

SB

24

1-LS0274P
Bannister
1/26/00

HOUSE CS FOR CS FOR SENATE BILL NO. 24()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS DONLEY, Taylor

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to regulations; and providing for an effective date."

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

3 * Section 1. The uncodified law of the State of Alaska is amended by adding a new
4 section to read:

5 SHORT TITLE. This Act may be known as the Alaska Regulations Reform Act.

6 * Sec. 2. AS 44.62.030 is amended to read:

7 Sec. 44.62.030. Consistency and relationship between regulation and
8 statute. Except as to a regulation, regulation amendment, or order of repeal of
9 a regulation that is made by a state agency to which AS 44.62.213 applies, if [IF],
10 by express or implied terms of a statute, a state agency has authority to adopt
11 regulations to implement, interpret, make specific, or otherwise carry out the provisions
12 of the statute, a regulation adopted is not valid or effective unless consistent with the
13 statute and reasonably necessary to carry out the purpose of the statute.

14 * Sec. 3. AS 44.62.030 is amended by adding a new subsection to read:

15 (b) If, by express or implied terms of a statute, a state agency to which

1 AS 44.62.213 applies has authority to adopt regulations to implement, interpret, make
2 specific, or otherwise carry out the provisions of the statute,

3 (1) a regulation, an order of repeal, or an amendment adopted by the
4 state agency is not valid or effective, notwithstanding any other provision of law, if

5 (A) the regulation, order of repeal, or amendment thwarts,
6 circumvents, conflicts with, or is contrary to the intent of the statute being
7 implemented, interpreted, made specific, or otherwise carried out; or

8 (B) the regulation, order of repeal, or amendment imposes any
9 material capital or operating costs on industrial, commercial, or other
10 development activity without yielding significant public benefits; and

11 (2) when a regulation is challenged

12 (A) under (1)(A) of this subsection, the burden of proof is on
13 the person challenging the regulation to prove by clear and convincing evidence
14 that the regulation is invalid under (1)(A) of this subsection;

15 (B) under (1)(B) of this subsection, the burden of proof is on
16 the person challenging the regulation to prove by a preponderance of the
17 evidence that the regulation is invalid under (1)(B) of this subsection.

18 * Sec. 4. AS 44.62 is amended by adding a new section to read:

19 **Sec. 44.62.213. Additional procedural requirements for certain state**
20 **agencies.** (a) The provisions of this section apply to regulations of the Department
21 of Environmental Conservation, but do not apply to regulations of

22 (1) a board or commission located in the Department of Environmental
23 Conservation; or

24 (2) any other organizational entity located in the Department of
25 Environmental Conservation if the organizational entity is governed by a board whose
26 members are subject to confirmation by the legislature.

27 (b) In addition to complying with the notice requirements of AS 44.62.190, a
28 state agency to which this section applies shall

29 * (1) mail notice to persons who have provided comment to the state
30 agency on the proposed adoption, amendment, or repeal of the regulation; and

31 (2) publish the notice on the Internet.

1 (c) In addition to meeting the requirements of AS 44.62.200(a) relating to
2 contents of a notice, a state agency to which this section applies shall include with the
3 notice an explanation of why the regulation of the agency is not invalid under
4 AS 44.62.030(b)(1).

5 (d) Notwithstanding the variance in content authorized by AS 44.62.200(b),
6 a regulation that is adopted, amended, or repealed by a state agency to which this
7 section applies may vary in content from the summary specified in AS 44.62.200(a)(3)
8 if the subject matter of the regulation remains the same and the notice was written so
9 as to assure that members of the public are reasonably notified of the proposed subject
10 of agency action in order for them to determine whether their interests could be
11 affected by agency action on that subject.

12 (e) If a state agency to which this section applies rewrites a proposed
13 regulation, an amendment of a regulation, or an order of repeal after it has complied
14 with AS 44.62.190, 44.62.200, and 44.62.210, and if the rewriting substantially
15 changes the substance of the regulation, amendment, or order but the state agency
16 would not normally consider the change to be significant enough to require additional
17 notice and opportunity for comment under AS 44.62.190, 44.62.200, and 44.62.210,
18 before adoption, the state agency shall provide notice and opportunity for public
19 comment under AS 44.62.190(a)(2) - (8), 44.62.200, 44.62.210, and (b) of this section
20 for the rewritten regulation, amendment, or order of repeal.

21 (f) If the state agency does not provide the notice and opportunity for public
22 comment under (e) of this section for a rewritten proposed regulation, amendment, or
23 order of repeal because it believes the rewriting did not substantially change the
24 substance,

25 (1) the state agency shall prepare a written explanation of the reasons
26 why the requirement of (e) of this section does not apply; and

27 (2) when the adopted regulation, amendment, or order of repeal is
28 published in the Alaska Administrative Journal, the lieutenant governor shall include
29 the state agency's explanation provided under (1) of this subsection with the text or a
30 summary of the text of the regulation, amendment, or order of repeal.

31 (g) The provisions of (e) and (f) of this section do not apply to regulations

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(1) adopted under AS 44.62.260 to make emergency regulations permanent;

(2) that are necessary to meet federal requirements, to obtain an exemption for a person, program, or situation in the state from federal requirements, or to revise, in a manner that reduces any burden imposed by a federal requirement, how the federal requirement will apply to a person, program, or situation in the state; or

(3) that would reduce the regulatory burden on the public.

(h) If, as to a state agency to which this section applies, a newly enacted statute does not expressly require the state agency to adopt regulations, the state agency shall, within 90 days after the date of enactment, publish notice in the manner required under AS 44.62.190(a)(1) that the state agency will or will not propose and adopt regulations to implement, interpret, or make specific the statute that it administers or to govern applicable procedures.

(i) A state agency to which this section applies may not take more than two years to adopt regulations that the state agency determines are needed unless the state agency complies with (j) of this section. The two-year period begins on the effective date of the statute or section of the statute under which the regulations are being adopted. However, the requirement of this subsection is not intended to prohibit the state agency from amending a regulation after the regulation has been adopted.

(j) When 17 months of the two-year time limit established under (i) of this section for the adoption of regulations have elapsed without adoption of the regulations, the state agency shall determine whether the adoption of the regulations will take longer than the two-year time limit. If the state agency determines that adoption of the regulations will not be completed within the two-year time limit, the state agency shall prepare a written report containing the reasons for the failure and submit the report before 18 months of the two-year time limit have elapsed to the president of the senate, the speaker of the house of representatives, and the Administrative Regulation Review Committee established under AS 24.20.400. Notwithstanding AS 44.62.300, a court may not hold a regulation invalid for failure to comply with this subsection.

- 1 (k) The provisions of (i) and (j) of this section do not apply if
2 (1) the regulations are necessary
3 (A) to meet federal requirements;
4 (B) to obtain an exemption for a person, program, or situation
5 in the state from federal requirements; or
6 (C) to revise, in a manner that reduces any burden imposed by
7 a federal requirement, how the federal requirement will apply to a person,
8 program, or situation in the state; and
9 (2) the agency has made a good faith effort to adopt the regulations
10 within the two-year period set out in (i) of this section.

11 * Sec. 5. The uncodified law of the State of Alaska is amended by adding a new section
12 to read:

13 APPLICABILITY. (a) AS 44.62.213(h) - (k), added by sec. 4 of this Act, apply to
14 the adoption of regulations if the effective date of the Act enacting the statutory authority
15 relating to the adoption is the same as or after the effective date of this Act.

16 (b) Except as provided by (a) of this section, this Act applies to the adoption,
17 amendment, or repeal of a regulation if the original notice under AS 44.62.190 of the
18 adoption, amendment, or repeal is given on or after the effective date of this Act.

19 * Sec. 6. This Act takes effect July 1, 2000.

order CSC (JUD)
amend # 7 delete section
2 & # 5

1-LS0274L
Bannister
4/7/00

HOUSE CS FOR CS FOR SENATE BILL NO. 24()
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2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 * Section 1. The uncodified law of the State of Alaska is amended by adding a new
4 section to read:

5 SHORT TITLE. This Act may be known as the Alaska Regulations Reform Act.

6 * Sec. 2. AS 44.19 is amended by adding a new section to read:

7 ~~Sec. 44.19.021. Powers of the lieutenant governor. (a) To promote public~~
8 ~~awareness and in the best interests of the state, the lieutenant governor, under the~~
9 ~~provisions of AS 36.30, may provide for the availability of consolidated space in~~
10 ~~newspapers of general circulation and in trade and industry publications for the~~
11 ~~publication of notices regarding state agency regulations as required by AS 44.52.010 -~~
12 ~~44.62.290. The lieutenant governor may require state agencies to participate in the use~~
13 ~~of consolidated space provided under this section and may waive the requirement if~~
14 ~~nonparticipation is in the best interests of the state.~~

15 (b) In this section, "state agency" means a department, board, commission,

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1 division, authority, ~~public corporation~~, or other administrative unit of the executive
2 branch of state government.

3 * Sec. 3. AS 44.62.190(a) is amended to read:

4 (a) At least 30 days before the adoption, amendment, or repeal of a regulation,
5 notice of the proposed action shall be

6 (1) published in the newspaper of general circulation or trade or
7 industry publication that the state agency prescribes and in the Alaska Administrative
8 Journal; in the discretion of the state agency giving the notice, the requirement of
9 publication in a newspaper or trade or industry publication may be satisfied by using
10 a combination of publication and broadcasting; [WHEN BROADCASTING THE
11 NOTICE, AN AGENCY MAY USE AN ABBREVIATED FORM OF THE NOTICE
12 IF THE BROADCAST PROVIDES THE NAME AND DATE OF THE NEWSPAPER
13 OR TRADE OR INDUSTRY JOURNAL WHERE THE FULL TEXT OF THE
14 NOTICE CAN BE FOUND;]

15 (2) furnished [MAILED] to every person who has filed a request for
16 notice of proposed action with the state agency;

17 (3) if the agency is within a department, furnished [MAILED OR
18 DELIVERED] to the commissioner of the department;

19 (4) when appropriate in the judgment of the agency,

20 (A) furnished [MAILED] to a person or group of persons who
21 [WHOM] the agency believes is interested in the proposed action; and

22 (B) provided [PUBLISHED] in the additional form and manner
23 the state agency prescribes;

24 (5) furnished to the Department of Law together with a copy of the
25 proposed regulation, amendment, or order of repeal for the department's use in
26 preparing the opinion required after adoption and before filing by AS 44.62.060;

27 (6) furnished to all incumbent State of Alaska legislators and the
28 Legislative Affairs Agency;

29 (7) furnished to the standing committee of each house of the legislature
30 having legislative jurisdiction over the subject matter treated by the regulation under
31 the Uniform Rules of the Alaska State Legislature, together with a copy of the

1 proposed regulation, amendment, or order of repeal for the committee's use in
2 conducting the review authorized by AS 24.05.182;

3 (8) furnished to the staff of the Administrative Regulation Review
4 Committee, together with a copy of the proposed regulation, amendment, or order of
5 repeal and, if preparation of an appropriation increase estimate is required by
6 AS 44.62.195, a copy of the estimate.

7 * Sec. 4. AS 44.62.190(c) is amended to read:

8 (c) The failure to furnish [MAIL] notice to a person as provided in this
9 section does not invalidate an action taken by an agency under AS 44.62.180 -
10 44.62.290.

11 * Sec. 5. AS 44.62.200(a) is amended to read:

12 (a) The notice of proposed adoption, amendment, or repeal of a regulation that
13 is published under AS 44.62.195 in the Alaska Administrative Journal or is
14 provided under AS 44.62.190(a)(2) - (8) must include the information described in
15 (1) - (7) of this subsection. The notice that is published in a newspaper of general
16 circulation or trade or industry publication or that is broadcast must include the
17 information described in (1), (4), and (6) of this subsection. The information that
18 must be provided according to requirements set out in this subsection is

19 (1) a statement of the time, place, and nature of proceedings for
20 adoption, amendment, or repeal of the regulation;

21 (2) reference to the authority under which the regulation is proposed
22 and a reference to the particular code section or other provisions of law that are being
23 implemented, interpreted, or made specific;

24 (3) an informative summary of the proposed subject of agency action;

25 (4) other matters prescribed by a statute applicable to the specific
26 agency or to the specific regulation or class of regulations;

27 (5) a summary of the fiscal information required to be prepared under
28 AS 44.62.195;

29 (6) a brief general description of the proposed subject of agency
30 action, how more detailed information may be obtained, and the name of the
31 agency contact person;

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~~(7) the reason for the proposed action, the initial cost to the state agency of implementation, the estimated annual costs to the state agency of implementation, the name of the contact person for the state agency, and the origin of the proposed action.~~

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

Sec. 44.62.213. Additional procedural requirements for certain state agencies. (a) The provisions of this section apply to regulations of the Department of Environmental Conservation, but do not apply to regulations of

(1) a board or commission located in the Department of Environmental Conservation; or

(2) any other organizational entity located in the Department of Environmental Conservation if the organizational entity is governed by a board whose members are subject to confirmation by the legislature.

(b) In addition to complying with the notice requirements of AS 44.62.190, a state agency to which this section applies shall

(1) furnish notice to persons who have provided comment to the state agency under AS 44.62.210 on earlier versions of the proposed adoption, amendment, or repeal of the regulation; and

(2) publish the notice on the Internet.

(c) Notwithstanding the variance in content authorized by AS 44.62.200(b), and except as provided in (d) of this section, a regulation that is adopted, amended, or repealed by a state agency to which this section applies may vary in content from the summary specified in AS 44.62.200(a)(3) if the subject matter of the regulation remains the same and the 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.

(d) If a state agency to which this section applies rewrites a proposed regulation, an amendment of a regulation, or an order of repeal after it has complied with AS 44.62.190, 44.62.200, and 44.62.210, and if the rewriting substantially changes the substance of the regulation, amendment, or order, the state agency shall, before adoption, provide notice and opportunity for public comment under

1 AS 44.62.190(a)(2) - (8), 44.62.200, 44.62.210, and (b) of this section for the
2 rewritten regulation, amendment, or order of repeal.

3 (e) If the state agency does not provide the notice and opportunity for public
4 comment under (d) of this section for a rewritten proposed regulation, amendment, or
5 order of repeal because it believes the rewriting did not substantially change the
6 substance,

7 (1) the state agency shall prepare a written explanation of the reasons
8 why the requirement of (d) of this section does not apply; and

9 (2) when the adopted regulation, amendment, or order of repeal is
10 published in the Alaska Administrative Journal, the lieutenant governor shall include
11 the state agency's explanation provided under (1) of this subsection with the text or a
12 summary of the text of the regulation, amendment, or order of repeal.

13 (f) The provisions of (d) and (e) of this section do not apply to regulations

14 (1) adopted under AS 44.62.260 to make emergency regulations
15 permanent; or

16 (2) that are necessary to meet federal requirements, to obtain an
17 exemption for a person, program, or situation in the state from federal requirements,
18 or to revise, in a manner that reduces any burden imposed by a federal requirement,
19 how the federal requirement will apply to a person, program, or situation in the state.

20 (g) If a statute is enacted or amended relating to a state agency to which this
21 section applies, the state agency shall, within 90 days after the effective date of the
22 statute or amendment, publish notice in the manner required under AS 44.62.190(a)(1)
23 that the commissioner of the agency does or does not find regulations presently
24 necessary to implement, interpret, or make specific the statute or amendment or to
25 govern applicable procedures.

26 (h) If a state agency to which this section applies publishes notice under (g)
27 of this section that the commissioner does not find regulations presently necessary, and
28 the commissioner subsequently finds that regulations are necessary to implement,
29 interpret, or make specific the statute or amendment or to govern applicable
30 procedures, the agency shall, within 90 days after the commissioner's revised finding,
31 publish notice of the revised finding in the manner required under AS 44.62.190(a)(1).

1 (i) A state agency to which this section applies may not take more than two
2 years to adopt regulations that the commissioner of the agency finds are necessary
3 under (g) or (h) of this section unless the agency complies with (j) of this section. The
4 two-year period begins on the date of the commissioner's finding that regulations are
5 necessary under (g) or (h) of this section. However, the requirement of this subsection
6 is not intended to prohibit the agency from amending a regulation after the regulation
7 has been adopted.

8 (j) If 21 months of the two-year time limit established under (i) of this section
9 for the adoption of regulations elapse without the agency adopting the regulations, and
10 if the agency determines that adopting the regulations will occur later than the two-
11 year time limit, the agency shall prepare a written report containing the reasons for the
12 failure and submit the report before expiration of the two-year time limit to the
13 governor, the president of the senate, the speaker of the house, and the chair of the
14 Administrative Regulation Review Committee established under AS 24.20.400.

15 (k) Notwithstanding AS 44.62.300, a court may not hold a regulation invalid
16 for failure to comply with (g) - (j) of this section.

17 * Sec. 7. AS 44.62.190(d) is repealed.

18 * Sec. 8. AS 44.62.213, enacted by sec. 6 of this Act, is repealed.

19 * Sec. 9. Sections 1, 10, and 11 of this Act are repealed.

20 * Sec. 10. The uncodified law of the State of Alaska is amended by adding a new section
21 to read:

22 APPLICABILITY OF AS 44.62.213(g) - (k). AS 44.62.213(g) - (k), added by sec. 6
23 of this Act, apply to the adoption of regulations under a statute or amendment if the effective
24 date of the Act enacting the statute or amendment is the same as or after the effective date
25 of sec. 6 of this Act.

26 * Sec. 11. The uncodified law of the State of Alaska is amended by adding a new section
27 to read:

28 APPLICABILITY OF OTHER NEW PROVISIONS. Except as provided by sec. 10,
29 secs. 1 - 7 of this Act apply to the adoption, amendment, or repeal of a regulation if the
30 original notice under AS 44.62.190 of the adoption, amendment, or repeal is given on or after
31 the effective date of secs. 1 - 7 of this Act.

- 1 * **Sec. 12.** Sections 1 - 7, 10, and 11 of this Act take effect July 1, 2000.
- 2 * **Sec. 13.** Sections 8 and 9 of this Act take effect July 1, 2005.

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

*1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907)269-5274
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March 22, 2000

The Honorable Pete Kott
Chair, House Judiciary Committee
Alaska State House
State Capitol
Juneau, Alaska 99801

Re: House CS for CS for Senate Bill No. 24 (Work Draft R, February 15, 2000)

Dear Representative Kott:

On February 7, 2000, at your invitation, I submitted a letter reviewing Work Draft P of Senate Bill 24. Subsequently, the Committee moved to Work Draft E. Yesterday I received Work Draft R, which deletes one set of provisions from the versions previously under discussion and rearranges the others. Because it will be difficult to correlate the comments on Work Draft P with the rearranged sections of Work Draft R, I am submitting this letter to specifically address Work Draft R. In substance, however, all of the comments made in this letter are comments I have made before.

The first six sections of Work Draft R apply to all agencies and relate to the procedure for giving notice of regulations. My comments do not address that portion of the bill.

Section 7 of Work Draft R would enact provisions aimed at regulations proposed by the Department of Environmental Conservation (DEC). The first part of Section 7 is a marked expansion of the public notice process for DEC regulations, including amendments and repealers. It increases both the volume of material to be published and the amount of time required to complete the process. The second part of Section 7 attempts to ensure that regulations are adopted soon after the effective date of the authorizing statute. Both parts of Section 7 are problematic as currently drafted.

As you know, Senate Bill 24 was first conceived as a broad regulatory reform bill governing several agencies. As a partial response to industry and Administration concerns raised about that earlier version, Section 7 of the bill has been narrowed to cover only DEC. Special administrative procedures applicable to only a single department should appear in the statutory title for that agency (Title 46 in the case of the Department of Environmental Conservation). Currently, the statutes already contain some special departures from the Administrative

The Honorable Pete Kott

March 22, 2000

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Procedure Act for DEC, and those are codified in Title 46. An example is AS 46.35.090. To avoid confusing the public, the new statutory section proposed in Section 7 should be revised to appear in Title 46 rather than Title 44.

I now turn to the particular subsections of the new AS 44.62.213, which Section 7 would create.

Subsection (b) presents two technical issues that need correction. First, the thrust of subpart (1) apparently is to require the agency to provide continuing notice to commenters as the multiple rounds of public notice called for in subpart (d) go forward. In other words, if someone comments on the first draft regulation put out to public comment, that person should receive notice of any revised draft following the first round of comment. If this is the intent, the subpart should be clarified by deleting the words "on the" from line 25 of page 4 and replacing them with the phrase: "under AS 44.62.210 upon a substantially similar". Otherwise, the language could require notice to people who have commented informally, outside of the Administrative Procedure Act context and not on the record.

Second, subsection (b), as simply an addition to the list of requirements in AS 44.62.190, should be tied to the limitation in AS 44.62.190(c) that applies to the other items on the list.

Subsection (d) requires a new round of public notice and comment each time the agency responds to previous comments by "substantially chang[ing] the substance" of the proposed regulation, provided the agency "would not normally consider the change to be significant enough to require additional notice." The quoted language creates an uncertain standard. As a practical matter, the agency will feel it must go back out to comment if it makes any change other than a change to form in response to public comments. The process will then be longer and more expensive.

Frequently, it is industry that is most anxious to get new regulations in place. An illustration of how this requirement might operate in practice is found in the recent process of adopting a site-specific water quality criteria regulation for Point Woronzof. The Municipality of Anchorage, which operates a water treatment plant at the location, desired an immediate state regulatory change to protect itself from potential liability for federal penalties. DEC took the new criteria from public notice through adoption in four months. However, the adopted version of the regulation contained a substantive change from the proposed version, because a criterion had been proposed for total chromium whereas it became apparent that the limit should apply to only one type of chromium. Had SB 24 been law, the agency would have had to put the regulation out to a second round of comment. This would have lengthened the process from four months to at least seven, and made it impossible to meet the municipality's target date for putting the new regulation in place.

The Honorable Pete Kott

March 22, 2000

Page 3

Subsection (e) requires the agency to explain a negative, that is, to publish an explanation of why subsection (d) does not apply to a particular situation. The benefit of this added effort and expense, in terms of informing the public, is questionable.

Subsection (f) attempts to create certain exceptions to the multiple notice rounds envisioned by subsection (d). Exception (2) is vague, and it would be risky to rely on it. It speaks of reducing "any burden imposed by a federal requirement" in connection with a "situation in the state." Whether a particular requirement imposes or relieves burdens often depends on one's point of view, and to avoid this uncertainty and the attendant risk of litigation the agency is likely to choose to re-notice. Note that the Point Woronzof regulation would not have qualified with any degree of confidence for either of the listed exceptions.

Subsections (g) through (j) appear to be aimed at requiring DEC to announce its intention to adopt, or not to adopt, regulations as soon as the authorizing statute is passed, and to complete the process of proposing regulations within two years. The premise of these subsections is unreliable: they are based on the assumption that each regulation draws on a single authorizing statute and that the statute is static. Instead, most regulations draw on multiple statutes, all enacted at different times and all amended from time to time. Applying the time limits imposed by subsections (g)-(j) would frequently entail guesswork.

Adding to the confusion is Section 12 of Work Draft R, the applicability provision for Section 7. That section makes the time limit provisions applicable only to regulations for which "the" statutory authority comes from an act with an effective date on or after July 1, 2000. Again, the multiple bases of authority for most regulations, and the tendency of statutes to be amended from time to time, makes this provision difficult to put into practice.

The difficulty of applying these subsections would be a serious problem indeed if regulations could be invalidated because some later litigant was able to convince a court that a deadline had been missed. Lines 19-20 of page 6 appear to be aimed at preventing that from occurring. However, to be fully effective in this regard, line 20 must be changed to "to comply with subsections (g) through (i) of this section."

* * *

The Honorable Pete Kott

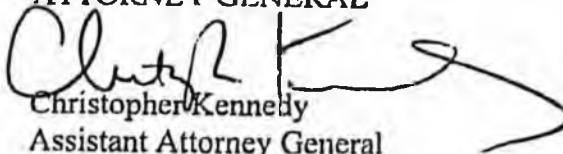
March 22, 2000
Page 4

Thank you for the opportunity to comment on Work Draft R of Senate Bill 24.
Should the committee require further information, please do not hesitate to ask.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:


Christopher Kennedy
Assistant Attorney General

cc: The Honorable Dave Donley (by fax and hand delivery)
Committee Members, House Judiciary
Commissioner Michele Brown
Pat Pourchot
Shari Kochman
Janice Adair
Chrystal Smith
Deborah Behr



SENATOR DAVE DONLEY
ALASKA STATE LEGISLATURE

SECTIONAL ANALYSIS
HOUSE CS FOR CS FOR SENATE BILL 24 ()
1-LSO274\R (2/15/00)

Section 1 – Provides that this act shall be called the *Alaska Regulations Reform Act*.

Section 2 – Allows the lieutenant governor to require state agencies to use abbreviated public notices in newspapers of general circulation and in trade and industry publications.

Section 3 – Amends Article 2 of the Administrative Procedure Act allowing the lieutenant governor to provide internet notice of regulations outside the scope of AS 44.62.040. This change is consistent with the sections of the bill dedicated to creating more efficiency in the Administrative Procedure Act by allowing for abbreviated, printed notices which direct interested parties to more detailed internet notices.

Section 4 – Amends 44.62.190(a) by recognizing the advances in technology away from broadcast medium and print to online services. It deletes reference to a broadcast notice providing the name and the date of the publication where the full text of a public notice can be found. If left in the law, this section would defeat the purpose of abbreviating public notices and allowing for the increasing use of internet capabilities. This section broadens the opportunities for the public to receive notice beyond mail or publication.

Section 5 – Substitutes the word “furnish” for “mail” in order to conform Article 4 of the Administrative Procedure Act – dealing with the procedure for adopting regulations.

Section 6 – Amends the contents of public notices, to allow for abbreviated notices in print. AS 44.62.200(a)(7) replaces AS 44.62.190(d). Abbreviated notices will include:

1. A statement of the time, place and nature of proceedings for adoption, amendment, or repeal of the regulation; (*current law*)

Vice-Chair, Senate Finance Committee • Chair, Capital Budget Subcommittee • Co-Chair, Anchorage Caucus
Member: Senate Judiciary Committee • Senate Labor & Commerce Committee • Legislative Council

January-May: STATE CAPITOL • JUNEAU, ALASKA • 99801-1182 • (907) 465-3892 • FAX: (907) 465-6595
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www.akrepublicans.org/Donley.htm • www.legis.state.ak.us/senate/donley.htm

2. Other matters prescribed by a statute applicable to the specific agency or to the specific regulation or class of regulations; (*current law*)
3. A brief general description of the proposed subject of agency action, how more detailed information may be obtained, and the name of the agency contact person. (*new language*)

Section 7 - AS 44.62 is amended by adding a new section—AS 44.62.213 *Additional procedural requirements for certain state agencies*. This section is the corpus of the pilot program created in this legislation. This section sets out additional procedural requirements for the DEC, but not for regulations produced by any DEC board, commission or any other organization within the DEC whose members are confirmed by the legislature (as set out in **subsection (a)**).

Subsection (b)--In addition to the notice requirements currently in statute under AS 44.62.190 (*Notice of proposed action*), SB 24 adds several more requirements:

- Furnish notice to persons who have provided comment to the state agency on the proposed adoption, amendment or repeal of a regulation;
- Publish the notice on the internet;

Subsection (c)— This subsection's language mirrors the language currently in statute under AS 44.62.200(b) with the exception of the word "*original*" which is deleted from between the words "*the*" & "*notice*" on page 4, line 30. By deleting the word "*original*" this section's requirements apply to all subsequent notices, as well as the original.

Subsection (d)— If an agency to which this section applies rewrites a proposed regulation, an amendment of a regulation, or an order of repeal after complying with AS 44.62.190, 44.62.200 & 44.62.210, and if the rewriting substantially changes the content of the original regulation, but the agency would not normally consider the change to be significant enough to require additional notice under the aforementioned statutes, before adoption, the state agency shall provide notice and opportunity for public comment under AS 44.62.190(a)(2)–(8) (excluding republishing in the newspaper), 44.62.200, 44.62.210 and (b) of this section.

Subsection (e) – If an agency to which this section applies fails to meet the requirements of (d) of this section because they feel that the change is not substantial, the agency must:

- Prepare a written explanation of the reasons why the requirement of (d) of this section does not apply; and

- The lieutenant governor shall publish the state agency's explanation in the Alaska Administrative Journal with the text or a summary of the text of the regulation, amendment, or order of repeal.

Subsection (f)— This subsection exempts emergency regulations, regulations necessary to meet federal requirements, or regulations that reduce the regulatory burden of the public from the provisions of (d) & (e) of this section.

Subsection (g)— This subsection requires a state agency to which this section applies to publish a notice, as dictated in AS 44.62.190(a)(1), within 90 days after the date of enactment that the agency will or will not propose and adopt regulations to implement the statute, if it is not expressly required to prepare regulations within said statute.

Subsection (h)— Creates a two year time limit for the adoption of regulations for state agencies to which this section applies (the DEC).

Subsection (i) – If the agency (DEC) determines that the adoption of the regulations will not be completed within the two year time limit of (i), the state agency shall prepare a written report containing the reasons for the failure and will submit the report before 18 months of the two year time limit have elapsed to the president of the senate, speaker of the house, and the Administrative Regulation Review Committee.

Subsection (j)— This subsection sets out criteria that allows the agency to disregard the provisions of (h) & (i) of this section.

Section 8 – Repeals AS 44.62.190(d) which was replaced by AS 44.62.200(a)(7)— in section 6 of this legislation.

Sections 9–13 & 15 – These sections of the bill set the sunset clause for sections 1 & 7 at five years –section 7 creates the pilot program for the promulgation of regulations.

Section 14 – Sets the effective date of this Act at July 1, 2000.

RESPONSES TO THE TESTIMONY OF CHRIS KENNEDY (DOL)

1. SB 24 applies only to the DEC, but SB 24 is written so that the law would be placed in AS 44, rather than title 46 (the DEC title).

During the evolution of SB 24 there have been many changes to the bill. Most notably, is the reduction in the number of agencies to which it applies. This is why it was originally written into title 44. However, it remains in title 44 because of the future possibility that the program could be expanded to other agencies. SB 24 is written in such a way that allows this to happen quite easily, whereas if it was placed in title 46 a substantial rewrite would be needed in order to add another agency.

2. The new standards in SB 24 (Sec. 3 (1)(A)) are novel. The courts will have a difficult time deciphering their meaning.

Perhaps. The novel approach has been taken in order to hold an agency more accountable and to require it to follow these strict standards before it promulgates regulations. The administration seems to believe that the status quo is working; yet from everything we hear it is not. Many citizens are unhappy with how regulations are promulgated and the first standard of this section was created to respond to some of those concerns. The test provided in (1)(A) is more stringent in order to ensure that the administration does not ignore the intent of the statute when promulgating regulations. Although the old test has been in place since 1959 and has been tested, it is clearly not working to the satisfaction of many citizens, industry groups and legislators. However, it should also be noted that after considering the comments of the administration and various groups it became apparent that if a stricter test is created for the agency, then the burden on the person challenging the regulation needed to be more stringent, thus the language clear and convincing evidence was used. This was done to allay the fears expressed by the administration and industry groups that the more stringent test would create more opportunities for the regulation to be challenged

3. The test in part B of section 3 is untested and troubling because it inserts courts into the public process of determining whether a benefit is truly public or not.

The language used in this standard was actually borrowed from the Alaska Forest Practices Act and though it is not the exact same language, it would not be accurate to say that this standard is a completely novel approach either.

4. Amending regulations is problematic due to the way Sec 5 reads on the applicability of this statute. When a regulation is amended after the enactment of the new test, but only in part, is the entire regulation subject to the new test or is only the new language?

Checking with legal.

5. Section 5(a) makes some provisions of the bill apply only to regulations if the statute giving authority for those regulations has an effective date of July 1, 2000 or later. This may become problematic when a regulation derives authority from a combination of statutes with various effective dates.

Checking with legal.

6. The language in Section 4 seems vague and should be clarified to require DEC to mail (now furnish) notices only to those who have formally commented on an earlier draft of the regulation.

Checking with legal.

7. The word "mail" in Section 4 seems too narrow and should be changed to "furnish" to allow for electronic mailing.

The word "mail" has been changed to "furnish" in the in the CS.

8. Subsection (c) of Section 4, requiring a written explanation by DEC is an invitation for lawyers to simply produce boilerplate explanations and is unlikely to produce any material that is genuinely informative.

This requirement appears to be a reasonable way to encourage agencies to inform the public and help the public understand the intent of the Department. This argument does not appear to have much merit and the public will likely find these explanations valuable.

9. Subsection (e) requiring a new round of public comments whenever the Department has substantially changed the substance of a proposed regulation would be too costly, would slow the process and would not be effective.

This section is really the heart of the bill. It is a policy call as to how much accountability one believes that the Department should have with the public.

10. Exceptions to (e) are too vague (except number 1) to be of any real use.

Subsection (2) on Page 4: represents an effort to acknowledge previous department testimony that federal requirements need to be considered. Subsection (3) has been removed from the new CS, since Rep. Murkowski pointed out that it could be used by the Department to get around having to provide another public notice.

11. Subsections (J) should be expanded to include (H)-(J) so that it would give DEC more flexibility to meet the two-year requirement to enact regulations.

Again, this represents a policy decision. There are no technical or legal problems with this expansion, but it would take the heart out of the requirement the Department promptly enact regulations to carry out the will of the Legislature.



SENATOR DAVE DONLEY
ALASKA STATE LEGISLATURE

CHANGES MADE IN CS TO SB 24 (1-LS0274\P)

Working from work draft SB 24 (1-LS0274\P) the changes are:

1. P. 2, Line 29: Delete "mail" and insert "furnish" in its place.
2. P. 4, Line 8: Delete subsection (3)—entire line.
3. P. 5, Lines 9-10: Language was added to require the department to provide a report explaining their "good faith effort" if they chose to utilize this clause to circumvent the requirements of (i) and (j).
4. A five year sunset clause was added for the material in version 'P'.
5. Senator Leman's amendment was incorporated into the new CS. Senator Leman's amendment is not covered by the sunset clause.

Vice-Chair, Senate Finance Committee • Chair, Capital Budget Subcommittee • Co-Chair, Anchorage Caucus
Member: Senate Judiciary Committee • Senate Labor & Commerce Committee • Legislative Council

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*TESTIMONY OF RICHARD HARRIS
SENIOR VICE PRESIDENT, NATURAL RESOURCES
SEALASKA CORPORATION
IN SUPPORT OF HCS CS SB(24) (VERSION P)
BEFORE THE HOUSE JUDICIARY COMMITTEE
FEBRUARY 2, 2000*

SEALASKA CORPORATION IS THE ANCSA REGIONAL CORPORATION FOR SOUTHEAST ALASKA. ON BEHALF OF OUR 16,000 SHAREHOLDERS, SEALASKA IS ACTIVELY ENGAGED IN AN ARRAY OF REGULATED ECONOMIC ACTIVITY, INCLUDING MINING AND COMMERCIAL FORESTRY.

SEALASKA IS PLEASED TO SUPPORT THE PROPOSED COMMITTEE SUBSTITUTE FOR SB 24, AND WE HAVE ALSO BEEN ASKED TO CONVEY THE SUPPORT OF THE ALASKA FOREST ASSOCIATION, OF WHICH SEALASKA IS A MEMBER. THE VERSION OF SB 24 THAT IS BEFORE YOU IS THE RESULT OF CONSIDERABLE EFFORT ON THE PART OF SENATOR DONLEY TO ACHIEVE TANGIBLE AND SIGNIFICANT REGULATORY REFORM WITHOUT RUNNING THE RISK OF FURTHER INVOLVING THE COURTS IN THE MAKING OF STATE NATURAL RESOURCE POLICY.

EARLIER VERSIONS OF THIS BILL WOULD HAVE REQUIRED ADEC TO PERFORM A COST/BENEFIT ANALYSIS OF CERTAIN

NEW REGULATIONS. WHILE THE BENEFITS OF THAT REQUIREMENT ARE OBVIOUS, MANY WERE CONCERNED THAT THE REQUIREMENT MIGHT INVITE LITIGATION OVER WHETHER PARTICULAR COSTS OR BENEFITS--AND PARTICULARLY DIFFICULT-TO-QUANTIFY ENVIRONMENTAL COSTS--WERE GIVEN ADEQUATE WEIGHT IN THE BALANCING PROCESS.

TO FIND A STANDARD THAT MET THE LEGISLATION'S ORIGINAL GOAL, BUT DID NOT RAISE THE RISK OF INCREASED LITIGATION, THIS BILL NOW BORROWS FROM ALASKA'S FOREST PRACTICES ACT--A PIECE OF LEGISLATION WITH WHICH SEALASKA IS UNIQUELY FAMILIAR.

THAT LEGISLATION, AS YOU KNOW, IS THE PRODUCT OF A CONSENSUS REACHED BY ALASKA'S RESOURCE AGENCIES, ENVIRONMENTAL GROUPS AND THE REGULATED INDUSTRY IN 1990. THAT LEGISLATION SERVES AS A MODEL FOR COOPERATIVE, SCIENTIFICALLY-BASED RESOURCE REGULATION, AND ITS 10-YEAR HISTORY PROVES THAT LITIGATION DOES NOT HAVE TO BE A PART OF MODERN ENVIRONMENTAL MANAGEMENT.

ONE OF THE PROVISIONS THAT ALL THE PARTIES AGREED TO IN THEIR UNANIMOUS ENDORSEMENT OF THE FOREST PRACTICES ACT WAS SECTION 080(D), WHICH PROVIDES THAT DNR CANNOT ADOPT REGULATIONS THAT IMPOSE COSTS ON THE INDUSTRY UNLESS THOSE REGULATIONS WILL PRODUCE "SIGNIFICANT BENEFITS TO PUBLIC RESOURCES."

I CAN TELL YOU, FROM EXPERIENCE, THAT THIS SIMPLE, STRAIGHTFORWARD STANDARD HAS HAD A SIGNIFICANT IMPACT IN ENSURING THAT THE RULES IMPOSED ON OUR INDUSTRY HAVE A CLEAR PUBLIC JUSTIFICATION. IT IS A STANDARD THAT MAKES THE AGENCY JUSTIFY WHAT IT IS DOING, AND IT MAKES THE AGENCY THINK EVERY TIME IT PROPOSES A NEW RULE THAT INCREASES PRIVATE-SECTOR COSTS.

BUT IT IS EQUALLY IMPORTANT IN WHAT IT DOES NOT DO. IT DOES NOT FORCE THE AGENCY INTO AN ESOTERIC WEIGHING OF COSTS AND BENEFITS. AND PARTLY FOR THAT REASON, IN ITS 10-YEAR HISTORY IT HAS PROVOKED NO LITIGATION OF WHICH WE ARE AWARE.

ON PAGE 2, LINES 8-10, OF DRAFT "P" OF SB 24, YOU WILL FIND AN ADAPTATION OF THAT FOREST PRACTICES STANDARD WHICH, IF THIS BILL IS ENACTED, WOULD APPLY TO A RANGE OF ADEC PROGRAMS. WE BELIEVE, IN THE LONG RUN, THAT ENVIRONMENTAL REGULATION IN ALASKA SHOULD BORROW EVEN MORE HEAVILY FROM THE SUCCESSFUL EXPERIENCE OF THE FOREST PRACTICES ACT. BUT WE COMMEND SENATOR DONLEY FOR TAKING THE FIRST STEP IN THAT REGARD, AND WE ENTHUSIASTICALLY SUPPORT THIS LEGISLATION.

STATE OF ALASKA

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February 7, 2000

The Honorable Pete Kott
Chair, House Judiciary Committee
Alaska State House
State Capitol
Juneau, Alaska 99801

Re: House CS for CS for Senate Bill No. 24 (Work Draft P, January 26, 2000)

Dear Representative Kott:

This letter reviews the work draft of Senate Bill 24 discussed in the House Judiciary Committee on February 2, 2000. I write at your invitation to detail the concerns I raised in oral testimony to the Committee on that date. I am grateful for the opportunity to submit these comments.

Work Draft P of Senate Bill 24 has three main features, all of them special provisions aimed at regulations proposed by the Department of Environmental Conservation (DEC). The first feature, found in Section 3 of the bill, is a change in the standard of review for DEC regulations. The second feature is a marked expansion of the public notice process, both in volume of material to be published and in the amount of time required to complete the process. Finally, the bill attempts to ensure that regulations are adopted soon after the effective date of the authorizing statute.

As you know, Senate Bill 24 was first conceived as a broad regulatory reform bill governing several agencies. As a partial response to industry and Administration concerns raised about that earlier version, the bill has been narrowed to cover only DEC. Special administrative procedures applicable to only a single department should appear in the statutory title for that agency (Title 46 in the case of the Department of Environmental Conservation). Currently, the statutes already contain some special departures from the Administrative Procedure Act for

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DEC, and those are codified in Title 46; an example is AS 46.35.090. To avoid confusing the public, the substantive provisions of SB 24 should be revised to appear in Title 46 rather than Title 44.

I now turn to the specific provisions of the bill, taken in order. References to page and line numbers are to Work Draft P.

Section 2 of the bill removes DEC from the current standard under which regulations are tested in the courts. The present standard has been in effect since 1959, and its meaning is no longer subject to uncertainty in litigation.

Section 3 lays out a replacement standard for DEC regulations. It is a wholly novel standard made up of words entirely new to the statutes, such as "thwarts" and "circumvents." Courts would attempt to give each of these words meaning, and would assume that the overall meaning must be different from the 1959 language or the Alaska State Legislature would not have gone to the trouble to change it. Beyond that, the outcome of litigation under this standard would be uncertain. This uncertainty makes the replacement standard undesirable, because it reduces the ability of both stakeholders and state officials to predict whether a court would uphold a regulation. Uncertainty interferes with business and government planning and adds to legal expenses.

It has been suggested that the new standard is modeled on the Forest Practices Act language found at AS 41.17.080(d). That provision reads: "The commissioner shall adopt only those regulations necessary to accomplish the purposes of this chapter and shall avoid regulations that increase operating costs without yielding significant benefits to public resources." The language found at lines 3-17 of page 2 of the work draft of SB 24 has been greatly altered from this model. More fundamentally, AS 41.17.080(d) is merely an overlay to the 1959 standard. There is no parallel in the Forest Practices Act to Section 2 of SB 24, and forestry regulations have *not* been exempted from the coverage of AS 44.62.030. Were SB 24 to parallel the Forest Practices Act, Section 2 of SB 24 would be eliminated and Section 3 would simply add the language of AS 41.17.080(d) to AS 46.03.020(10), or would use that language to replace the current text of AS 46.03.024. As DEC has pointed out, AS 46.03.024 is a counterpart to the Forest Practices Act language that already applies to DEC.

Appearing as it does as a freestanding standard of review, the cost-benefit comparison in lines 8-10 of page 2 of the work draft is especially problematic. A court cannot uphold a regulation without finding that it yields "significant" and "public" benefits to counterbalance any "material" costs imposed on any industry or other development activity. This enlists the Alaska Superior Courts in weighing what is a benefit, what is a significant benefit, and what is a public benefit. It is a role that, as the Alaska Supreme Court has sometimes recognized, is inappropriate for the judicial branch.

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The following example illustrates the kind of weighing that would be involved. DEC issues special regulations, set out at 18 AAC 70.230-236, to provide particular industrial facilities with locally relaxed water quality standards allowing those facilities to discharge more waste into the water than federal and state law would otherwise permit. Though these site specific regulations typically do not impose a cost on the industry that requests and receives them, they may impose costs on another "industry" that shares the same resource. For example, I recently worked on a case where the state was adverse to certain plaintiffs seeking to block oil development of the Alpine field. Some plaintiffs claimed standing to sue by asserting that they were in the business of taking paying clients on ecotourism trips in the Colville River delta. Under SB 24, such a group--as a member of the tourist industry--might claim the special water criterion affected its operation. It would then be in a position to invalidate the regulation unless the regulation created a *significant* and *public* benefit. While the state would argue otherwise, some judges might view the benefit conferred by a water quality standard adjustment extended to a single company as neither significant nor public, but rather a private benefit. By introducing such uncertainty into the process, SB 24 would make it hard for industry or government to know which regulations may be relied on and which may later be invalidated.

Further difficulties emerge when Section 3 is viewed in conjunction with Section 5 on applicability. SB 24 applies only to new regulatory actions begun after July 1 of this year. The problem arises because most DEC regulatory actions are amendments to existing regulations, in order to make them clearer, to respond to problems pointed out by the regulatory community, or to respond to changing conditions or amendments to statutes. An amendment may only change, for example, the last three words of a sentence. Later, if that regulation were challenged, the court would have to review three words of the sentence under one standard and the other words under another standard. Within a few years, the DEC regulations would be a Byzantine tangle of fragments covered by the old standard and fragments covered by the new test.

It is no answer to this problem to make SB 24 apply retroactively. That solution would reopen all existing regulations, even those that have already been upheld in court, to new challenges based on the changed standard of review, renewing opportunities for gadfly litigants to press agendas that have previously failed.

A technical problem with Section 3 is its use of "burdens of proof" in connection with the standard of review for regulations. Whether or not a regulation meets the standard of review is traditionally a question of law, not a question of fact. The court must reach the same conclusion about the validity of a regulation regardless of who is testing it and regardless of what "evidence" is brought before the court; after all, a regulation cannot be valid law for one person and invalid law for another, or serious equal protection issues would ensue. For this reason courts test regulations using the public record of legislative context and intent. While parties may help to illuminate this record to the court through briefing, in the end the court is to examine the issue objectively and to consult all relevant legislative sources on its own. The concept of "burden of proof" is largely foreign to the process of deciding questions of law. Its inclusion in

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Senate Bill 24 would lead to confusion and uncertainty. Should the court accept the notion that testing regulations against a standard of review should be approached as a triable factual issue, the consequence would be that challenges to regulations could rarely be decided on summary judgment. The principal beneficiaries of such a development would be litigants whose objective is to obstruct projects by means of delay.

I turn next to Section 4 of the work draft, which creates a new section 213 of the Administrative Procedure Act. I will address each lettered subsection in turn.

Subsection (a) appears to be an artifact of the earlier version of SB 24 that applied to multiple agencies, some of which encompassed boards or commissions. It is probably unnecessary to a bill that applies only to DEC, unless the sunset of the Board of Storage Tank Assistance, scheduled under AS 44.66.010(a)(18) for the day before the effective date of SB 24, is extended.

Subsection (b) presents three technical issues that needs correction. In subpart (1), the word "mail" on line 29 should be changed "furnish," to avoid restricting the agency to the use of U.S. Postal Service mail. The flexibility is needed because members of the public who comment by e-mail generally prefer to receive subsequent notices by e-mail.

Secondly, the thrust of subpart (1) appears to be to require the agency to provide continuing notice to commenters as the multiple rounds of public notice called for in subpart (e) go forward. In other words, if someone comments on the first draft regulation put out to public comment, that person should receive notice of any revised draft following the first round of comment. If this is the intent, the subpart should be clarified by deleting the words "on the" from line 30 and replacing them with the phrase: "under AS 44.62.210 upon a substantially similar". Otherwise, the language could require notice to people who have commented informally, outside to Administrative Procedure Act context and not on the record.

Thirdly, subsection (b), as simply an addition to the list of requirements in AS 44.62.190, should be tied to the limitation in AS 44.62.190(c) that applies to the other items on the list.

Subsection (c) is related to the standard of review change, requiring the agency to publish an explanation of its legal position on the validity of the proposed regulation. Such an explanation could be lengthy, and writing and publishing it would be expensive. Long public notices can actually decrease the likelihood of successfully informing the public, in that the information of real interest to the public becomes lost in the volume of material. If a stakeholder is genuinely concerned that the agency has given inadequate consideration to the legal standard for adopting the regulations, it can raise the issue by comment and receive an explanation in the responsiveness summary that many DEC divisions prepare when issuing regulations.

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Subsection (e) requires a new round of public notice and comment each time the agency responds to previous comments by "substantially chang[ing] the substance" of the proposed regulation, provided the agency "would not normally consider the change to be significant enough to require additional notice." The quoted language creates an uncertain standard. As a practical matter, the agency will feel it must go back out to comment if it makes any change other than a change to form in response to public comments. The process will then be longer and more expensive.

Frequently, it is industry that is most anxious to get new regulations in place. An illustration of how this requirement might operate in practice is found in the recent process of adopting a site-specific water quality criteria regulation for Point Woronzof. The Municipality of Anchorage, which operates a water treatment plant at the location, desired an immediate state regulatory change to protect itself from potential liability for federal penalties. DEC took the new criteria from public notice through adoption in four months. However, the adopted version of the regulation contained a substantive change from the proposed version, because a criterion had been proposed for total chromium whereas it became apparent that the limit should apply to only one type of chromium. Had SB 24 been law, the agency would have had to put the regulation out to a second round of comment. This would have lengthened the process from four months to at least seven, and made it impossible to meet the municipality's target date for putting the new regulation in place.

Subsection (f) is similar to subsection (e), requiring the agency to explain a negative, that is, to publish an explanation of why subsection (e) does not apply to a particular situation. The benefit of this added effort and expense, in terms of informing the public, is questionable.

Subsection (g) attempts to create certain exceptions to the multiple notice rounds envisioned by subsection (e). Exceptions (2) and (3) are vague, and it would be risky to rely on them. Exception (2), for example, speaks of reducing "any burden imposed by a federal requirement" in connection with a "situation in the state." Whether a particular requirement imposes or relieves burdens often depends on one's point of view, and to avoid this uncertainty and the attendant risk of litigation the agency is likely to choose to re-notice. Note that the Point Woronzof regulation would not have qualified with any degree of confidence for any of the listed exceptions.

Subsections (h) through (k) appear to be aimed at requiring DEC to announce its intention to adopt, or not to adopt, regulations as soon as the authorizing statute is passed, and to complete the process of proposing regulations within two years. The premise of these sections is flawed: they are based on the assumption that each regulation draws on a single authorizing statute and that the statute is static. Instead, most regulations draw on multiple statutes, all enacted at different times and all amended from time to time. Applying the time limits imposed by subsections (h)-(k) would be an exercise in guesswork.

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Adding to the confusion is subsection (a) of the applicability provision of SB 24. That section makes the time limit provisions applicable only to regulations for which "the" statutory authority comes from an act with an effective date on or after July 1, 2000. Again, the multiple bases of authority for most regulations, and the tendency of statutes to be amended from time to time, makes this provision difficult to put into practice.

The difficulty of applying these subsections would be a serious problem indeed if regulations could be invalidated because some later litigant was able to convince a court that a deadline had been missed. Lines 30-31 of page 4 appear to be aimed at preventing that from occurring. However, to be fully effective in this regard, line 31 must be changed to "to comply with subsections (h) through (j) of this section."

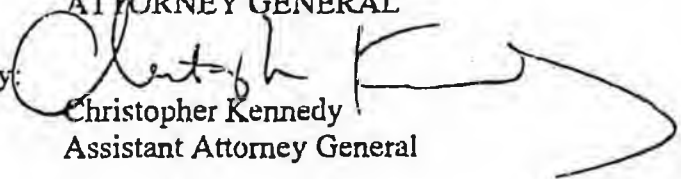
* * *

Thank you for the opportunity to comment on Work Draft P of Senate Bill 24. Should the committee require further information, please do not hesitate to ask.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:


Christopher Kennedy
Assistant Attorney General

cc: The Honorable Dave Donley
Committee Members, House Judiciary
Commissioner Michele Brown
Pat Pourchot
Shari Kochman
Janice Adair
Chrystal Smith
Deborah Behr

Testimony from Chris Kennedy on SB 24:

Number 0149

CHRIS KENNEDY, Assistant Attorney General, Civil Division, Environmental Section, Department of Law, came forward to testify on SB 24. He indicated Janice Adair, Director, Division of Environmental Health, Department of Environmental Conservation (DEC), was unable to testify at today's committee meeting. He asked, on her behalf, that she be given the opportunity to comment later. He referred to the committee substitute for SB 24 and stated,

While the bill has improved over previous versions, we continue to have a number of concerns. First of all, a housekeeping point. As, I think, Senator Donley covered, SB 24, as it's revised applies special procedures only to DEC. Now, special administrative procedures applicable only to a single department are normally in place in the statutory title for that agency. And, currently, we already have on the books some special departures from the Administrative Procedures Act that apply only to DEC and those are in Title 46. The main example is AS 46.35.090. Now that it has been narrowed to relate only DEC, the main provisions of this bill in Sections 3 and 4 should be revised to go into Title 46, rather than Title 44. I heard the discussion of this being a pilot program that might last 5 years or so. Of course, if it were a successful pilot program and someone wanted to expand in 5 years from now, one could recodify again, but 5 years is a long time to have a DEC statute stuck off in another title where people might miss it.

Number 0239

MR. KENNEDY continued,

Now I'll turn to the substance of the bill. I'd like to look first at the standard of review which has just been discussed. It can be found in Section 3 of the bill. It completely replaces the current standard under which an agency's regulations are tested, and the current standards in [AS]44.62.030 is quite a firm standard. It says that regulations have to be consistent with the statutes and that they have to be reasonably necessary to carry out the purposes of the

authorizing statute. This standard has been in place since 1959. It stood the test of time. The courts have decided dozens of changes based on it and the legal community of both industry and government knows what it means. The new standard in SB 24 is entirely novel. It uses words like "thwarts" and "circumvents" that are new to the Alaska statutes and not found in many other states statutes either. No one can predict how a court would interpret them. The SB 24 standard also inserts "courts" into a process of weighing costs and benefits. And here I'm talking about part (B) of the new standard of review which is at lines 8 through 10 on page 2. Under SB 24 a court cannot uphold a regulation without finding that it yields "significant public benefits" to counter balance any "material costs imposed on development activities". This gets the superior courts into laying what is a benefit, what is a significant benefit, and what is a public benefit. Increasingly, unfortunately, courts in Alaska are coming to the realization that they're not equipped for that kind of role. The Alaska Supreme Court said in the recent Casio(ph) case that it doesn't want to (indisc.-coughing) get mired in questions of public policy as to regulations because that is beyond our authority and expertise.

Concern
over
Standard

Ind case

Number 0331

MR. KENNEDY further stated,

I'll give you an example of the kind of weighing that would be involved. DEC issues special regulations to provide particular industrial facilities with mixing zones that, as a practical matter, allow the industry to discharge more waste into the water than federal or state law would otherwise permit. And a user of the water body, such as an eco-tourism company, might challenge a regulation like that, alleging that it imposed cost on them because they have to travel farther to find a pristine tourist destination. Against that cost, the court would have to weigh the benefits of letting the industrial facility use the mixing zone. Then you would have the question of whether that is a public benefit or just a private benefit to the company that owns the facility. And some judges might even question whether it's a benefit at all. No one knows how a court would rule given

The test
may work
against
industry

this kind of language and it introduces an uncertainty into the whole process and makes it hard for industry or anyone to know which regulations they can rely on and which are going to be snatched out from under them in some later litigation. There's another very troubling aspect in introducing a whole new standard for reviewing regulations. And to appreciate it, you have to look at Section 3 in conjunction with Section 5 on applicability. As it must, to avoid a host of other problems, this bill has been (indisc.) not to be retroactive. It applies to new regulatory action begun after July 1 of this year. The trouble comes because most of what DEC does with regulations is amend existing regulations in order to make them clearer or to respond to problems pointed out by the regulated community or to respond to changing conditions or amendments to statutes. An amendment may only change, for example, the last three words of a sentence under one sentence of a regulation. Later, if that regulation is challenged, then you would, you would be testing those three words under one standard of review and the other words of the regulation under another standard of review. And within a few years, the DEC regulations would be a hopeless patchwork of bits covered by, some covered by the old standard and some covered by the new test. It would be very hard to predict how a court would unravel that.

Number 0458

MR. KENNEDY continued,

While I'm on the subject of applicability in Section 5, I want to just talk for a moment about subsection (a) of the applicability provision. That section makes some provisions of the bill only apply to regulations if the statute giving authority for those regulations has an effective date after July 1 of 2000. The problem there is that many regulations draw authority from a combination statute that all have different effective dates. Also, do you go by the effective date of the first version of the statute, or do you go by the effective date of the most recent amendment of the statute, or do you engage in some sort of court inquiry as to how significant the latest statutory amendment was? I think both the agency and

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the court and industry would have a very difficult time knowing how to interpret this applicability provision. Let me just turn back, if I may, to Section 4. The other substantive provision of the draft. The first part of that relates to the public notice process for adopting regulations. I think that the rest of this is perhaps to make sure that the agency has a genuine dialogue with the public. The idea may be that if the draft set of regulations is out to the public then it significantly revises the draft. It'd have to take a new round of public comment. I should make a couple of technical points.

In subsection (b)(1) of the new section [AS 44.62.]213 the bill would require DEC to mail notice to person had provided comment to DEC on the proposed adoption, amendment, or repeal of a regulation. I think the intent here is probably to refer to those who have commented formally on a previously noticed draft of those regulations. But the language of the bill doesn't quite say that and this requirement could be interpreted to invalidate a regulation just because the agency did not notify someone who had commented in some informal context at some time in the past. Also, and this is a minor concern, that the phrase "mail notice" should be changed to "furnish notice". As we move more and more to electronic commenting, the agency receives comments by e-mail and would want to respond and providing notice by e-mail to people who prefer. That mechanism and the use mail is usually going to be interpreted just as strictly U.S. mail.

Number 0576

MR. KENNEDY stated,

Moving onto subsection (c). This is a requirement that the agency developed in explanation of why its proposed regulation is not invalid under the new standard of review that I mentioned before. This is an invitation for lawyers to compose boiler plates. It's unlikely to produce any material genuinely informative to the general public and whatever it does produce will have to be published, potentially at great cost, in the Alaska Administrative Journal. Next, I'd like to comment on the core subsection here, subsection (e), which requires a new round of public notice whenever the agency, in response to comments,

has "substantially changed the substance of the draft regulation". The first concern is that this imposes an uncertain standard. Secondly, it slows down the process considerably. Whereas industry and the public, in general, are often impatient for regulations to become final. Third, it's costly and fourth, it may not be an effective way to accomplish what seems to be the goal of this provision. If the goal is to make sure the agency has a meaningful dialogue with commenters the best solution might be to require the agency to compare and furnish to commenters a response in the summary explaining why it accepted or rejected each comment. I understand some DEC divisions do this already and it's a procedure that's been well received when it's been tried. I'd like to touch briefly on the exceptions to subsection (e). The exceptions are in subparts of subsection (g) which travels pages 3 and 4 of the draft. The point to made here is that these exceptions, other than number 1 are too vague to be of any real use to the agency. They talk about reducing burden. One person's burden is another person's benefit and it will generally be difficult to tell if a regulation reduces burdens on society as a whole.

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Finally, I would like to; I should comment briefly on subsections (h) through (k) which attempt to ensure that regulations are adopted probably after the underlying statute has passed. These provisions suffer from similar concerns. They are vague and even more of a problem is that the underlying assumption is that regulations will be based on a single statute that has a single effective date. These, which as I mentioned previously, is frequently not the case, or most commonly is not the case. These provisions will be extremely hard to apply where regulations have multiple statutes behind them. All with different effective dates and with multiple statutory amendments that often have different effective dates.. Finally, while a delay in issuing regulations can be frustrating, these provisions are perhaps a little too blunt to address that. Often the need for regulations doesn't become apparent...to anyone until there's been years of experience in attempting to implement the underlying statute; and it would be unfortunate to have a blanket two-year cut-off for regulations in those situations. Last of all, what I think is a

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technical fix; the last line of subsection (j) which was lines 30, 31 on page 4, state that the court may not hold a regulation invalid for failure to comply with "this subsection which is part, but not all of the two-year limit mechanism. If this line were changed to "failure to comply with subsection (h) through (j)" then the two-year limit would be something for DEC to strive for, and perhaps to be embarrassed if it failed to meet the code because we'd have to report to the Legislature. But it would not be set in stone and wouldn't hold out the threat of having regulatory reforms become impossible if it later became apparent that...they were needed after the two-year period had gone by.

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SENATOR DAVE DONLEY

ALASKA STATE LEGISLATURE

SPONSOR STATEMENT HOUSE C₂ FOR CS FOR SENATE BILL 24 () "THE ALASKA REGULATION REFORM ACT"

Senate Bill 24 reforms how administrative regulations are adopted by the state of Alaska and places reasonable new limits on the power of state bureaucracy to impose new regulations on Alaskans.

SB 24 increases opportunities for public notice and comment regarding adoption of regulations. SB 24 requires that new regulations pass a "needs" test and be drafted in a way to minimize their impact on personal liberties and property rights. Senate Bill 24 pertains only to the Department of Environmental Conservation. Its scope has been reduced dramatically in an effort to single out a department where the measures required in SB 24 could serve as a pilot program. However, SB 24 is written in such a way so as to make it easy to broaden its applicability to other departments in the future.

Regulations adopted by state agencies have the effect of law similar to statutes adopted by the legislature. The regulation adoption process however has very few of the safeguards and opportunities for public input that the legislative process has. Unlike statutes which require a series of public hearings in the state House and Senate, regulations can be adopted with a single notice and hearing which may or may not even reflect the actual content of the final version of the regulation.

Once adopted, state regulations can only be amended by the agency that adopted them or by the adoption of a statute that somehow directly conflicts with the regulation. This makes state regulations in Alaska very hard to amend or appeal once in place. Entrenched state bureaucrats, with little incentive to be responsive to the public, often have more real control over public policy through regulations than elected state officials.

Senate Bill 24 makes state regulators more accountable to the public and to elected officials. SB 24 places reasonable and needed restraints on the ever increasing number of state regulations Alaskans live with.

DD/hrn
1/31/00

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SENATOR DAVE DONLEY
ALASKA STATE LEGISLATURE

SECTIONAL ANALYSIS
HOUSE CS FOR CS FOR SENATE BILL 24 ()
1-LS02741P (1/26/00)

Section 1 – Provides that this act shall be called the *Alaska Regulations Reform Act*

Section 2 – Amends AS 44.62.030—*Consistency between regulation and statute.*—by referencing AS 44.62.213 (Sec. 4 of this Act) as an exception to the standards provided in this section.

Section 3 – Amends AS 44.62.030 by adding a new subsection that sets new regulation validity standards for state agencies to which AS 44.62.213 is applicable (the DEC).

Under this section, a regulation, an order of repeal, or an amendment adopted by the state agency is **not valid or effective**, notwithstanding any other provision of law, if:

- A. It thwarts, circumvents, conflicts with, or is contrary to the intent of the statute being implemented.
- When a regulation is challenged under this standard, the burden of proof is on the person challenging the regulation to prove by clear and convincing evidence that the regulation is invalid.

Or

- B. It imposes any material capital or operating costs on industrial, commercial, or other development activity without yielding significant public benefits.
- When a regulation is challenged under this standard, the burden of proof is on the person challenging the regulation to prove by a preponderance of evidence that the regulation is invalid.

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Section 4 – AS 44.62 is amended by adding a new section—AS 44.62.213 *Additional procedural requirements for certain state agencies*. This section sets out additional procedural requirements for the DEC, but not for regulations produced by any DEC board, commission or any other organization within the DEC whose members are confirmed by the legislature (as set out in **subsection (a)**).

Subsection (b)--In addition to the notice requirements currently in statute under AS 44.62.190 (*Notice of proposed action*), SB 24 adds several more requirements:

- Mail notice to persons who have provided comment to the state agency on the proposed adoption, amendment or repeal of a regulation;
- Publish the notice on the internet;

Subsection (c)—In addition to the requirements of AS 44.62.200(a) (*Contents of Notice*), SB 24 adds a requirement that the agencies to which this section applies include with the notice an explanation of why the regulation of the agency is not invalid under AS 44.62.030(b)(1)—standard # 1 of section three of this bill (how the regulation does not thwart, circumvent, conflict with...etc. the intent of the statute).

Subsection (d)—This subsection's language mirrors the language currently in statute under AS 44.62.200(b) with the exception of the word "*original*" which is deleted from between the words "*the*" & "*notice*" on page 3, line 8. By deleting the word "*original*" this section's requirements apply to all subsequent notices, as well as the original.

Subsection (e) – If an agency to which this section applies rewrites a proposed regulation, an amendment of a regulation, or an order of repeal after complying with AS 44.62.190, 44.62.200 & 44.62.210, and if the rewriting substantially changes the content of the original regulation, but the agency would not normally consider the change to be significant enough to require additional notice under the aforementioned statutes, before adoption, the state agency shall provide notice and opportunity for public comment under AS 44.62.190(a)(2)–(8) (excludes republishing in the newspaper), 44.62.200, 44.62.210 and (b) of this section.

Subsection (f)—If an agency to which this section applies fails to meet the requirements of (e) of this section because they feel that the change is not substantial, the agency must:

- Prepare a written explanation of the reasons why the requirement of (e) of this section does not apply; and
- The lieutenant governor shall publish the state agency's explanation in the Alaska Administrative Journal with the text or a summary of the text of the regulation, amendment, or order of repeal.

Subsection (g)—This subsection exempts emergency regulations, regulations necessary to meet federal requirements, or regulations that reduce the regulatory burden of the public from the provisions of (e) & (f) of this section.

Subsection (h)—This subsection requires a state agency to which this section applies to publish a notice, as dictated in AS 44.62.190(a)(1), within 90 days after the date of enactment that the agency will or will not propose and adopt regulations to implement the statute, if it is not expressly required to prepare regulations within said statute.

Subsection (i) – Creates a two year time limit for the adoption of regulations for state agencies to which this section applies (the DEC).

Subsection (j)—If the agency (DEC) determines that the adoption of the regulations will not be completed within the two year time limit of (i), the state agency shall prepare a written report containing the reasons for the failure and will submit the report before 18 months of the two year time limit have elapsed to the president of the senate, speaker of the house, and the Administrative Regulation Review Committee.

Subsection (k)—This subsection sets out criteria that allows the agency to disregard the provisions of (i) & (j) of this section.

Section 5 – Sets out the applicability of this Act.

Section 6 – Sets the effective date of this Act at July 1, 2000.