

**HB**

**264**

# Alaska State Legislature

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## House Of Representatives

House District 34

### **CSHB 264 (FIN)**

**“An Act relating to negotiated regulation making; and providing for an effective date”**

## **Sponsor Statement for HB 264**

**Rep. Jeannette James**

**4/15/98**

### **HB 264 Negotiated Regulation/Rule Making**

House Bill 264, enables and encourages negotiated regulation/rule making. Currently negotiated regulation making is in use by the Federal government, Montana and Nebraska and several other states.

The citizens of Alaska are clamoring for the Legislature to do something about the regulation process; negotiated regulation making addresses the issue on point.

Negotiated regulation making is used only in cases involving very complex or controversial regulations.

Negotiate regulation (Neg/Reg) is a voluntary process for drafting regulations that brings together those parties who would be significantly impacted by a regulation (rule), including the Government, to reach consensus on some or all of its aspects before the rule is formally published as a proposal. An impartial mediator is used to facilitate intensive discussions among the participants, who operate as a committee open to the public.

Regulations drafted using this process tend to be more technically accurate, clear and specific, and less likely to be challenged in litigation than are rules drafted by the agency alone without input from outside parties. The APA notice process is unchanged.

The negotiated regulation making process costs more money at the front end than the traditional approach (e.g. the added cost for a facilitator). In addition, agency personnel must work closely as a team with outside party representatives and their time must be dedicated to the project if it is to succeed. The advantages clearly outweigh these considerations, however. Because representative of all the interested parties draft the regulation, the formal process of public notice and comment is generally very smooth and very few comments and concerns are raised in that process. More importantly, lengthy regulation litigation is hopefully generally eliminated and compliance with the rule is believed to be much higher. Thus, agency long-term costs of litigating rules and enforcing standards are sharply reduced.

Use of a negotiated regulation making process requires most agencies to change the way they are accustomed to developing a rule. Standard practice in rule development is to have a particular office in the agency develop a draft regulatory document, and then that document is critiqued and reformulated as it is sequentially referred to other parts of the agency, the department, the Executive Branch, and the public. In negotiated regulation making, by contrast, the parties are brought together for simultaneous discussion and consideration of particular issues at the beginning of the process.

Please call Walt Wilcox, or me if there are questions.

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## House Of Representatives House District 34

3-11-98

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March 9, 1998

Sectional Analysis of CSHB 264 (FIN)  
("Negotiated Regulation Making Process")

Section 1 of the bill sets out a new article in the Administrative Procedure Act (APA) to establish procedures for negotiated regulation making. The sections are explained as follows:

AS 44.62.710 sets out the purpose and applicability of negotiated regulation making. It explains that

(1) the purpose of the new provision is to establish a framework for conducting negotiated regulation making consistent with the APA;

(2) negotiated regulation making is supplemental to the "regular" regulation process and may be used as a supplemental procedure to permit the direct participation of affected interests in the development of regulations;

(3) a state agency may modify the consensus as a result of the subsequent regulation making process;

(4) innovation and experimentation in negotiation regulation making process is not limited by the bill; and

(5) other state agencies that are not subject to APA may use the process.

AS 44.62.720 sets out the standards for determination of the need for a negotiated regulation making committee. The state agency may use it when it is "the public interest." This section sets out a list of factors for state agency to consider in determining the public interest. Upon determining that a committee will be formed, the state agency must notify the public so that interested persons can apply to be appointed to the committee.

AS 44.62.730 sets out the standard for the use of a convener to assist in the making the determination of need under AS 44.62.720.

AS 44.62.740 sets out the standards for establishment, support, and termination of the committee. Subsection (a) authorizes the agency to establish a negotiated regulation making committee. Subsection (b) allows the agency head to expand the membership if necessary to facilitate the workings of the committee. Subsection (c) requires the agency to make available administrative support to the committee that the agency determines necessary. Subsection (d) terminates the committee upon adoption of the regulation or at earlier date.

AS 44.62.750 sets out the committee duties, procedure, and report. Subsection (d) allows the committee to transmit a report that contains the proposed regulation, if the committee reaches consensus. Subsection (e) allows the committee, if it does not reach consensus to transmit a report specifying areas on which consensus was reached and unresolved issues. Subsection (f) requires the committee to comply with the Open Meetings Act requirements.

AS 44.62.760 sets out standards for facilitator selection, duties, and authority. Subsection (a) allows the agency to appoint a facilitator. Subsection (b) requires the facilitator to preside at meetings and coordinate with the agency on the management of records. Subsection (c) provides that facilitator does not have decision-making authority for the committee.

AS 44.62.770 set out the standards for employees, contractors, expenses, and funding relating to the committee. Subsection (a) allows the agency to employ or contract for services for a person to serve as a convener or facilitator or use the services of a state employee for those purposes. Subsection (b) precludes consideration of a person as a convener or facilitator if the person has a financial or other interest that would prevent the person from serving in an impartial and independent manner. Subsection (c) allows the state to accept grants or gifts to fund the process if the information on the grant or gift is public, no condition is placed on the grant or gift to the agency, and any other legal requirements have been met. Subsection (d) requires a member of a negotiated regulation making committee to disclose a grant, gift, or other financial benefit that exceeds \$150 and that has been accepted to finance the disclosing member's participation on the committee.

AS 44.62.780 precludes judicial review of an agency decision to establish, assist, or terminate regulation making committee. A regulation that is product of negotiated regulation making meeting and later subject to judicial review is given no greater deference.

AS 44.62.790 requires negotiated regulation making to be an additional process to APA regulation making. This section requires that negotiation "shall, where possible, occur" before formal regulation process begins.

AS 44.62.795 sets out confidentiality of certain records or documents that contain proprietary information.

AS 44.62.830 sets out definitions.

Section 2 of the bill provides specified immunity for negotiated regulation making committee and its members for an act or omission occurring in the course and scope of their official duties.

Section 3 of the bill provides an exemption from the procurement code for any contracts for the convener or for the facilitator.

Section 4 of the bill places any state position established as convener or facilitator in the exempt service.

Section 5 of the bill provides an express exemption to the Alaska Executive Branch Ethics Act for members of a negotiated regulation making committee.

Section 6 of the bill provides a conforming amendment to remove the changes made by sec. 5 of the bill after the sunset provision repeals the provisions of secs. 1 - 4 of the bill on July 1, 2003.

Section 7 of the bill repeals the provisions of secs. 1 - 4 of the bill on July 1, 2003. This provides a sunset provision to allow state agencies and the legislature to evaluate the process after five-year experience with it.

Section 8 of the bill makes the bill effective immediately, if the bill is enacted into law.