

HB

158

22-LS0578\F
Bannister
3/26/01

Adopted

CS FOR HOUSE BILL NO. 158()

**IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SECOND LEGISLATURE - FIRST SESSION**

BY

**Offered:
Referred:**

Sponsor(s): REPRESENTATIVES MCGUIRE, Dyson, Fate, Rokeberg, Ogan, Murkowski, Wilson, Lancaster

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the criteria for the adoption of regulations and to the relationship**
2 **between a regulation and its enabling statute; and providing for an effective date."**

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 *** Section 1. AS 44.62.020 is amended to read:**

5 **Sec. 44.62.020. Authority to adopt, administer, or enforce regulations.**
6 **Except for the authority conferred upon the lieutenant governor in AS 44.62.130 -**
7 **44.62.170, AS 44.62.010 - 44.62.320 do not confer authority upon or augment the**
8 **authority of a state agency to adopt, administer, or enforce a regulation. To be**
9 **effective, each regulation adopted must be within the scope of authority conferred by**
10 **the statute under which the regulation is adopted and in accordance with standards**
11 **prescribed by other provisions of law.**

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

13 **Sec. 44.62.030. Relationship [CONSISTENCY] between regulation and**
14 **statute. The authority to adopt a regulation must be clearly and expressly**

1 conferred by statute. If, by express [OR IMPLIED] terms of a statute, a state agency
2 has authority to adopt regulations to implement, interpret, make specific, or otherwise
3 carry out the provisions of the statute, a regulation adopted is not valid or effective
4 unless

5 (1) the subject of the regulation and the treatment of the subject of
6 the regulation are clearly authorized and not just implied by the statute;

7 (2) the regulation is consistent with the statute that the regulation
8 purports to implement, interpret, make specific, or otherwise carry out; and

9 (3) the regulation is reasonably necessary to carry out the purpose of
10 the statute.

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

12 (b) Notwithstanding (a) of this section, if, by express or implied terms of a
13 statute, a state agency has authority to adopt regulations to implement, interpret, make
14 specific, or otherwise carry out the provisions of the statute, a regulation adopted is
15 not valid or effective unless consistent with the statute and reasonably necessary to
16 carry out the purpose of the statute. The provisions of this subsection apply to a
17 regulation that is adopted by

18 (1) a board or commission located in an office or department listed in
19 AS 44.17.005; or

20 (2) a state agency that is required by the federal government to amend
21 a regulation if application of the general standard of (a) of this section would prevent
22 the state agency from amending the regulation and would result in a loss of federal
23 money.

24 * Sec. 4. The uncodified law of the State of Alaska is amended by adding a new section to
25 read:

26 APPLICABILITY. This Act applies to the adoption or amendment of a regulation if
27 the original notice under AS 44.62.190 of the adoption or amendment of the regulation is
28 given on or after the effective date of this Act.

29 * Sec. 5. This Act takes effect immediately under AS 01.10.070(c).

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 26, 2001

SUBJECT: CSHB 158() relating to regulation adoption standards (Work Order No. 22-LS0578\F)

TO: Representative Lesil McGuire
Attn: Jim

FROM: ^{JB} Theresa L. Bannister
Legislative Counsel

This memo accompanies a draft of the bill described above. This version adds a subsection to AS 44.62.030 to cover the two exceptions that you requested. The two exceptions are for boards and commissions and for certain situations involving federal money. The new subsection applies the current regulation standard under AS 44.62.030 to those two categories.

The exception for boards and commissions covers the boards and commissions established in the executive departments and the Office of the Governor. Since it appears that all of the regulations of the Department of Education and Early Development go through the State Board of Education, under this draft all of the regulations of that department will continue under the current regulation standard rather than the new "clearly and expressly conferred" standard.

Also, a significant portion of the regulations of the Department of Fish and Game will continue under the current regulation standard rather than the new standard. Except for a few items that are controlled exclusively by the commissioner of fish and game, the regulations of that department are adopted through the Board of Fisheries and the Board of Game, and the boards acting jointly.

Finally, the University of Alaska will probably take the position that its regulations are not covered by AS 44.62 and, therefore, that these regulation standards do not apply to its regulations. The regulatory authority of the University under AS 14.40.170(b)(1) does not require that its regulations be adopted under AS 44.62. The University appears to claim that it is not located in the executive branch. In that case it would not be considered a state agency under the AS 44.62.640(a) definition of that term for the regulation provisions of AS 44.62. The University was established under art. VII, sec. 2 of the state constitution.

If I may be of further assistance, please advise.

TLB:glc
01-278.glc
Enclosure

Alaska State Legislature

Session
State Capitol Building, Room 418
Juneau, Alaska 99801-1182
Phone (907) 465-2995
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716 West Fourth Avenue, Suite 430
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Chair, House Special Committee
on Economic Development, Trade
and Tourism

Chair, Joint House and Senate
Administrative Regulation and
Review Committee

Member
Resources Committee
Rules Committee

Representative Lesil McGuire

House District 17

Sponsor Statement

CS for HB 158

“An Act relating to the criteria for the adoption of regulations and to the relationship between a regulation and its enabling statute; and providing for an effective date.”

The Legislature is the branch of government charged with making law. This bill establishes a two-step process, by first requiring us to be specific when writing legislation to ensure that the true intent of the bill is easily understood. When the Legislature makes a law, it should specify if regulations are envisioned or not by first asking does the bill need regulations to fill in gaps or to clarify specifics. Second, when a regulation author prepares to promulgate supporting regulations, a through review of pertinent information relating to the bill must be completed before writing the regulations. This will result in regulations that complement rather than contradict the statute.

HB 158 limits the broad interpretation that is now applied during the regulation process by requiring that the regulation must be clearly authorized by statute. It further requires that the regulation be consistent with the statute and prevents the writing of regulations if they are not absolutely necessary to carry out the statute.

The public should find regulations easier to understand in the future as the legislation and regulations will clearly stem from the same intent and policy. This will ultimately result in a cost savings to the State, as it will greatly reduce the number of appeals at both the administrative and the civil levels.

CS for HB 158 is a modification of the original bill designed to correct some oversights dealing with two specific areas. It should be noted that Boards and Commissions and their regulatory authority are exempted as well as regulations that must be rewritten because of changes in Federal Regulations which the state agency must adopt or risk losing federal funds.

Easy to understand language in both legislation and regulation will lessen the burden on many of Alaska's people and businesses. Individuals will have direct access and input as to how the rules are written because they can contact their elected representatives in the legislature. When Alaskans have input, providing information and insight that is listened too and acted upon, we will have succeeded in returning a trusted government to the people.

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Member
Resources Committee
Rules Committee

Representative Lesil McGuire House District 17

February 28, 2001

Representative Norman Rokeberg
Chair, House Judiciary Committee
State Capitol, Room 118
Juneau, Alaska 99801-1182

Dear Representative Rokeberg:

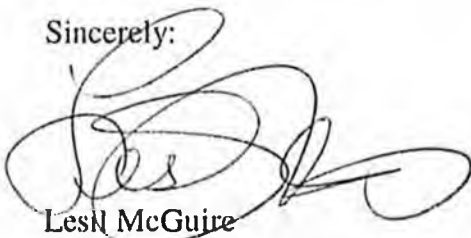
Please accept this letter and the attached documents as a request for the House Judiciary Committee to hear HB 158, "An Act relating to the criteria for the adoption of regulations and to the relationship between a regulation and its enabling statute; and providing for an effective date."

HB 158 is modeled after the doctrine being used by the United States Supreme Court in considering whether the Administrative Branch of government has taken action through regulation or policy that Congress did not intend or authorize in statute. It is also a primary argument being used by our Attorney General's challenge of the Katie John Suit.

Like the federal government, our administrative branch has broad powers to interpret both legislative language and intent. HB 158 makes it clear that the Legislature wants a more conservative approach when it promulgates regulations. This "Clear Statement Doctrine" bill will require a more judicious review of statute and intent and will reduce conflicts between the agencies and the public.

Passage of HB 158 will require regulation authors to follow, not interpret statute ultimately reducing both the administrative and judicial review. It will be a major first step in fiscal savings and more efficient government. I respectfully request scheduling of HB 158 in the House Judiciary Committee at your earliest convenience. Thank you in advance for your time and consideration. If you have any questions please do not hesitate to call.

Sincerely:



Lesil McGuire
Representative, District 17
LM/jp

FEB 28 2001

Alaska State Legislature

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State Capitol Building, Room 418
Juneau, Alaska 99801-1182
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Representative Lesil McGuire *House District 17*

Sponsor Statement

HB 158

“An act relating to the criteria for the adoption of regulations and to the relationship between a regulation and its enabling statute; and providing for an effective date.”

HB 158 is the first major step to a better more consistent regulation/statute process. In our efforts to pass legislation we sometime inadvertently delete phrases or create language that can have a broad interpretation. The Departments then promulgate regulations using statute references based on that interpretation rather than specific language. HB 158 will resolve these problems.

HB 158 is modeled after the doctrine that has been applied in recent years by the United States Supreme Court in considering whether the Administrative Branch of government has taken action through regulation or policy that Congress did not intend or authorize in statute. It is also a primary argument being used by our Attorney General’s challenge of the Katie John Suit.

Like the federal government, our administrative branch has broad powers to interpret both legislative language and intent. HB 158 makes it clear that the Legislature wants to see a more conservative approach applied to the promulgation of regulations. This “Clear Statement Doctrine” bill will require a more judicious review of statute and intent, and will reduce conflicts between the agencies and the public.

HB 158 is legislation that will begin the process of a more user friendly regulation system. It eliminates subjective interpretation of statute and specifies when regulations are required. It brings clearer language to the public as the bill and the regulations will compliment rather than contradict each other.

LEGAL SERVICES

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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

February 19, 2001

SUBJECT: Clear Statement Doctrine (Work Order No. 22-LS0629)

TO: Representative Lesil McGuire
Attn: Sue Stancliff

FROM: George Utermohle *GU*
Legislative Counsel

The memorandum is in response to your request for a summary of the "clear statement doctrine."

The "clear statement doctrine" is a rule of statutory construction that has been adopted the United States Supreme Court. Gregory v. Ashcroft, 501 U.S. 452, 115 L.Ed.2d 410 (1991). In cases where an enactment by Congress ambiguously implicates the sovereignty of a state, the court will construe the enactment so as to maintain the sovereignty of the state. The doctrine may be invoked when a statute is susceptible to two plausible interpretations, one of which would have altered the existing balance of federal and state powers. Absent a clear indication of Congress' intent to change the balance, the proper course is to adopt a construction that maintains the existing balance. Id. at 460-01, 115 L.Ed.2d at 424. The Supreme Court requires a clear statement by Congress that it intends to limit the powers of the state before the court will find that an enactment limits state power. The court will not find that Congress has limited state powers based on a statutory interpretation that is merely implied by the statutory language.

As a rule of construction, the doctrine will come into play only when an ambiguity exists in the interpretation of a statute. A statute can be unambiguous without addressing every reasonable interpretive theory. The statute need only be plain to anyone reading the law. Salinas v. United States, 522 U.S. 52, 60, 139 L.Ed.2d 352, 364 (1997). On the other hand, the existence of an ambiguity is often a subjective determination.

The clear statement doctrine allows the federal courts to resolve conflicts between states and the federal government through the construction of statutes rather than addressing the constitutionality of the statute that is at issue. Courts generally decline to address constitutional issues if the controversy at issue can be resolved through the interpretation of the applicable laws. "Application of the plain statement rule thus may avoid a potential constitutional problem." Gregory, at 464, 115 L.Ed.2d at 426.

Representative Lesil M. uire
February 19, 2001
Page 2

The clear statement doctrine is not a limitation on the power of Congress to impinge on state sovereignty. In the event that a court does find that an enactment of Congress contains a clear statement of its intent to alter the current state-federal balance of power then the issue becomes whether the enactment is a constitutional exercise of Congress' power under the United States Constitution.

If I may be of further assistance, please advise.

GU:glc
01-168.glc

ALASKA STATE LEGISLATURE
SENATE RESOURCES COMMITTEE

January 29, 2001

3:35 pm

MEMBERS PRESENT

Senator John Torgerson, Chair
Senator Drue Pearce, Vice Chair
Senator Rick Halford
Senator Robin Taylor
Senator Georgianna Lincoln

MEMBERS ABSENT

Senator Pete Kelly
Senator Kim Elton

OTHER MEMBERS PRESENT

Senator Loren Leman

COMMITTEE CALENDAR

Department of Law: Status of Alaska's resource cases

WITNESS REGISTER

Ms. Barbara Ritchie, Deputy Attorney General
Civil Division
Department of Law
P.O. Box 110300
Juneau AK 99811

POSITION STATEMENT: Commented on resource cases.

Ms. Joanne Grace, Assistant Attorney General
Department of Law
1031 W 4th Ave., Suite 200
Anchorage AK 99501

POSITION STATEMENT: Commented on resource cases.

ACTION NARRATIVE

TAPE 01-4, SIDE A
Number 001

CHAIRMAN JOHN TORGERSON called the Senate Resources Committee

meeting to order at 3:35 pm and announced the committee would hear an update by the Department of Law of the state's resource cases.

MS. BARBARA RITCHIE, Deputy Attorney General, Department of Law, said her main role today was to introduce Ms. Joanne Grace, Assistant Attorney General, head of the statehood defense section.

MS. JOANNE GRACE said she would focus primarily on the cases that have undergone the most change in the last year, like the Katie John case and the Glacier Bay case, which really involve all of Southeast Alaska. She is getting ready to file another case within the next day or two on the roadless directive for the Tongass National Forest that she would comment on, also.

The Katie John case - we appealed the final judgment in that case exactly a year ago and after a few months we asked the Ninth Circuit to consider the case 'en banc' rather than to consider it again with just three judges. In the Ninth Circuit that means 11 judges hear the case instead of just three judges. Ninth Circuit agreed to hear the case en banc and we briefed it and argued it. So we're now before the Ninth Circuit again. I would say we're at a really critical stage in this case not only because it's nearing the end of its existence, but also because having survived for 10 years, the case is now intercepting a distinct trend in Supreme Court case law.

The Supreme Court more and more recently has been willing to identify and precisely define limits on Congress's authority to interfere with traditional state functions. The case law that's coming out of the Supreme Court on federal/state balance of power issues is much different today than it was 10 years ago. So our argument in the Katie John case is based on one of the issues the Supreme Court is finding particularly important these days. It's called the Clear Statement Doctrine.

Under the Clear Statement Doctrine, a federal court will not assume that Congress intended to take over a traditional state function unless Congress has made it unmistakably clear that's what it intends to do. So it's absolutely plain to anyone reading the act. The reason is that Congress will not shift the balance of power between a state and the federal government lightly. You are not going to assume Congress intended to do that.

This is a doctrine that developed out of a 1991 case called *Ashcroft v. Gregory*. In that case the issue

before the court was whether the Missouri constitution that mandated that state judges retire at age 70 violated a federal act that prohibited age discrimination. The court looked at that issue and said it's a particularly state function to define the qualifications of state officials, particularly state judges. It's not something the federal government normally involves itself in. The Age Discrimination Act had an exception in it for appointees on a policy making level. The court said it is not clear whether state judges fit into this exception or not. So we are going to refuse to find that Congress intended to designate the qualifications of state judges because Congress hasn't made it absolutely clear that that is what it intends to do. The court also didn't seem to think that Congress would have that authority even if that had been its intent.

So this is the doctrine we are arguing in the Katie John case. Our argument is that federal takeover of fisheries management on most of Alaska's navigable waters is an assumption of a traditional state authority and, therefore, the court could not find that Congress had that intent unless Congress made that unmistakably clear in the language of ANILCA (Alaska National Interest Land Claims Act).

There's a lot of good argument on our part that fisheries management is a traditional state function. The U.S. Supreme Court has said for 150 years that states take title to the land underlying navigable waters at statehood because the state has dominion over those waters. The state has an obligation to manage the waters in the resources in trust for the public for fishing and transportation and other public uses. Therefore, the state has an obligation to conserve those resources which means it has an obligation to limit uses by setting seasons, means and methods, bag limits, and things like that. That has always been understood to be a state function.

So our argument in the Katie John case in this appeal is because this is a traditional state function, it has to be unmistakably clear in ANILCA that Congress intended the federal subsistence board to have authority over navigable waters where the United States has reserved a water right. Our position is that that is not unmistakably clear in ANILCA. If Congress had wanted to include navigable waters subject to a reserved water

right, Congress would have said that. It wouldn't have done it in the roundabout way that the United States has argued. It's obviously not clear from the statute given the position the parties have taken in this case.

The United States took the position in the beginning of the litigation that the statute did not clearly include navigable waters and, in fact, took the position that it clearly did not include navigable waters. When the United States flipped its position three years into the litigation, it didn't change its mind about the clearness of the statute. It didn't say we were wrong; actually it's absolutely clear in the statute that navigable waters were intended to be included. It simply said the statute is ambiguous. We can't tell from the statute whether Congress intended to include these navigable waters, but as a federal agency, it's our duty to interpret this statute and resolve ambiguities - and we think it's reasonable to interpret it to include certain navigable waters.

The Alaska Supreme Court in the Totemoff case found that it was clear those navigable waters were not included in the language of the statute and that Congress did not intend to include those waters. In the original Ninth Circuit case, the dissenting judge, Judge Hall, looked at the statute and said it's not clear that Congress intended to include these waters. It's not our place as judges to decide that they should be included. Congress has to do it. Even the two judges who decided the case against the state did not find the language to be clear. Those judges said we can't tell what Congress meant from the language in statute. We can't tell what Congress meant from legislative history. We'll look to the federal agencies' interpretation. We find this federal agencies' interpretation to be reasonable.

But under the Clear Statement Doctrine that the Supreme Court applies, it's not enough that it's a reasonable interpretation. It has to be unmistakably clear from the language in statute. So that's the argument that we've made in this second appeal on the Katie John case. The timing of this turned out to be fortuitous because we argued it on December 20 and only two weeks later the United States Supreme Court issued a new decision in a different case applying the Clear Statement Doctrine.

That case, I'm sure you heard about it on the radio - it's a really landmark case for states. It's called the Solid Waste Services of Northern Cook County v. U.S. Army Corps of Engineers. It's a case where the issue was whether the Corps of Engineers has authority to regulate intrastate waters. In this case it was an abandoned gravel pit where there was some migratory waterfowl and the question was whether it was the Corps of Engineers authority under the Clean Water Act to issue dredge and fill permits [indisc] to those waters. They had issued regulations stating that their authority extended to intrastate waters as long as there were migratory birds that used that water as habitat.

The Supreme Court looked at the case and said it's a traditional state function to regulate intrastate waters. It's not clear from language of the Clean Water Act that Congress intended these agencies to extend their authority that far. It's unclear. Also, again the court seemed to think that if Congress had made that clear, Congress's commerce clause authority probably didn't extend that far. So, it refused to interpret the Clean Water Act to give the Corps of Engineers authority to regulate intrastate waters.

We just think that the climate is right for the kind of arguments we're making in the Katie John case. The Court actually has another case before it now under Congress's spending clause authority. It's an Alabama case and the issue in that case is whether the state's English proficiency requirement for driver's license violates Title 6 of the Civil Rights Act. Again, it's a clear statement doctrine argument that the state is making. It has to be clear that Congress is intending that statute to apply. So, this is definitely an area a lot of the Supreme Court is focusing on. It's cutting back on the general understanding of what Congress's authority is to take over traditional state functions and it's refusing to interpret laws to have the effect of shifting state/federal authority unless Congress has made it perfectly clear that that's what it intends to do.

Not predicting that we're going to lose the Ninth Circuit case and, therefore, the Supreme Court is going to hear this, but I'm assuming the Ninth Circuit is following this trend and is well aware that it needs to follow Supreme Court authority. If it doesn't, it seems to me this is the kind of case that the Supreme Court would be

interested in hearing - partially because it involves this issue of state/federal authority and also because, at this point, it would be an en banc decision and probably with a dissent and that's the kind of case that the Supreme Court is more likely to take.

Number 899

SENATOR TAYLOR thanked her for the explanation and asked, "Judge Holland's opinion in the Babbitt case where he said that Congress in ANILCA had not provided any authorization for creation of regulations and hoped they must have intended to do so. That seems directly contrary to the Clear Statement Doctrine."

MS. GRACE replied, "It is obviously completely contrary to the Supreme Court law in this area and I don't believe that he had any authority for making that statement."

SENATOR TAYLOR responded that that was the case the Department dismissed in the final hour and asked if there is opportunity at this juncture to reopen that and ask the judge in light of current law to reconsider that decision.

MS. GRACE answered, "The state agreed to dismiss that with prejudice and we would not be in a position to bring that ever again. That's not to say that the issue couldn't arise again, but the state couldn't raise it directly in a new case."

Number 1000

FISCAL NOTE

**STATE OF ALASKA
2001 LEGISLATIVE SESSION**

Fiscal Note Number: _____
 Bill Version: HB 158
 () Publish Date: _____

Title: An Act relating to the criteria for the adoption of regulations and to the relationship between a regulation....
 Sponsor: Representative McGuire
 Requester: House Judiciary Committee
 Dept. Affected: Department of Correction
 BRU: Administration and Operations
 Component: Office of the Commissionr
 Component Number: 694

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	***	***	***	***	***	***

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	***	***	***	***	***	***

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

HB 158 would eliminate implied authority as a basis for regulations, and would require that statutory authority be "clearly and expressly conferred." There are relatively few statutes governing the Department of Corrections. Thus, it would become problematic for the Department to adopt new regulations or amend existing regulations. One consequence of this would be increased litigation against the state by prisoners, who are quick to make legal challenges. Another would be difficulties for the Department in adopting regulations that let the public know what standards it is applying for various programs. For example, DOC is currently drafting regulations that will govern the provision of sex offender treatment to its inmates, probationers, and parolees. These regulations will set out the process by which sex offender treatment providers are approved by DOC, the standards they must meet to maintain their status as approved providers, and the process that DOC must abide by before revoking a provider's status as an approved provider. The regulations will help ensure that providers'

Prepared by: Candace Brower Phone 465-4652
 Division: Commissioner's Office Date/Time 3/30/01/4:25 p.m.
 Approved by: Margaret Pugh Date 3/30/01
 Agency: Department of Corrections

For distribution information, call the Governor's Legislative Office

rights to due process are not denied. If this bill passes, these proposed regulations may be considered beyond the scope of DOC's statutory authority, which would have the effect of denying treatment providers a clear understanding of their rights and obligations. DOC is unable to ascertain the fiscal impact that this would have.

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 158
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affect: Fish and Game
 Title: Criteria for adoption of regulations BRU: _____
 Component: _____
 Sponsor: Representative McGuire
 Requester: House Judiciary Component Number: _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2001) cost: _____ *

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

Full-time	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

(see attachment)

Prepared by: Gordy Williams Phone 465-6143
 Division: Commissioner's Office Date/Time 03/29/2001 3:00 p.m.
 Approved by: Gordy Williams for Commissioner Frank Rue Date 03/30/2001
 Agency: Department of Fish and Game

For distribution information, call the Governor's Legislative Office

HB 158 Fiscal Note Analysis

ADF&G statutes, found in Title 16, primarily provide general authority, and in some cases implied authority, sufficient to regulate all uses of fish, game, and their habitat. Under general statutory authority, regulations are adopted that apply to highly specific circumstances and activities, including geographic area, timing of harvest, gear type, method of harvest, permits and licensing, habitat protection measure, fish transport, harvest limitation, etc. Clear, explicit statutory and legislative intent does not exist that addresses the full range of regulatory issues that come before the department, the Board of Fisheries, and the Board of Game.

Accordingly, compliance with HB 158 would first require wholesale review and multiple revisions to Title 16. Any new regulations adopted by the boards of fisheries and game would have to be analyzed in regard to the explicit authority provided in statute, and lacking such explicit authority could not be adopted.

Time is frequently of the essence in fish and game management -- particularly so with management of commercial fisheries. Given the contentious allocation issues that are addressed in regulation each year, legal challenges to regulations on the basis of non-compliance with the terms of HB 158 are a virtual certainty. Sustained yield management of fish and game would be significantly compromised under these circumstances.

HB 158 would create tremendous problems with regard to fish and game management. Statutory overhaul to craft language expressing legislative intent and explicit authority would be necessary. This process would be time consuming and costly to the legislature and the department, and would seriously hinder the ability of the boards of fisheries and game to have regulations developed through their public process in place for the orderly management of our fish and game resources.

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: HB158
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Fish and Game
Title: Criteria for regulations BRU: Comm Fish (Limited) Entry Comm
Component: Comm Fish (Limited) Entry Comm
Sponsor: Rep. McGuire
Requester: House Judiciary Committee Component Number: 471

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attachment

Prepared by: Roger Kolden Phone 790-6950
Division: Commercial Fisheries Entry Commission Date/Time 3/14/01 2:25 PM
Approved by: Mary McDowell Date 03/14/2001
Agency: Commercial Fisheries Entry Commission

For distribution information, call the Governor's Legislative Office

HB 158 Fiscal Note Explanation:

While CFEC statutes contain language granting explicit regulatory authority for most of the commission's major functions, the commission depends on the more general authority in AS 16.43.110 and 16.43.100(b) for implementing some regulations, particularly for carrying out necessary administrative functions. If the intent in HB158 could be interpreted as negating or superceding the authority in those two provisions, regulations the commission needs to enact in the future under that authority could be subjected to challenge.

Furthermore, since CFEC regulations are specifically designed to limit entry into fisheries, they always result in some people "losing out" and being motivated to seek bases upon which to challenge the action. The phrase "clearly and expressly conferred by statute" in HB158 appears to establish a new standard. Not knowing how the courts will interpret that phrase will create considerable uncertainty as to whether regulations would be upheld if challenged under that provision. This uncertainty creates a window of opportunity inviting legal challenge. Thus, HB158 could lead to significant numbers of legal challenges to CFEC limitation regulations. Although CFEC might very well prevail in such cases, defending these cases would require the expenditure of a significant amount of time and resources by both CFEC and Dept of Law.

In addition to time and expense in defending legal challenges, the delay in implementation of CFEC regulations that could result from legal challenges could have disastrous consequences for fisheries and result in additional expense to CFEC. CFEC must often move very quickly to limit a fishery which is experiencing rapid growth. Being able to limit without delay is critical to locking into a number of permits to be issued that would preserve the place of residents in the fishery. Under Supreme Court rulings, CFEC must set the number of permits to be issued in a fishery no lower than the highest number of participants in any one of the four years preceding the date of limitation. Thus, if a challenge to the commission's authority to adopt regulations limiting a fishery were to cause delay in implementation, it could result in a rush of new participants (perhaps non-locals or even non-Alaskans) entering the fishery in the next open access season. The opportunity to limit the fishery at the lower number and preserve the place of the earlier participants could be lost forever, possibly altering the future make-up of the fishery significantly and disadvantaging Alaskans. Having then missed the timeframe allowable for using the originally proposed qualification period, the commission would be forced to go through the arduous and expensive task of making a new limitation proposal for the fishery and starting the regulatory process all over again.

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: HB 158
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
Title "An Act relating to the criteria for the adoption of BRU Civil Division
regulations and to the relationship between a regulation . . ." Component Legislation/Regulations
Sponsor Representative McGuire
Requester House Judiciary Committee Component No. 2209

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services	60.6	60.6	60.6	60.6	60.6	60.6
Travel	0.2	0.2	0.2	0.2	0.2	0.2
Contractual	9.4	9.4	9.4	9.4	9.4	9.4
Supplies	0.8	0.8	0.8	0.8	0.8	0.8
Equipment	6.5					
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	77.4	70.9	70.9	70.9	70.9	70.9

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	77.4	70.9	70.9	70.9	70.9	70.9
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	77.4	70.9	70.9	70.9	70.9	70.9

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's 2002 budget proposal:

POSITIONS

Full-time						
Part-time	1	1	1	1	1	1
Temporary						

HB 158 would eliminate implied authority as a basis for regulations, and would require that statutory authority be "clearly and expressly conferred." Because the new concept lacks underpinnings in administrative law, courts will struggle over a period of years to give it meaning. Accordingly, even if a regulation is based on a broad but non-specific grant of authority, the state may still incur costs to defend that regulation against court challenges. Increased attorney time would be required for: (1) review of regulatory authority; (2) defense of regulations; (3) historical analysis of regulations to distinguish between parts adopted before and after HB 158's effective date; and (4) eventual review of existing authorities and drafting of legislative proposals to address areas where existing statutory authority has been found or is in danger of being found inadequate.

The Department of Law anticipates one-half of a FTE attorney position will be required to handle an estimated 10% increase in regulations review and litigation. Costs are based on the department's FY02 standard attorney cost schedule and include clerical support, communications, space, supplies, and other normal overhead expenses, plus \$6,500 in FY02 for one-time equipment costs.

Prepared by: Joan M. Kasson Phone 465-5370
Division Attorney General's Office Date/Time 3/12/01 3:51 PM
Approved by: Kathryn Daughhete for Bruce M. Botelho, Attorney General Date 3/12/01
Agency Department of Law

For distribution information, call the Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 158
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affect: Environmental Conservation
 Title: Criteria for Regulations BRU: Administration
 Component: Commissioner
 Sponsor: Reps. McGuire, Dyson, Fate, Rokeberg, Ogan
 Requester: House Judiciary Component Number: 633

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*

CAPITAL EXPENDITURES	*	*	*	*	*	*
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CHANGE IN REVENUES ()	*	*	*	*	*	*
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

Full-time	*	*	*	*	*	*
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached

Prepared by: Mary Siroky Phone 465-5355
 Division: Statewide Public Services Date/Time 3/22/01 11:45am
 Approved by: Kurt Fredriksson Date 3/22/2001
 Agency: Department of Environmental Conservation

For distribution information, call the Governor's Legislative Office

The department is still evaluating the possible effects of this legislation on federal receipts. Several programs, most notably the Drinking Water Program and Pesticide Program are funded by federal grants. Federal law requires the department update its regulations to match federal requirements. These changes must be done within set periods of time otherwise financial penalties, up to and including complete loss of the programs and all associated federal funds, may be levied by the Environmental Protection Agency.

Under this legislation, the treatment of the subject of the regulation must be clearly authorized by the statute. DEC's statutory authority is generally broad. Our ability to respond to changes in industries that we regulate will be significantly hampered by this legislation. **Therefore, we anticipate that the real cost will be to industry.**

New or revised DEC regulations where the treatment of the subject of the regulations is not clearly authorized by statute and may be challenged based on this legislation include: Mixing zones for wastewater disposal into surface waters, which allows industries to meet water quality standards at the edge of the mixing zone instead of at the end of the discharge pipe;

- ◆ Site specific criteria for wastewater disposal into surface waters, which allows the Department to set different water quality standards for specific discharges that cannot otherwise meet the established water quality standards;
- ◆ Zones of deposit, which allow the discharge of a limited amount of solids into surface waters instead of requiring complete screening and land disposal of those solids;
- ◆ Solid waste landfill permitting, including streamlined permitting mechanisms;
- ◆ Certification of commercial pesticide applicators, which is required by federal law;
- ◆ Public drinking water system construction, installation and water contaminant level requirements;
- ◆ Seafood processing requirements, which must be in place and consistent with federal requirements in order for Alaska's seafood to be sold interstate and internationally; and
- ◆ Site specific cleanup standards for contaminated sites, which allow for alternative – and less stringent -- cleanup levels.

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: HB 158
 Bill Version: _____
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Department: Labor and Workforce Development
 Title: Criteria for Regulations BRU: All
 Component: All
 Sponsor: Representative Mcguire
 Requester: House JUD Component Number: 340

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0*	0.0*	0.0*	0.0*	0.0*	0.0*

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0*	0.0*	0.0*	0.0*	0.0*	0.0*

Estimate of any current year (FY2001) cost: None

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill sets guidelines for the relationship between a regulation and its enabling statute as well as requiring clear and expressed authorization, not just implied, by the statute for which a regulation is developed. The department does not anticipate a financial impact as a result of this legislation.

*The department has some concern that, should this legislation be adopted, a court may interpret the presence or absence of specific authorization for regulations in ways that could be detrimental to efficient program operations and potentially result in unanticipated costs.

Prepared by: Remond Henderson, Director Phone: 465-2720
 Division: Administrative Services Division Date/Time: 3/21/01 4:00 PM
 Approved by: Ed Flanagan, Commissioner Date: 03/21/01
 Agency: Department of Labor and Workforce Development

For distribution information, call the Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 158
 () Publish Date: _____
 Dept. Affected: Natural Resources
 BRU: Minerals, Land & Water Dev.
 Component: Claims, Permits & Leases
 Component Number: 2460

Revision Date/Time (Note if correction): _____
 Title: CRITERIA FOR REGULATIONS
 Sponsor: Rep. MCGUIRE
 Requester: (H)Jud

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services	(195.0)	(390.0)	(390.0)	(390.0)	(390.0)	(390.0)
Travel	(12.5)	(25.0)	(25.0)	(25.0)	(25.0)	(25.0)
Contractual	(42.5)	(85.0)	(85.0)	(85.0)	(85.0)	(85.0)
Supplies	(10.0)	(20.0)	(20.0)	(20.0)	(20.0)	(20.0)
Equipment	(2.5)	(5.0)	(5.0)	(5.0)	(5.0)	(5.0)
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	(262.5)	(525.0)	(525.0)	(525.0)	(525.0)	(525.0)

CAPITAL EXPENDITURES	(750.0)	(1,500.0)	(1,500.0)	(1,500.0)	(1,500.0)	(1,500.0)
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

FUND SOURCE	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
1002 Federal Receipts	(1,012.5)	(2,025.0)	(2,025.0)	(2,025.0)	(2,025.0)	(2,025.0)
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	(1,012.5)	(2,025.0)	(2,025.0)	(2,025.0)	(2,025.0)	(2,025.0)

Estimate of any current year (FY2001) cost: None

Check this box if funding for this bill is included in the Governor's FY2002 budget proposal: []

POSITIONS

POSITIONS	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Full-time	-5	-5	-5	-5	-5	-5
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This analysis does not show HB 158's impact on most DMLW programs because that cannot be quantified. For proprietary programs (state land sales, leases, etc.), regulations prohibited by HB 158 could be replaced by sale terms or permit and lease stipulations. Initial cost savings (no APA notice or review by Dept. of Law) would likely be offset by higher costs in the long run due to "reinventing the wheel" for each sale, and more administrative/judicial appeals due to resultant inconsistent treatment of applicants.

This analysis deals instead with a regulatory program where the impact is clear-cut [CONT.]

Prepared by: Bob Loeffler
 Division: Mining, Land and Water
 Approved by: Pat Pourchot
 Agency: Natural Resources

Phone 269-8600
 Date/Time 21-Mar-01
 Date 21-Mar-01

For distribution information, call the Governor's Legislative Office

ANALYSIS: (continued)

(because regulatory programs cannot function without intact, legally enforceable regulations).

Alaska's surface coal mining statute, AS 27.21, lets DNR adopt regulations to gain "primacy," replacing federal jurisdiction under an extensive congressional law and associated regulations. AS 27.21 does not specify which topics DNR can address by regulation, nor how they are to be treated, and does not appear to meet the standard set by HB 158. Primacy was achieved in 1983, but must be maintained by frequent amendments required by the federal Office of Surface Mining to keep the program at least equally "stringent" as the federal program.

This analysis assumes that early in FY 02, OSM directs DNR to change 10 reclamation regulations in order to maintain primacy, but that HB 158 prohibits DNR from doing so. By mid-FY2002, DNR loses primacy and OSM cuts off funding. Full budgeted federal funding for FY 2002 would otherwise have been \$525.0 in the operating budget to administer the regulatory program, and \$1,500.0 in the capital budget for the Abandoned Mine Land contracts. If the state loses primacy, half of this is lost in FY2002. For future fiscal years, the Abandoned Mine Land project loses the full amount of funding (\$2,025.0).

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 158
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Revenue
 Title: Criteria for Regulations BRU: Administration and Support
 Component: Commissioner's Office
 Sponsor: Representative McGuire
 Requester: House Judiciary Component Number: 123

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

* Although it is impossible to quantify possible budget costs to the Department of Revenue from this legislation, it is likely that the statutory change in this bill would create significant problems -- and costs -- for the department and its divisions, boards and corporations that rely on regulatory authority to carry out their missions and to administer their programs. Those problems could delay implementation of regulations essential to program operations, including, but not limited to, the collection and enforcement of oil and gas taxes, collection of child support payments, Permanent Fund dividend eligibility requirements, AHFC housing loan programs, and enforcement of the state's charitable gaming laws.

Prepared by: Larry Persily, Deputy Commissioner Phone 465-5469
 Division: Department of Revenue Date/Time March 10, 2001, 2 p.m.
 Approved by: Larry Persily, Deputy Commissioner Date 03/10/2001
 Agency: Department of Revenue

For distribution information, call the Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 158
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Health & Social Services
 Title: Relating to criteria for adoption of regulations BRU: Administrative Services
 Component: Commissioner's Office
 Sponsor: McGuire
 Requester: Judiciary Component Number: 317

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The Department of Health and Social Services cannot quantify the cost of the proposed legislation due to lack of understanding of the intent of the bill. Most regulations are adopted under the general departmental authority to adopt regulations contained in AS 47.05.010(2) and (9). Some functions of the department have authorization within enabling statutes to adopt certain regulations, while others do not. We do not believe that any specific Legislative intent was inherent in the way regulations were or were not authorized within statutes over time, but that these differences reflect varying drafting styles. The department is concerned that, should this legislation be adopted, a court may interpret the presence or absence of specific authorization for regulations in ways that could be detrimental to efficient program operation. Specifically, the department would like to see the term "treatment of the subject" on page 2, line 5 clearly defined as to intent, so that we can better analyze the affect on current enabling laws.

Prepared by: Nancy Weller Phone 465-3355
 Division: Medical Assistance Date/Time 3/14/01 4:34 PM
 Approved by: Elmer A. Lindstrom, Special Assistant Date 3/20/01 4:00 PM
 Agency: Department of Health & Social Services

For distribution information, call the Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

BILL NO. HB 158

Revision Date/Time (Note if correction) _____ Dept. Affected _____
 Title Regulatory Reform BRU Alaska Court System
 Component Trial Courts
 Sponsor Representative McGuire
 Requester House Judiciary Component No. 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

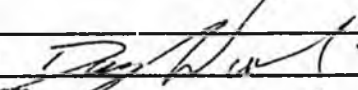
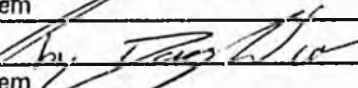
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2001) cost: 0.0

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
 House Bill 158 removes the implied authority that is currently sufficient for an administrative agency to adopt regulations. Under this bill the authority to adopt regulations must be "clearly and expressly conferred" by the statutory scheme. Because this is a new standard that will be clarified over time through court decisions, it will likely lead to an initial increase in the number of regulatory challenges that come before the court system. However, the extent of that increase is too speculative to support a fiscal note. If HB 158 results in a significant increase in this type of litigation the court system may return to the legislature for additional funding.

Prepared by: Douglas Wooliver  Phone 463-4750
 Division: Alaska Court System Date/Time 2/29/01 9:30 a.m.
 Approved by: Stephanie Cole  Date _____
 Agency: Alaska Court System

For distribution information, call the Governor's Legislative Office

ALASKA STATE LEGISLATURE
JOINT MEETING
ADMINISTRATIVE REGULATION REVIEW

March 27, 2001

DAVID PREE, Resident of the Anchorage Pioneer Home, informed the committee that he was the last First Assistant Attorney General during statehood and he was also the Statehood Election Commissioner. Therefore, he is very familiar with statutory construction and the relationship between the executive and judicial branches and the executive and legislative branches of government. Mr. Pree asked if Commissioner Cohen had requested an opinion from the Attorney General regarding the Department of Administration's interpretation of the various statutes involved.

MS. ELGEE answered that all regulation development promulgated by any program or department is done so with the legal advice and review of the Department of Law. The department worked directly with an attorney from the Department of Law on the drafting of these regulations. Then another attorney within the Department of Law reviews the regulations before the department is allowed to promulgate the regulations and conduct public hearings. Upon completion of the public hearing process, there is a final review of the regulations by the Department of Law before the regulations become effective.

MR. PREE remarked that Ms. Elgee's answer refers to the legal ease of the regulations with which he is not interested. Mr. Pree clarified that he is interested in the intent of the legislature. He said:

What was the intent that the legislative body had in enacting the Pioneer Homes and the cost entailed thereof. We have a co mangling (ph) of the capital expenses here, maintenance of the existing facility, and then you have operating expenses. If ... the administrative agency, who is to administer these laws interpret these statute one way and it's inconsistent with the legislative intent, then you've created a lot of mess for the state and for the individual agency. If the commissioner hasn't requested an Attorney General's opinion on the question of legislative intent and your proposed increases here and use of the money, I respectfully submit that the administrator or the executive branch of government is not willing to ... have the Attorney General look at this aspect, then I respectfully submit that the legislative attorney should look at it. There are a number of questions that I have involved in this whole mess.

CHAIR MCGUIRE clarified that the role of Joint Committee on Administrative Regulation Review is to review proposed regulations in order to determine whether those regulations comport or do not comport with legislative intent. She said, "That's precisely the reason why we are holding this hearing." Chair McGuire noted that Senator Lincoln had requested the ability to respond in writing. Chair McGuire said, "We respectfully request that the Lieutenant Governor doesn't sign these yet." She pointed out that these regulations don't go into effect until July 1st and the public comment period is now.

HB 158--EXAMPLES OF IMPACTS UPON REGULATORY ACTIVITIES

- The Real Estate Commission adopts regulations to carry out the real estate broker licensing statutes. One such regulation requires real estate brokers to keep separate trust accounts for money collected in trust, such as earnest money deposits or purchase money. The statutes do not say who should receive the interest if a trust account earns interest, or whether the broker must disclose it. However, Commission has written regulations to require disclosure of whether a trust account bears interest and at what rate, and they provide that any interest earned does not belong to the broker. If HB 158 became law, the validity of new regulations in this area would be called into doubt.
- Alaska's surface coal mining statute, AS 27.21, lets the Department of Natural Resources (DNR) adopt regulations "pertaining to surface coal mining and reclamation." DNR has used this general authorization to gain "primacy," thus replacing federal jurisdiction. The statute, however, does not specify which topics DNR can address by regulation or how they are to be treated. Primacy must be maintained by frequent regulatory amendments required by the federal Office of Surface Mining. HB 158 would prevent adoption of these amendments, and DNR would lose primacy.
- The Board of Fisheries has general authority to adopt regulations as needed to conserve, develop, and utilize fisheries. Other statutory provisions address bag limits, but to enforce these limits realistically for sport-caught fish, the Board must also set possession limits. Otherwise, if a fish and wildlife enforcement officer discovered someone with 15 sockeye salmon in an icebox, despite a bag limit of three fish per day, the person might claim that the fish were caught on earlier days. Enactment of HB158 would invite lawsuits as to whether the authority to set new possession limits was "clearly expressed."
- The Department of Environmental Conservation (DEC) may adopt regulations to control, prevent, and abate pollution, but DEC's statutes are silent about relaxing water quality standards. By regulation DEC currently allows site-specific water quality criteria for sites where the safe dispersion of pollutants allows standards to be relaxed. With implied authority, DEC can respond quickly, flexibly, and effectively to foster development in an environmentally safe manner by enacting these site-specific criteria. Without implied authority, new regulations of this kind would be vulnerable to litigation from parties opposed to the proposed development. At a minimum, such litigation would be an effective vehicle to create project delays, and, indeed, the litigation might overturn the special regulation entirely.
- DEC may also adopt drinking water standards, as well as regulations for constructing, improving, and maintaining public water systems. DEC's statutes do not address monitoring of systems for contamination, notice to the public about potentially unsafe water, or streamlined approvals for small systems that serve few people. Nonetheless, DEC's regulations require monitoring and notification, so that the state follows the federal Safe Drinking Water Act and avoids a federal takeover. Additionally, DEC has streamlined its approvals for small systems, which has eased regulatory burdens on owners and operators. These initiatives would be jeopardized by HB 158.



Resource Development Council for Alaska, Inc.

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April 2, 2001

APR 10 2001

Representative Norman Rokeberg
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Re: HB 158

Dear Representative Rokeberg:

On behalf of the Resource Development Council for Alaska, Inc. (RDC), I am writing to express our serious concerns with HB 158. While RDC believes the intent of this legislation is well meaning, its application would create extreme obstacles to the regulated community. As such, we have no choice but to oppose this bill.

RDC is a private, membership-funded trade association representing individuals and companies from the mining, timber, oil and gas, fishing and tourism industries. We are active in the regulatory and statutory arenas of local, state and federal government. Our mission is to grow Alaska's economy through responsible resource development.

HB 158 would create an even more cumbersome regulatory system in Alaska. It would generate increased litigation and damage the state's business climate. RDC urges you to pull this bill from the Judiciary Committee schedule.

Thank you for your consideration and please don't hesitate to contact me if you have any questions.

Sincerely,

RESOURCE DEVELOPMENT COUNCIL
for Alaska, Inc.

Tadd Owens
Executive Director



ALASKA MINERS ASSOCIATION, INC.

3305 Arctic #202, Anchorage, Alaska 99503 • (907) 563-9229 • FAX: (907) 563-9225 • www.alaskaminers.org

April 2, 2001

The Honorable Norman Rokeberg, Chairman
House Judiciary Committee
Alaska State Legislature
State Capitol, Mailstop 3100
Juneau, Alaska 99801-1182

APR 04 2001

Re: HB 158

Dear Representative Rokeberg:

I am writing to express the concerns the Alaska Miners Association has with HB 158. Although we appreciate your ongoing support of the mining industry in Alaska and the intent of this bill, we feel it would statutorily eliminate critical permitting aspects that currently exist that are important to the mining industry in Alaska today. Therefore, we cannot support this bill.

Our primary concern relates to the implications this bill would have on site specific criteria. Within the current regulations, site specific criteria allows unique characteristics of various projects to be addressed on a case-by-case basis. This approach provides flexibility in allowing how each operation can ensure that proper environmental protections are in place. This is an important component of the operating permits for many mining projects in Alaska today. HB 158 could create situations where these site specific criteria could be legally challenged unless each specific case was addressed in statute, which would be cumbersome, at best. In addition, existing site specific situations could be legally challenged leading to costly and lengthy litigation.

Therefore, even though we appreciate the intent of the bill to formulate a more responsible regulatory framework, we cannot risk losing the site specific aspect of the current regulatory scheme.

Once again, your ongoing support of the mining industry is greatly appreciated. Thank you for the opportunity to comment on this important issue.

Should you have any comments or questions, please do not hesitate to contact me.

Sincerely,
Alaska Miners Association

Stanley T. Foo
(Acting) Executive Director

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Alaska Oil and Gas Association



121 W. Fireweed Lane, Suite 207
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Phone: (907)272-1481 Fax: (907)279-8114
Email: brady@aoga.org
Judith Brady, Executive Director

April 2, 2001

The Honorable Norman Rokeberg
Chair, House Judiciary Committee
Alaska State House of Representatives
State Capitol, Room 118
Juneau, Alaska 99811

APR 02 2001

Dear Representatives Rokeberg:

Thank you for the opportunity to comment on HB 158.

The Alaska Oil & Gas Association (AOGA) is a private, non-profit trade association whose member companies represent the majority of oil and gas exploration, production, transportation, refining and marketing activities in Alaska.

The members of AOGA have a strong interest in the State of Alaska's regulatory framework. As the committee is aware, the oil and gas industry in Alaska is the subject of literally hundreds of regulations based on local, state and federal law. At the state level the oil and gas industry is governed by regulations adopted and administered by numerous agencies, including the Department of Natural Resources, the Department of Environmental Conservation, the Department of Fish & Game, the Department of Revenue, the Department of Labor, the Division of Governmental Coordination for the Alaska Coastal Management Program and the Alaska Oil & Gas Conservation Commission. Each year the Association and its member companies review and provide comment on proposed new or amended regulations from several of these Departments, Commissions and Divisions. As an example, at the present time AOGA is participating in public comment on a full review of the Consistency regulations for the Alaska Coastal Management Program (6 AAC 50) conducted by the Division of Governmental Coordination.

It is in this context that we express both our appreciation and our concerns regarding HB 158. We recognize and appreciate the sincere and appropriate desire of the sponsors to open the dialogue on improving Alaska's regulatory framework. However, we are concerned that HB 158, as proposed, may go too far in reducing the flexibility necessary to write reasonable regulations.

Representative Norman Rokeberg
April 2, 2001
Page 2

The challenge for the Legislature is ensuring sufficient flexibility to allow regulators to fill in the gaps resulting from the unanticipated or the ambiguous that occur during the creation of new law, while at the same time including safeguards to prevent disregard of clear legislative intent. The need for flexibility is a crucial point; if it is not addressed, HB 158 could have the unintended consequence of creating worse problems.

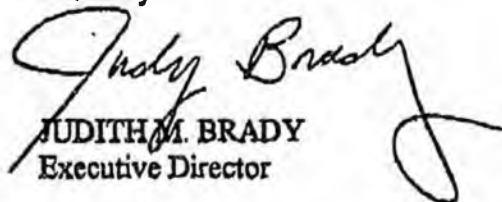
As HB 158 recognizes, the power to create and alter the statutory law of Alaska is vested in the Legislature. The function of the executive branch is to implement the laws which the Legislature enacts. Regulations and administrative rule-making enter this picture because legislation often requires them. Sometimes there are details in legislation which the Legislature intentionally leaves for the executive branch to fill in. Sometimes there are gaps between the scope of one legislative provision and another and the executive branch has to fill in or narrow these gaps. Sometimes the Legislature has a particular kind of situation in mind but chooses words to deal with that situation which can also be read as extending to other situations which the Legislature never even considered. There are infrequent situations when two statutory provisions are in conflict with each other and the executive branch must try to reconcile those provisions to give reasonable effect to both.

In these circumstances the agency administering such a statute needs some flexibility to exercise discretion in deciding how to draft regulations that are covered by the statute, but which the Legislature did not expressly consider. The problem with the wording of HB 158, as proposed, is that some of this needed flexibility may be lost.

There have been instances when AOGA has gone on record that a proposed regulation is outside the intent and scope of the enabling statute and we want to express appreciation for your focus on improving Alaska's regulatory framework. However, this bill as proposed, may have unintended consequences. HB 158 attempts to offer a single solution for a broad set of regulatory problems. We offer to work with you and the rest of the regulated community to identify specific problems which then could be legislatively resolved.

Thank you for your consideration of these comments.

Sincerely


JUDITH M. BRADY
Executive Director

Cc: Representative Lesil McGuire
Members of the House Judiciary Committee

Representative McGuire
State Capitol
Juneau, AK 99801
Re: HB 158

Representative McGuire,

Our industry association has been lobbying ADF&G for years to clarify policy on on-bottom aquaculture, now we are trying to stop the adoption of regulations that will kill the development of the industry. Everything they are doing is directed at department problems, they are doing nothing to address industry problems. Now we have the added problem of killer regulations. Apart from the content of the regulations I will focus on the structural tactics and abuses being used to change the intent of the statutes. I will be using examples from my first-hand experience in the application process that may get confusing. The facts are confusing because the department is attempting to apply the proposed regulations to applications that I made over two years ago; it is therefore difficult to keep the two sets (existing and proposed) of regulations separate.

Summary

- 1) The department told me/us, at the end of the application process, that they are using principles that will be embodied in regulation, they will be adopting at some point in the future, as the basis for the issuance of my permits. This is expo-facto rulemaking. They are not only going to apply these regulations to me/us after they are adopted, they have in fact apply them to us before they were adopted.
- 2) In order to receive a permit I would have to agree to these principles in advance.
- 3) One of these principles is that the proposed renewal criteria will contain all of the original issuance criteria. In other words we will have to re-apply every five years. This is contrary to the renewal statute AS 16 40.110.
- 4) The net effect of this regulatory scheme is to prevent farmers from acquiring the status referred to in statute (AS 16 40.105b) as "existing use", even after five years. We would always have to go to the bottom of the list of users and start over.

Example I

Proposed regulation 5 AAC 41.280 (c) adds the issuance criteria of AS 16 40.105 to the renewal criteria in this section. I see something fundamentally wrong with this. The renewal statute outlines what is needed to renew a current permit. It seems to me that the regulatory process is limited to implementing, clarifying, interpreting, and making specific that intent. For example, setting the referred to fees. Regulations should not be adding criteria that do not come under one of the requirements addressed in the statute. I can only assume that if it were the Legislature's intent to use issuance criteria as renewal criteria they would not have passed statutes addressing them independently.

Example II

Proposed regulation 5 AAC 41.290 (a) expands the use of Stock Acquisition Permits (SAP) to include stocks removed from the farm. Statutory language limits the use of a SAP for stocks to the farm.

THE PROBLEM

The APA already restricts these kinds of activities (consistency with statute) by agencies. They continue to do it anyway. They seem to think that as long as they meet the public notice and comment requirements* they can write whatever they want into law. There needs to be some sanction on regulators who violate this law. Is this any different than breaking other laws? Making regulations is an expensive cost to the public. Making illegal regulations is more expensive as it burdens the State's court system. I think that punitive damages to litigants who have to bare the burden of correcting these violations in courts of the State are appropriate. What about the public that does not know or is unable to bare the burden? They are forced to live under the application of countless regulatory abuses.

*We were told at the last Mari-culture Panel meeting that we would not see the proposed regulations again until the Lieutenant Governor signed them. I consider this an insult to the public process. I cannot complain to you effectively about these regulations because I do not know what the final language is.

Over use of the term "may" tends to transform any section of a regulation into departmental deference. This "due deference" refers to areas where actions are dependant on the special expertise of the department. We could use some statutory definition of these deferential functions that restricted agencies from using it to justify any action they take. "May" leaves the door open for selective application of the regulations that tends to be arbitrary and discriminatory, i.e. unequal application of the law. Proper use of the term "may" is described in the "Drafting Manual For Administrative Regulations".

This manual sets out procedure to be followed in adoption of regulation. A problem we encountered in the process is that DOL is not telling ADF&G what is legal but vise versa. We have a legal history of statements and opinions that dates back to Statehood from DOL on these issues. We have references from ADF&G staff that assistant attorney general Steve White says everything is Constitutional with the Aquatic Farm Act. When conflicts between Steve White and the department became irresolvable the department basically fired him and got a new lawyer that had no experience in fisheries law who would tell them what they wanted to hear. All applications are currently under appeal, in all likelihood will end up going to the State Supreme Court on Constitutional issues that Steve White had no problem with. The department is challenging the constitutionality of their own statutes against DOL advice. Statute that used to be regulations before they were lifted into statute in 1988.

Definition, the department, means the Director of Commercial Fish, Doug Mecum.

THE NET RESULT

The cumulative affect of these regulations is not consistent with the statutory framework. The statutes require the department to evaluate each farm application for suitability, conflicts with existing use and operational and technical feasibility before issuing a permit. Therefore, if the proposed site is suitable, there are no existing conflicts, and the applicants have presented a plan that is technically feasible and they are capable of implementing it, the department will issue a permit. All of these conditions must be met before the department can turn the land and the resource over to private hands.

Under the proposed regs the issuance criteria for an aquatic farm operations permit gets expanded to include all of the statutes and regs applicable to renewal of existing farms including wether or not some commercial fishery, five years from now, decides to fish for the same species of shellfish you are growing, and the issuance criteria for a SAP. This is the extent that the Director had to torture the regulatory process in order to subvert the plain meaning of the word "existing". Soon he will have a quagmire all law that allows him to deny permits based on future potential conflict and criteria designed for a SAP instead of the statutory directive of existing use. When in place no court will be able to sort out all the confusion. Of course the point is mute because no potential applicant would be foolish to fight this regulatory deadbolt. The Director wins. Now he does not have to issue on-bottom aquatic farm permits in areas outside of the critical habitat areas either. Mission accomplished.