when the "Notice of Adoption of Emergency Regulations" was published. According to these affidavits, the Notice was published on August 13, 1990 in the Anchorage Daily News, and in the Juneau Empire; on August 14, 1990, in the Fairbanks Daily News Miner; and on August 17, 1990, in the All Alaska Weekly. The parties agree that the "Department of Fish and Game Notice of Adoption of Emergency Publication," was first published in the Alaska Administrative Journal on August 20, 1990. Finally, the State submits an Affidavit of Notice of Adoption of Regulations signed by Warren Wiley, the Assistant Commissioner of the Department of Fish and Game, on August 23, 1990, confirming that the "Notice of Adoption of Emergency Regulations" was published

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MD&O

in the Anchorage Daily News, the Juneau Empire, the All Alaska Weekly, and the Fairbanks Daily News Miner.

Based on these undisputed facts, the issue involved in this aspect of the case turns on the meaning of "adoption." If, as plaintiffs suggest, the regulations were "adopted" by the Board of Game on July 25, 1990, the Department failed to give the required notice by the end of the tenth day following the adoption. Such failure, according to the explicit terms of AS 44.62.250, "automatically repeals the regulation." If, as defendant suggests, "adoption" means the formal promulgation of the written findings and "order of adoption" by the Deputy Commissioner of ADF&G, notice was given by the end of the tenth day.²

AS 44.62.250 provides:

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; nowever, upon adoption of an emergency regulation

² The Deputy Commissioner of ADF&G entered the written finding and order of adoption on August 9, 1990. The final act of notice was the publication in the Alaska Administrative Journal on August 20, 1990. This act occurred within ten days of the Deputy Commissioner's order since the tenth day, August 19, fell on a Sunday. See AS 01.10.080 (where the last day is a holiday, that day is not counted).

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.

In order to interpret the word "adoption" in AS 44.62.250, the "plain meaning" of the word "adoption" must be ascertained. The Alaska Administrative Procedures Act, AS 44.62.010 does not include a definition of the term "adoption." Unless the legislative intent is to the contrary,³ where the legislature uses a word or phrase without defining it, and where there is no established judicial construction of the word, the court should assume that the legislature intended the phrase to have its common, ordinary meaning. See Wilson v. Municipality of

³ There is little available legislative history on AS 44.62.250. In 1972, the "public notice" portion of AS 44.62.25 was added. 1972 House Journal ch. 46. The only potentially significant comment was the report made by Judiciary Committee on March 16, 1972:

The concern which caused referral back to the judiciary committee was the possible effect of the bill on the Department of Fish and Game and that after checking with that department, it was found that the bill would not unduly interfere with activities and the department in fact supports the bill in the present form.

William J. Moran
Chairman.

1972 House Journal 512-513. If anything, this legislative history indicates that the Board and the ADF&G agreed to comply with the new public notice requirements for emergency regulations.

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Anchorage, 669 P.2d 569, 571-572 (Alaska 1983); Lambert v. State, 694 P.2d 791, 793 (Alaska App. 1985). Commonly, the court turns to the dictionary as a source to determine what the legislature intended in using a word. See, e.g., Michael v. State, 767 P.2d 193, 197 (Alaska App. 1988).

Black's Law Dictionary (5th ed.) defines the verb to "adopt" as follows:

To accept, appropriate, chose or select. To make that one's own (property or act) which was not so originally. To accept to, consent to and put into effective operation; as in the case of a constitution, constitutional amendment, ordinance, court rule or by-law.

Black's Law Dictionary, at 45 (5th ed. 1979).

It is undisputed that the Board was exercising its general rulemaking authority found in 16.05.255⁴ when it passed the emergency regulations on July 25, 1990. While the Board may delegate,⁵ (and in this case has apparently delegated), some of its rulemaking authority to the Commissioner of ADF&G, there is no indication that the emergency regulations in question were promulgated by the Commissioner of ADF&G. Rather, the

⁴ AS 16.05.255(a) provides, in pertinent part: "The Board of Game may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) . . ." The statute goes on to denote the specific types of Board regulation.

⁵ AS 16.05.270 states, in pertinent part: "For the purpose of administering AS 16.05.251 and 16.05.255, each board may delegate authority to the commissioner to act in its behalf."

involvement of Deputy Commissioner Cohen was limited to formalizing the emergency regulations previously approved by the Board on July 25, 1990. As such, it appears that the Board "adopted" the emergency regulations within the ordinary meaning of that word.

Courts in other jurisdictions have ruled that the word "adoption" is synonymous with the word "passage."

In Town of Sheboygan v. City of Sheboygan, 441 N.W.2d 752, 753 (Wis. App. 1989), the plaintiff brought an action challenging the municipality's annexation of certain territory. The sole issue on appeal was whether the action, filed 92 days after the annexation ordinance was passed, was barred under a statute of limitations which mandated that an be "brought within 90 days after the adoption of the order, annexation ordinance or final determination of the action contested." Id. The town argued that the language of the statute indicated that the statute of limitations began to run only when the ordinance became "'final,' i.e., approved and published." Id.

Based upon the language of the statute, other similar statutes, legislative history and caselaw in other jurisdictions, the Wisconsin Court of Appeals held:

. . . the usage of the term "adoption" in context, unambiguously refers to the action of the legislative body in voting to approve the ordinance. It does not refer to the approval of the ordinance by the mayor, the publishing of the ordinance or its effective date.

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Sheboygan, 441 N.W.2d at 754. The Court also noted that it had found no authority which interpreted "adopt" in the manner urged by the Town.

Other cases support this interpretation of adoption. In Gleason v. City of Santa Monica, 24 Cal. Rptr. 656, 657-658 (2nd Dist. App. 1962), and in In Re Appeal of Mortimer, 112 A.2d 151, 153 (Pa. 1955), the courts construed the date of "adoption," to mean the date of passage of the ordinance instead of the effective date of the ordinance. In Agrico Chemical Co. v. State, 365 So.2d 759, 764-766 (Fla. App. 1979), the Florida Court of Appeals held that the Florida Environmental Commission's approval of a proposed rule constituted an "adoption" within the meaning of the Florida Administrative Procedure Act provision which stated that "No rule . . . shall be adopted . . . until the hearing officer had rendered his decision."

In the case at bar, the State is arguing that adoption did not take place when the Board passed the emergency regulations, but rather, when the Deputy Commissioner of ADF&G signed the written "Finding of Emergency" and "Adoption Order." This argument is similar to those made by the losing parties in the cases noted above.

Given the plain meaning of AS 44.62.250, as supported by the caselaw from other jurisdictions, the court concludes that the term "adoption" means approval of emergency regulations by

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the Board. It is undisputed that the Board deliberated and decided upon certain emergency regulations on July 25, 1990. Consequently, the court finds that the Board "adopted" those regulations on July 25, 1990. Since the Notice of Adoption of Emergency Regulations was published in the various Alaska newspapers and in the Alaska Administrative Journal after August 3, 1990, the court concludes that the Board's Notice of Adoption of Emergency Regulations was untimely, resulting in the repeal of the emergency regulations by operation of law pursuant to AS 44.62.250.⁶

For reasons set forth above,

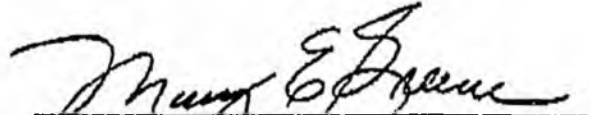
IT IS HEREBY ORDERED that plaintiffs' motion for

⁶ The State makes two arguments in support of its interpretation of the facts in this case. First, the State argues that implicit in AS 44.62.250 is the idea that adoption only occurs once the agency adopting the emergency regulation makes a written finding which includes both a statement of facts and a finding of necessity. However, the statute does not specifically require that the finding of emergency be put into writing before the emergency regulations are adopted by the Board. In this case, the emergency regulations were adopted and the finding of the emergency was formally reduced to writing afterwards. So long as the Board considered the facts constituting the emergency, the court concludes that putting such facts into writing is a ministerial function. The second argument made by the state is that the deputy commissioner "in adopting" the regulations was acting under the proper delegation of authority from the Board of Game. The court has examined document number 87-42A-GB, the Board of Game's delegation of authority to adopt emergency regulations. This delegation is clearly not intended to cover the situation involved in this action. The delegation is addressed to commissioner authority to promulgate regulations when the Board cannot meet, not when it has already met.

partial summary judgment is granted.

IT IS FURTHER ORDERED that defendant's cross-motion for partial summary judgment is denied.

DATED at Fairbanks, Alaska this 18th day of March, 1991.



MARY E. GREENE
Superior Court Judge