

**HB**

**205**

LEXSEE 606 P.2D 769

**STATE of Alaska and Department of Revenue, Appellants, v. A.L.I.V.E.  
VOLUNTARY, Appellee**

**No. 3670**

**Supreme Court of Alaska**

*606 P.2d 769; 1980 Alas. LEXIS 520*

**February 19, 1980**

**PRIOR HISTORY: [\*\*1]**

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Peter J. Kalamarides, Judge.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellants, the state of Alaska and the Alaska Department of Revenue (state), challenged the decision of the Superior Court of the State of Alaska, Third Judicial District, Anchorage, which granted partial summary judgment in favor of appellee association. The association had filed an action against the state, claiming that a legislative veto by concurrent resolution violated Alaska Const. art. II.

**OVERVIEW:** The state denied the association's request for renewal of a gaming permit on grounds that the association violated the limit for prizes as set forth in Alaska Admin. Code tit. 15, § 05.410(4). The association filed an action against the state. While the case was pending, the legislature annulled, by concurrent resolution, § 05.410(4). The association amended its complaint, claiming that the denial of its permit was wrongful because it was based on enforcement of a regulation which had been nullified. The state argued that the legislature could not constitutionally annul an administrative regulation by concurrent resolution. The superior court granted partial summary judgment in favor of the association, holding that the legislative annulment power was constitutional and that the regulation in question was void ab initio. On appeal, the court reversed and remanded with directions to enter partial summary judgment in favor of the state. The court concluded that

nullification of the regulation by concurrent resolution violated Alaska Const. art. II. The court reasoned that the legislature could not exercise its legislative power without following the enactment provisions of art. II.

**OUTCOME:** In the association's action against the state for wrongful permit denial, the court reversed the superior court's partial summary judgment in favor of the association and remanded with directions to enter partial summary judgment in favor of the state.

**LexisNexis(R) Headnotes**

*Governments > Legislation > Enactment  
Governments > State & Territorial Governments >  
Legislatures*

[HN1] Alaska Const. art. II, § 13 provides that every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title. The enacting clause shall be: "Be it enacted by the Legislature of the State of Alaska."

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[HN2] Alaska Const. art. II, § 14 provides that the legislature shall establish the procedure for enactment of bills into law. No bill may become law unless it has passed three readings in each house on three separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it. No bill may become

law without an affirmative vote of a majority of the membership of each house. The yeas and nays on final passage shall be entered in the journal.

*Governments > Legislation > Enactment  
Governments > State & Territorial Governments > Legislatures*

[HN3] Alaska Const. art. II, § 13 requires that every bill be confined to one subject and that there be a descriptive title. These requirements are designed to prevent the inclusion of incongruous and unrelated matters in the same bill in order to get support for it which the several subjects might not separately command, and to guard against inadvertence, stealth and fraud in legislation. The same section also requires a specific form of enactment clause to avoid confusion as to when the legislature is speaking with the force and effect of law, as distinguished from the mere expression of its views and desires.

*Governments > Legislation > Enactment  
Governments > State & Territorial Governments > Legislatures*

[HN4] Alaska Const. art. II, § 14 requires three readings of a bill, on three separate days in order to ensure that the legislature knows what it is passing, and to ensure an opportunity for the expression of public opinion and due deliberation. Section 14 also requires that the vote of each legislator on final passage of a bill be recorded and that no bill may pass without an affirmative vote of a majority of the membership of each house. These provisions are meant to ensure deliberation prior to passage, to ensure that the requisite majority of each house affirmatively votes to enact a bill into law, and to provide a public record of the vote cast by each legislator. In addition to these formal safeguards there is the condition that no bill shall become law unless the governor has the opportunity to veto it. This power is granted to preserve the integrity of the executive branch of government and thus maintain an equilibrium of governmental powers and to act as a check upon corrupt or hasty and ill-considered legislation. Finally, there is the clause that laws do not become effective, unless a two-thirds vote of the membership of each house provides otherwise, until 90 days after they are enacted. Alaska Const. art. II, § 18. This is designed to provide a fair opportunity to those people affected by legislation to learn of the laws they must live by.

*Governments > Legislation > Enactment  
Governments > State & Territorial Governments > Legislatures*

[HN5] The requirements of Alaska Const. art. II, § 14, which sets forth formal safeguards for a bill to become a law are mandatory, not permissive.

*Governments > Legislation > Enactment  
Governments > State & Territorial Governments > Legislatures*

[HN6] The Alaska Constitution imposes certain requirements of formality on legislative action. The legislature enacts laws by the passage of bills meeting the foregoing formalities. It may not enact a law or change one by committee report.

*Governments > Legislation > Enactment  
Governments > State & Territorial Governments > Legislatures*

[HN7] A mere resolution is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it.

*Governments > Legislation > Enactment  
Governments > State & Territorial Governments > Legislatures*

*Governments > Legislation > Suspension, Expiration & Repeal*

[HN8] A concurrent resolution of the legislature is not effective to modify or repeal a statutory enactment. To repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice.

*Governments > Legislation > Enactment  
Governments > State & Territorial Governments > Legislatures*

*Governments > Legislation > Suspension, Expiration & Repeal*

[HN9] No implied general power to veto agency regulations by informal legislative action exists.

**COUNSEL:**

Joseph K. Donohue, Assistant Attorney General, Avrum M. Gross, Attorney General, Juneau, for Appellants.

Joe P. Josephson, Josephson & Trickey, Inc., Anchorage, for Appellee.

Stephen M. Ellis, Delaney, Wiles, Moore, Hayes & Reitman, Inc., Anchorage, for Amici Curiae Alaska Legislative Council and Administrative Regulation Review Committee.

**JUDGES:**

Boochever, Chief Justice, Rabinowitz, Connor, Burke and Matthews, Justices. Boochever, Chief Justice, with whom Connor, Justice, joins, dissenting.

n5 AS 05.15.060(11).

**OPINIONBY:**

MATTHEWS

**OPINION:**

[\*770] AS 44.62.320(a) provides:

The legislature, by a concurrent resolution adopted by a vote of both houses, may annul a regulation of an agency or department.

This statute encompasses a variant of what has come to be called the legislative veto. n1 The question in this case is whether this device violates article II of the Alaska Constitution. We hold that it does.

n1 For excellent histories of the legislative veto, see Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 *Harv. L. Rev.* 569 (1953); Newman & Keaton, *Congress and the Faithful Execution of Laws - Should Legislators Supervise Administrators?* 41 *Cal. L. Rev.* 565 (1953); and Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 *Cal. L. Rev.* 983 (1975).

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I

Chapter 15 of Title 5 of the Alaska Statutes authorizes games of chance and skill to be operated by permit holders. Only certain kinds of games, ("bingo, raffles and lotteries, ice classics, dog mushers' contests, fish derbies and contests of skill") are allowed, n2 only nonprofit organizations may be issued a permit, n3 and all revenues must be devoted to "the awarding of prizes to contestants or participants and to educational, civic, public, charitable, patriotic or religious uses." n4 The Commissioner of Revenue has been delegated the authority to adopt rules and regulations "necessary to [\*771] carry out this chapter or protect the best interest of the public." n5

n2 AS 05.15.100.

n3 AS 05.15.120, .210(15).

n4 AS 05.15.150.

From 1960 until 1976 one of the Commissioner's regulations prohibited lottery operators from giving prizes exceeding \$15,000 in personal property or \$30,000 in real property annually. n6 In November of 1976 the regulation was amended by increasing [\*\*3] the annual personal property limit to \$30,000 and the annual real property limit to \$50,000 and by stating that personal property included cash and negotiable instruments. n7

n6 The regulation was designated 15 AAC 05.410(4). It provided:

In holding, operating, and conducting raffles or lotteries, no permittee shall raffle prizes of personal property in excess of the sum or value of \$15,000.00 in any one calendar year and real property in excess of the sum or value of \$30,000.00 in any one calendar year.

n7 As amended the regulation reads:

(4) In holding, operating and conducting raffles or lotteries, a permittee may not raffle prizes of personal property, including cash or a negotiable instrument, the aggregate total of which is in excess of the sum or value of \$30,000 in any one calendar year and real property in excess of the sum or value of \$50,000 in any one calendar year.

A.L.I.V.E. Voluntary is an unincorporated association which acts as the political action committee [\*\*4] for the Teamster's Union Local No. 959, and affiliated unions. For three years it has operated fund raising lotteries under a permit issued by the Department of Revenue. It applied for a permit for 1977 and reported that during 1976 it had distributed \$80,000 in cash prizes. The Department denied A.L.I.V.E. a permit for 1977 on the ground that its prize distribution in 1976 had exceeded the allowable limit.

A.L.I.V.E. then brought suit against the Department alleging that the denial of the permit was wrongful, claiming that under the first version of the regulation

which was in effect for most of 1976 cash prizes were not included within the personal property limitation of \$15,000. While the case was pending before the superior court, the legislature, acting under AS 44.62.320(a), annulled, by concurrent resolution, 15 AAC 05.410(4). n8

n8 Legislative Resolve No. 79, in full, states:

Annulling a regulation of the Department of Revenue pertaining to the value of prizes awarded in raffles and lotteries.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS under AS 44.62.320 the legislature by concurrent resolution adopted by a vote of both houses may annul a regulation of an agency or department; and

WHEREAS 15 AAC 05.410(4), adopted by the Department of Revenue, restricts the value of prizes which may be awarded in a single year by a qualified organization in a raffle or lottery to \$30,000 in personal property and \$50,000 in real property; and

WHEREAS the prevention of high-stakes gambling sought by this regulation could be achieved more effectively through less restrictive means; specifically, the value of prizes awarded in individual raffles or lotteries could be limited or the prize limit could be related to the amount required to participate in the raffle or lottery; and

WHEREAS this regulation would frustrate the intent of AS 05.15.150, which specifies permissible uses for net proceeds of raffles and lotteries, by preventing qualified organizations from garnering net proceeds in sufficient amounts for uses specifically mentioned in AS

05.15.150, such as erecting or maintaining public buildings or works, or lessening the burden on government;

BE IT RESOLVED by the Alaska State Legislature that administrative regulation 15 AAC 05.410(4) is annulled.

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As a result of the legislative annulment A.L.I.V.E. added another count to its complaint under which it claimed that the denial of its permit was wrongful because it was based on continuing enforcement of the regulation despite its nullification by the legislature. In response, the state claimed that the legislature could not constitutionally annul an administrative regulation by concurrent resolution and therefore the regulation had not been annulled. Both parties moved for summary judgment on this issue. The court granted partial summary judgment in favor of A.L.I.V.E., holding that the legislative annulment power was constitutional and that the regulation in question was void *ab initio*. n9

n9 That is, since 1960. Legislative Resolve No. 79 purported to annul not merely the 1976 amendments to the regulation, but the regulation in its entirety. See note 8, *supra*.

[\*772] II

The Alaska Constitution defines with specificity the mechanics of legislation. n10 Each provision has a purpose [\*\*6] "designed to engender a responsible legislative process worthy of the public trust." *Plumley v. Hale*, 594 P.2d 497, 500 (Alaska 1979).

n10 [HN1] Art. II, § 13 provides:

*Form of Bills.* Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title. The enacting clause shall be: "Be it enacted by the Legislature of the State of Alaska."

[HN2] Art. II, § 14 provides:

*Passage of Bills.* The legislature shall establish the procedure for enactment of bills into law. No bill may become law unless it has passed three readings in each house on three separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it. No bill may become law without an affirmative vote of a majority of the membership of each house. The yeas and nays on final passage shall be entered in the journal.

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[HN3] Article II, section 13 requires that every bill be confined to one subject and that there be a descriptive title. These requirements are designed "to prevent the inclusion of incongruous and unrelated matters in the same bill in order to get support for it which the several subjects might not separately command, and to guard against inadvertence, stealth and fraud in legislation." *Suber v. Alaska State Bond Committee*, 414 P.2d 546, 557 (Alaska 1966). The same section also requires a specific form of enactment clause to avoid confusion as to when the legislature is speaking with the force and effect of law, as distinguished from the mere expression of its views and desires. n11

n11 See 3 Proceedings of the Alaska Constitutional Convention 1746-48 (January 11, 1956).

[HN4] Article II, section 14 requires three readings of a bill, on three separate days in order "to ensure that the legislature knows what it is passing," *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 543 n.11 (Alaska 1978), [\*\*8] and to ensure an opportunity for the expression of public opinion and due deliberation. n12 Section 14 also requires that the vote of each legislator on final passage of a bill be recorded and that no bill may pass without an affirmative vote of a majority of the membership of each house. These provisions are meant "to ensure deliberation prior to passage, to ensure that the requisite majority of each house affirmatively votes to enact a bill into law, and to provide a public record of the vote cast by each legislator." *Plumley v. Hale*, 594 P.2d 497, 500 (Alaska 1979).

n12 See 3 Proceedings of the Alaska Constitutional Convention 1751-54 (January 11, 1956).

In addition to these formal safeguards there is the condition that no bill shall become law unless the governor has the opportunity to veto it. n13 This power is granted "to preserve the integrity of . . . [the executive] branch of government . . . and thus maintain an equilibrium of governmental powers . . . [and] to act as a check upon [\*\*9] corrupt or hasty and ill-considered legislation." *Thomas v. Rosen*, 569 P.2d 793, 795 n.5 (Alaska 1977) (citation omitted). Finally, there is the clause that laws do not become effective, unless a two-thirds vote of the membership of each house provides otherwise, until ninety days after they are enacted. Art. II, § 18. This is designed to provide a fair opportunity to those people affected by legislation to learn of the laws they must live by. n14

n13 Art. II, § § 15, 16 and 17.

n14 See 4 Proceedings of the Alaska Constitutional Convention 3110 (January 25, 1956).

The question presented by this case is whether the legislature can exercise its legislative power without following these enactment provisions. In our view the answer must be in the negative, for otherwise they would serve no purpose. In *Plumley v. Hale*, 594 P.2d 497, 502 (Alaska 1979) we held that [HN5] the requirements of Art. II § 14 are mandatory, not permissive. n15 [\*\*73] The minutes of the proceedings of our constitutional [\*\*10] convention indicate that the delegates were fully aware that only by following the enactment procedures could the legislature make law. Thus, Delegate Sundborg stated:

Now, a majority vote in each house of the legislature is not equivalent to passing a law, because it does not require the signature of the governor, and it does not require conformance with the provisions of this constitution and the provisions of such laws as will be passed under it with respect to the procedure in enacting a law. So, when we say in the second sentence, "The state may by law," we are saying that that law must be passed by the legislature in the manner that is required by the constitution and the statutes, and either signed by the governor or passed over his veto or become law without his

signature in the manner provided in the constitution, which we felt was the real intention of the body rather than merely requiring that the legislature by a majority in each house and without adhering to any of those other restrictions and without any reference to the governor could contract debt on behalf of the state.

5 Proceedings of the Alaska Constitutional Convention at 3405 (January 28, 1956). [\*\*11] Of course, when the legislature wishes to act in an advisory capacity it may act by resolution. However, when it means to take action having a binding effect on those outside the legislature it may do so only by following the enactment procedures. Other state courts have so held with virtual unanimity. n16

n15 We also referred to the Art. II, § § 14 and 15 safeguards in *North Slope Borough v. Sohio Pet. Corp.*, 585 P.2d 534, 543 n. 11 (Alaska 1978), stating: [HN6] "Our constitution imposes certain requirements of formality on legislative action . . . . The legislature enacts laws by the passage of bills meeting the foregoing formalities. It may not enact a law or change one by committee report."

n16 *Watrous v. Golden Chamber of Commerce*, 121 Colo. 521, 218 P.2d 498 (Colo. 1950) is perhaps an exception. At issue there was a statute allowing certain tax proceeds to be pledged as security for bonds to pay for construction of state turnpikes under the condition "that any such pledge shall first be approved by joint resolution of the Senate and House of Representatives." *Id.* at 502. The court upheld the statute, finding that such a resolution was not legislative in character, but "relat[ed] solely to the transaction of the business of the two houses." *Id.* at 510. One proponent of the legislative veto has remarked that the reasoning of this case is "so unsatisfactory as to destroy its value as a precedent." Schwartz, *Legislative Control of Administrative Rules & Regulations*, 30 N.Y.U. L. Rev. 1031, 1043 n.56 (1955).

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Thus in *People ex rel. Burritt v. Commissioners of State Contracts*, 120 Ill. 322, 11 N.E. 180 (Ill. 1887) a joint resolution directed state officials to make a contract for the publication and distribution of certain municipal laws and provided an appropriation for that purpose. The Illinois Supreme Court held that the joint resolution was invalid because the enactment procedures prescribed

by the Illinois Constitution had not been followed. Speaking of them, the court stated:

That these various provisions, giving the form and mode by which, through the concurrent action of the legislative and executive departments, valid and binding laws are enacted, are, in the highest sense, mandatory, cannot be doubted.

11 N.E. at 185. The court went on to note that

nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential. [Citation omitted].

*Id.*

In *Mullan v. State*, 114 Cal. 578, 46 P. 670 (Cal. 1896) [\*\*13] the California legislature had passed a resolution requiring compensation of a private individual. In rejecting the argument that the resolution had the effect of law, the court stated:

[HN7] A mere resolution . . . . is not a competent method of expressing the legislative will, where that expression is to [\*\*774] have the force of law, and bind others than the members of the house or houses adopting it.

46 P. at 672.

*Moran v. La Guardia*, 270 N.Y. 450, 1 N.E.2d 961 (N.Y. 1936) involved statutory provisions reducing public employees' salaries during an economic emergency "until the legislature shall find their further operation unnecessary." The legislature first attempted to repeal this law by passing a bill, but it was vetoed by the Governor. The same result was then sought by the passage of a joint resolution. In an alternative holding the court held that the legislature could not constitutionally terminate the operation of the statute by resolution: n17

[HN8] A concurrent resolution of the Legislature is not effective to modify or repeal a statutory enactment . . . . To

repeal or modify a statute requires a legislative act of equal dignity and import. Nothing [\*\*14] less than another statute will suffice. A concurrent resolution of the two Houses is not a statute . . . . A concurrent resolution, unlike a statute, is binding only on the members and officers of the legislative body. It resembles a statute neither in its mode of passage nor in its consequences. The form of a bill is lacking, and readings are not required. It does not have to lie on the desks of members of the Legislature for three legislative days . . . . But more important, its adoption is complete without the concurrent action of the Governor, or, lacking this, passage by a two-thirds vote of each House of the Legislature over his veto. Thus a joint resolution may be adopted by a mere majority of the Legislature without action by the Governor or notice to the public, whereas the enactment of a statute requires action by three distinct bodies and at least three days' notice to the public. As has been well said: "In the exercise of this vast power [of the Legislature] according to the fundamental idea and constitution of parliament the concurrence of the three distinct bodies of which it is composed, each acting by itself and independent of the others, is necessary. No two [\*\*15] of them acting together, much less alone, can make a law." [Citations omitted]. n18

1 N.E.2d at 962.

n17 The other alternative holding was that the statute had not authorized termination by resolution.

n18 To the same effect are: *Becker v. Detroit Sav. Bank*, 269 Mich. 432, 257 N.W. 853 (Mich. 1934); *Cleveland Terminal & V.R. Co. v. State ex rel. Attorney General*, 85 Ohio St. 251, 97 N.E. 967, 973 (Ohio 1912) ("[A] joint resolution is not an act of legislation and . . . it cannot be effective for any purpose for which an exercise of legislative power is necessary . . ."); *Scudder v. Smith*, 331 Pa. 165, 200 A. 601, 604 (Pa. 1938) ("The subject matter of this joint resolution is legislative in its nature. It is not a mere formal expression of legislative opinion [and is therefore invalid]); *State ex rel. Todd v. Yelle*, 7 Wash. 2d

443, 110 P.2d 162, 165 (Wash. 1941) ("It is . . . clear that a house resolution is not a law. A law must be enacted either by popular initiative or by the legislature, and, when by the legislature, must be by bill . . ."); *Rowley v. City of Medford*, 132 Ore. 405, 285 P. 1111, 1114 (Or. 1930) ("The power of the Legislature to effectively legislate by resolution is confined within very narrow limits. It may provide for expenses incident to its sessions, such as employing clerks and stenographers and procuring supplies, and other matters incident to the carrying on of its own business, but it cannot go outside and legislate generally on matters involving property or other rights. As to such matters, its resolutions have only the effect of an expression of opinion and no more."); *Hawks v. Bland*, 156 Okla. 48, 9 P.2d 720, 721 (Okla. 1932) ("[a] resolution is the mere expression of an opinion and not an enactment of law."); *Newport News Fire Fighters Ass'n, Local 794 v. City of Newport News*, 307 F. Supp. 1113, 1115 (E.D.Va. 1969) ("The resolution expresses only the opinion of that legislative body.").

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The express provision in the Alaska Constitution of two specific legislative veto mechanisms supports our view that [HN9] no implied general power to veto agency regulations by informal legislative action exists. On the subject of the organization of the executive department the governor may propose changes in the law by executive order. Unless they are disapproved by the legislature within sixty days by "resolution concurred in by a majority of the members in joint session . . .", such changes shall "become effective at a date thereafter [\*775] to be designated by the governor." n19 On the subject of municipal boundary changes, the state local boundary commission may make recommendations. They become effective forty-five days after presentation to the legislature unless vetoed by a "resolution concurred in by a majority of the members of each house." n20

n19 Art. III § 23.

n20 Art. X § 12. We do not agree with the dissent's characterization of the power granted in these two provisions as rule-making power, which we see as the power to interpret and implement statutes. Rather, the power contained in these provisions is the power to *change* statutes; therefore, the expression of these extraordinary powers in the constitution cannot be regarded as carrying an implication that

general administrative rule making was meant to be forbidden.

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There are several noteworthy aspects of these expressed powers. First, they are accompanied by specific time deadlines. Second, the deadlines are different, sixty days in one case and forty-five days in the other. One may question, if there is an implied legislative veto power in the constitution, whether it is accompanied by a time limit, and if so, what the limit is. Third, the expressed legislative vetoes annul proposed executive action, they do not change existing law. They therefore do not have the same potential for the disruption of public expectations and ongoing executive programs that the blanket veto in question has. Fourth, the legislative vote required for the exercise of each of the expressed vetoes is different. Re-organization orders may be blocked by a resolution of disapproval concurred in by a majority of the members of the legislature in joint session, n21 while boundary change vetoes require disapproval by a resolution concurred in by a majority of the members of each house. n22 Since the Senate has twenty members and the House has forty, n23 these differences can be quite important. The votes of thirty legislators are required to forestall a veto taken [\*\*18] in joint session, while ten senators can prevent a veto if the vote is to be by a majority of the members of each house. Here, as with the differing time deadlines mentioned above, one may inquire as to how the constitution addresses the issue of an implied general legislative veto power. The answer, of course, is that the constitution contains no clue. In our view, the specificity with which the constitution deals with the legislative veto powers it does grant leads logically to the conclusion that no other veto power is implied.

n21 Art. III, § 23.

n22 Art. X, § 12.

n23 Art. II, § 1.

### III

We are aware of only three cases which have decided the question whether a legislative veto is constitutional. n24 They are *Atkins v. United States*, 556 F.2d 1028, 214 Ct. Cl. 186 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009, 98 S. Ct. 718, 54 L. Ed. 2d 751 (1978); *Opinion of the Justices*, 96 N.H. 517, 83 A.2d 738 (N.H. 1950); and *Reith v. South Carolina State Housing Authority*, (Ct. C.P., 11th [\*\*19] Jud. Dist., Aug. 28, 1975), rev'd on other grounds, 267 S.C. 1, 225 S.E.2d 847, 848 (S.C. 1976). n25

n24 The dissent suggests that our comment in *Boehl v. Sabre Jet Room, Inc.*, 175 Cal. App. 2d 123, 345 P.2d 585 (Alaska 1960), supports an affirmative answer to this question. We stated that "[the legislature] has the power by resolution to annul any agency or department rule or regulation." However, the constitutionality of annulment was not argued in that case, and our statement obviously was not a judgment on this issue.

n25 The Amici would add *Sibbach v. Wilson*, 312 U.S. 1, 61 S. Ct. 422, 85 L. Ed. 479 (1940) to this list; however, the type of veto discussed there apparently entailed formal law enactment and, therefore, the case has no relevance to the question before us. See *Atkins v. United States*, 556 F.2d at 1060 and n. 21. In *Buckley v. Valeo*, 424 U.S. 1, 140 n. 176, 96 S. Ct. 612, 46 L. Ed. 2d 659, 757 n. 176 (1976), the United States Supreme Court found it unnecessary to pass on the validity of a legislative veto, but Justice White in a concurring opinion indicated he thought it was constitutional. 424 U.S. at 284-85, 46 L. Ed. 2d at 838-39. Subsequently, the Court of Appeals for the District of Columbia avoided the same issue, *Clark v. Valeo*, 559 F.2d 642, 182 U.S. App. D.C. 21 (D.C. Cir.) (en banc) aff'd mem. sub nom. *Clark v. Kimmitt*, 431 U.S. 950, 97 S. Ct. 2667, 53 L. Ed. 2d 267 (1977), but Circuit Judge MacKinnon reached the merits in a vigorous dissent criticizing Justice White's conclusion in *Buckley*. 559 F.2d at 685.

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[\*776] The New Hampshire case, *Opinion of the Justices*, 96 N.H. 517, 83 A.2d 738 (N.H. 1950), involved the question whether a reorganization statute violated the state constitution. The statute provided that the reorganization plan proposed by the governor would become law if the two legislative houses did not disapprove it by concurrent resolution. The court concluded that the statute violated the enactment provisions of the New Hampshire Constitution:

The procedure which [the reorganization statute] provides is in distinct contrast to that contemplated by the Constitution. Consent is to be manifested by silence or adjournment, and disapproval by "concurrent resolution" . . . . The contemplated procedure violates the constitutional provisions requiring separate action by each house of the

Legislature . . . . The act would dispense with the "passage" of any measure, as that word is commonly used, and with the requirement of presentation to the Governor. In a sense the act provides for a reversal of the democratic processes required by the Constitution, for under it the Governor would propose the legislative action, rather than approve or disapprove of action [\*\*21] taken. 83 A.2d at 741.

In *Reith v. South Carolina State Housing Authority*, (Ct. C.P., 11th Jud. Dist., Aug. 28, 1975), *rev'd on other grounds*, 267 S.C. 1, 225 S.E.2d 847, 848 (S.C. 1976), the South Carolina Court of Common Pleas considered, *inter alia*, the validity of a statutory provision stating that regulations promulgated by the Housing Authority shall be "null and void unless approved by a concurrent resolution of the General Assembly at its session following such promulgation." The court held that this provision violated the constitutional enactment requirements because "the General Assembly may not perform a legislative function by means of a concurrent resolution." n26 The court also concluded that the provision impermissibly infringed on the executive's power to administer and enforce the laws. n27 On appeal, neither ruling was challenged, but the state supreme court reversed on the grounds that the legislative veto provision was not severable and, therefore, the whole act was unconstitutional. n28 The appellate court accepted the lower court's ruling on the veto provision as the law of the case and did not pass on the issue. n29

n26 *Reith v. South Carolina State Housing Authority*, Op. at 9. [\*\*22]

n27 *Id.* at 10.

n28 225 S.E.2d at 848-49.

n29 225 S.E.2d at 848.

*Atkins v. United States*, 556 F.2d 1028, 214 Ct. Cl. 186 (Ct. Cl. 1977), *cert denied*, 434 U.S. 1009, 98 S. Ct. 718, 54 L. Ed. 2d 751 (1978) involved a statute empowering the President to make recommendations for judicial salary increases and transmit them to Congress; the recommendations would become effective after thirty days unless disapproved by either House. It was claimed that this mechanism was unconstitutional because it contravened article I, section 1 of the United States

Constitution, which vests the legislative power of the United States in a bi-cameral Congress, article I, section 7, which grants veto power to the President, and the principle of separation of powers. The Court of Claims, *en banc*, in a four-to-three decision upheld the statute.

*Atkins* is not strong authority in this case, for the following reasons. First, the majority took pains to confine its opinion to the narrow issue before it, emphasizing that Congress' special role in the establishment of judicial salaries shaped [\*\*23] its reasoning and conclusion. *Id.* at 1058-60, 1063, 1065, 1068. Moreover, the United States Constitution does not contain detailed directions for legislative action similar to those set forth in the Alaska Constitution, discussed *supra*, pp. 7-10. Thus the Court of Claims was able to say, speaking of article I, section 1 of the United States Constitution: n30 [\*777] "The clause does not itself, as a textual matter, mechanically direct the manner in which Congress must exercise the legislative power." *Id.* at 1062. Such a statement could not be made with reference to Article II of the Alaska Constitution. Further, the court stressed that no change in the law was accomplished by the one-House veto, because the President's recommendations never had the effect of law. *Id.* at 1063. The court implied that for one House to have the authority to make such a change would be unconstitutional: "Nor could one House do anything more than preserve existing law . . ." *Id.* at 1064. In contrast, the annulment provision of AS 44.62.320(a) permit the legislature to void administrative regulations which are in effect. Such regulations are laws in every meaningful sense. [\*\*24] n31 and annulling any one of them effects a change in the law.

n30 U.S. Const. art. I, § 1 provides:

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

n31 1 Mezines, Stein & Gruff, *Administrative Law* § 1.02[2] at 1-45 (1977); 2A Sutherland, *Statutes and Statutory Construction* § 49.05 at 240 (4th ed. Sands 1973), which states:

An administrative agency may be vested with the power to promulgate legislative interpretive rules which have the force and effect of law. Such powers must be limited by a standard, and,

when exercised, the ensuing regulations, if within the standards, have the same efficacy as an original statute enacted by the legislature. [Footnote omitted].

#### IV

We turn now to a discussion of the major arguments of Appellee and the Amici.

The first is that since AS 44.62.320(a) was passed by the first state legislature, several members of which had served in [\*\*25] the Alaska Constitutional Convention, and was approved by Governor Egan, who had been chairman of the Convention, a stronger than usual presumption of constitutionality should be applied. n32 We need not pause to debate that point. Whatever the strength of the presumption might be, it will be overcome if the statute cannot be squared with a reasonable reading of the constitution. That, in our opinion, is the situation here.

n32 The same argument was unsuccessfully made in *Brauner v. Hammond*, 553 P.2d 1, 4 nn. 4 & 5 (Alaska 1976).

The Amici argue that since the legislature may delegate law-making power to an administrative agency, it follows that it may reserve to itself a part of the delegable power, and that a delegation can be made subject to a condition that the legislature may later change the terms of the delegation by informal action. The answer to this argument, in our opinion, is that while the legislature can delegate the power to make laws conditionally, the condition must be lawful and may not [\*\*26] contain a grant of power to any branch of government to function in a manner prohibited by the constitution. The legislature is bound to act in accordance with the constraints provided in article II of the constitution. The fact that it can delegate legislative power to others who are not bound by article II does not mean that it can delegate the same power to itself and, in the process, escape from the constraints under which it must operate. n33

n33 "A delegation which disperses power is not necessarily constitutionally equivalent to one which concentrates power in the hands of the delegating agency." Watson, *Congress Steps Out: A Look at Congressional Control of the*

*Executive*, 63 Cal. L. Rev. 983, 1067 n.430 (1975).

To illustrate this point we may assume that the legislature has the power to establish an independent agency which would have the power to disapprove of agency regulations. Since the agency would be a part of the executive department the article II constraints on legislative action would [\*\*27] not govern its functions. Could the legislature instead convey to its own members the power to act as such an agency free from these constraints? The answer, we think, is clearly no for that would amount to dual officeholding, prohibited by article II, section 5, n34 and would [\*\*778] infringe on the executive appointment power set out in article III, section 26. n35 While the power to void agency regulations could be exercised by either the legislature, or by an agency, when the legislature exercises such power it must do so while acting as a legislature. It may not grant itself the power to act as an agency.

n34 Art. II, § 5 provides in relevant part:

*Disqualifications.* No legislator may hold any other office or position of profit under the United States or the State.

n35 Art. III, § 26 provides:

*Boards and Commissions.* When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

*See, e.g., Buckley v. Valeo*, 424 U.S. 1, 118-43, 96 S. Ct. 612, 46 L. Ed. 2d 659, 744-58 holding that Federal Elections Commission members were necessarily "Officers of the United States" because, among other reasons, of their administrative rule-making power, and therefore could not be appointed by Congress; *People v.*

*Tremaine*, 252 N.Y. 27, 168 N.E. 817 (N.Y. 1929) discussed *infra*, slip op at pp. 25-26.

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It might be supposed that if the legislature could condition the validity of a regulation upon the subsequent disapproval by both of its houses by concurrent resolution, it could condition the same upon disapproval by a committee, n36 or a single legislator. Using the theory, propounded by the Amici, that a veto is merely a condition there is no principled distinction between these cases. It is therefore worth observing that most authorities have rejected the validity of laws conferring either affirmative or negatory legislative powers on individual legislators or legislative committees.

n36 In fact, under AS 24.20.445(a), the Administrative Regulation Review Committee, a permanent joint committee of the legislature, is granted the power to suspend the operation of any regulation adopted after adjournment of the legislature until thirty days after the legislature reconvenes.

In *State ex rel. Judge v. Legislative Finance Committee*, 168 Mont. 470, 543 P.2d 1317 (Mont. 1975), at issue was a statute empowering [\*\*29] an interim legislative committee to approve budget amendments. The statute was held invalid. The court pointed out that the power to approve budget amendments could be exercised by the entire legislature in making an appropriation, or by an executive agency acting on a proper delegation from the legislature, but the legislature could not delegate the power to so act to one of its subdivisions. *Id.* at 1321. n37 The same reasoning was employed in *People v. Tremaine*, 252 N.Y. 27, 168 N.E. 817 (N.Y. 1929), where the Court of Appeals struck down a statute granting certain legislative committee chairmen the power to disapprove of the allocation of lump sum appropriations to an executive agency. The court acknowledged that the legislature might itself legislate the allocation, or it could delegate the responsibility to an executive agency. It could not, however, delegate the responsibility to one, or more than one, of its members: "The Legislature might make the segregation itself, but it may not confer administrative powers upon its members without giving them, unconstitutionally, civil appointments to administrative offices. It might by general law confer the power of segregation [\*\*30] or approval of segregation upon any one but its own members . . . but the Constitution . . . makes its own members ineligible to such an

appointment." *Id.* at 822. See also, *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220, 223 (Colo. 1912); *Bramlette v. Stringer*, 186 S.C. 134, 195 S.E. 257, 264 (S.C. 1938). *Contra*, *Opinion of the Justices*, 110 N.H. 359, 266 A.2d 823 (N.H. 1970).

n37 The people of Alaska recently rejected a constitutional amendment which, like the law struck down in Montana, was designed to vest the power to approve budget revisions in an interim legislative committee. See Alaska Const. art. II, § 11 (proposed amend. 1978 Supp.).

The Appellee also argues that legislative oversight of administrative regulations is desirable and that such oversight cannot take place effectively if it must follow the path of legislation prescribed by article II. There are two answers to this argument. First, and most important, the question of [\*\*779] whether the legislature might perform [\*\*31] a task more efficiently if it did not have to follow article II is essentially irrelevant. Since article II applies, the question of whether efficiency takes primacy over other goals must be taken to have been answered by our constitutional framers. Second, at least according to a recent case study, the legislative veto has been unimpressive in practice. See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977). That study concludes, essentially, that the legislative veto encourages secretive, poorly informed, and politically unaccountable legislative action. *Id.* at 1409-20. It is consequences such as these that the enactment provisions of our constitution are designed to guard against. See discussion, *supra*, slip op. at pp. 7-10.

Appellee also makes an argument based on the doctrine of separation of powers. Rule-making is essentially a legislative rather than executive function and so, the argument goes, broad latitude must be afforded the legislature to act as it sees fit in this, the core area of its duties. This argument is essentially inconsistent with the requirements prescribed [\*\*32] in article II of the constitution which must be observed in the process of legislation. The legislature is not free to ignore these requirements. See, discussion *supra*, slip op. at pp. 7-10.

Appellee finds it significant that the Alaska Constitution contains no provision like that in section 7, clause 3 of article I of the United States Constitution n38 which authorizes the executive to veto legislative resolutions, and argues that executive involvement in the enactment of resolutions was not deemed necessary by the framers of the state constitution. This point, however, does not advance Appellee's case. Under the

United States Constitution joint resolutions are one means by which laws are enacted; n39 they are therefore naturally included among those legislative acts subject to Presidential veto. However, under the state constitution resolutions are not an alternative law enactment process, and therefore there is no need to make them subject to an executive veto.

n38 This clause provides:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill. [Emphasis added].

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n39 *United States ex rel. Levey v. Stockslager*, 129 U.S. 470, 9 S. Ct. 382, 32 L. Ed. 785 (1889).

The Amici contend that since AS 44.62.320(a) was itself passed in accordance with all constitutional mandates and since the governor had the opportunity to veto the statute, constitutional requirements have been satisfied with respect to subsequent acts of the legislature taken pursuant to the statute. In other words, by virtue of one enactment approved by the governor, the legislature can free itself, in certain instances, of the constitutional constraints that would otherwise govern its actions. Such an enactment would impermissibly preserve legislative power possessed at one instant in time for future periods when the legislature might otherwise be incapable of acting because of the executive veto. n40 It would also do away with the formal safeguards of article II which are meant to accompany law-making. The requirements of the constitution may not be eliminated in this fashion.

n40 See Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal. L. Rev. 983 at 1067 (1975).

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REVERSED AND REMANDED with directions to enter partial summary judgment in favor of the state as to the effect of the concurrent resolution and for further proceedings.

DISSENTBY:

BOOCHEVER

DISSENT:

BOOCHEVER, Chief Justice, with whom CONNOR, Justice, joins, dissenting.

I

I believe that the legislative power to annul administrative regulations by concurrent [\*780] resolution is constitutional. In my opinion, the majority reasoning is fallacious in equating regulations with laws passed by the legislature. The litany of constitutional requirements outlined in the majority opinion is indeed mandated for the passage of a bill into law. The constitution, however, makes none of those requirements applicable to regulations. In fact, the constitution is silent as to the practice of delegating authority by the legislature to the executive or administrative agencies for promulgation of regulations. n1 Regulations may be promulgated without having each regulation confined to one subject, a descriptive title, a specific form of enactment clause, three readings on three separate days, the vote of each member adopting the regulation recorded, a majority vote of each house of the legislature. [\*\*35] a public record of the vote cast, being subject to veto by the governor, a 90-day waiting period before becoming effective. n2 Nevertheless, the majority does not question the authority of the legislature to delegate the power to promulgate regulations without these safeguards. It seems to me that if the legislature, in authorizing regulations, cannot condition that authority with a reasonable provision for oversight because the annulment of a regulation is equated with repeal of a statute, then the regulation itself must be considered invalid as not having been passed with the requirements necessary, for enacting a bill into law.

n1 The constitution does authorize "regulatory, quasi-judicial and temporary agencies" to be established by law. Art. III, § 22.

There are no constitutional requirements for promulgation of regulations.

n2 AS 44.62.180 does specify that, with certain exceptions, regulations become effective on the 30th day after filing by the lieutenant governor.

This issue was considered by [\*\*36] this court shortly after statehood in *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585, 588 (Alaska 1960), where we stated:

The legislative power of the state "is vested in a legislature." It is argued that because of this constitutional provision the power may not be delegated.

But such a strict theory of separation of powers ignores realities and the practical necessities of government. The United States Supreme Court has said that delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility, and that necessity fixes a point beyond which it is unreasonable and impracticable to compel the legislature to prescribe detailed rules. [Footnotes omitted.]

One of the bases specified in *Boehl* for upholding this power of the legislature to delegate regulatory authority was the identical right to annul regulations which the majority now finds to be unconstitutional. In *Boehl* we stated:

It also is not essential, in order to sustain the grant of authority, that the legislature circumscribe administrative discretion by express standards of action in order that the opportunity for capricious [\*\*37] exercise of power will not exist. There is slight danger of that. The exercise of the board's powers is hedged about by substantial safeguards. Before the board may act it must conduct a public hearing and afford any interested person the opportunity to be heard, and it must then "consider all relevant matter presented to it." There is ample opportunity for judicial review; for "any interested person may obtain a judicial declaration as to the validity of any regulation \* \* \*". Finally, there is legislative supervision. The legislature, which meets annually, may revise the statute and thus restrict the bounds of

administrative action; it has the power by resolution to annul any agency or department rule or regulation; and the Legislative Council, an interim legislative committee charged with the duty of making recommendations to the legislature, must annually review all agency regulations to determine if the legislative intent is being correctly followed.

349 P.2d at 590 (emphasis added) (footnotes omitted).

[\*781] In my opinion, the majority misstates the question presented as being whether the legislature can exercise its legislative power without the usual [\*\*38] constitutional safeguards. The real question is whether, having exercised its legislative power, subject to all those safeguards, it may condition the delegation of regulatory power to an executive agency upon a provision for legislative oversight. I agree with our statement in *Boehl* that the legislature has that power.

## II

The advent of the industrial revolution vastly increased and complicated the tasks of legislatures. Due to limits of time and specialized expertise, legislatures have found it impossible to prescribe laws adequately covering the tremendously varied and intricate forms of social relationships arising out of the proliferation of business, manufacturing, trade, transportation, communication and commercial enterprises. n3 Of necessity, legislative authority had to be delegated to administrative agencies. Nevertheless, both in England and in the United States, efforts were initiated to maintain some controls over broad delegations of authority. n4

n3 See generally Stone, *The Twentieth Century Administrative Explosion and After*, 52 Calif. L. Rev. 513 (1964).

n4 See Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 Fordham L. Rev. 638 (1957); Schwartz, *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 N.Y.U. L. Rev. 1039 (1955) (hereinafter cited as Schwartz); Carr, *Legislative Control of Administrative Rules and Regulations: Parliamentary Supervision in Britain*, 30 N.Y.U. L. Rev. 1045 (1955).

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England has long utilized the laying system, whereby an administrative order or regulation must be laid before Parliament for a specified period of time before becoming effective.

Parliamentary control over administrative rules and regulations . . . is asserted principally through provisions in enabling statutes that rules made under them shall be laid before Parliament. This is customarily combined with a provision in the statute, either that the rule shall not be operative until it is approved by resolution, either of both Houses or of the House of Commons alone . . . , or that, if within forty days a resolution is passed by either House for annulling the rule, the rule is to be void . . . n5

n5 Schwartz, *supra* note 4, at 1032-33.

In the United States, the issue of whether a legislature can reserve to itself the power to disapprove administrative regulations has been brewing for more than forty years. n6 The early stages of the dispute involved the Reorganization Acts of the 1930's [\*\*40] and 1940's which provided that executive reorganization plans became effective sixty days after transmission to Congress, unless within that period Congress disapproved by resolution. n7 Federal acts incorporating similar provisions have proliferated in recent years. n8 Yet no federal court has squarely evaluated the validity of provisions reserving to Congress the power to disapprove administrative regulations. n9

n6 *Clark v. Valeo*, 182 U.S. App. D.C. 21, 559 F.2d 642, 649-50 (D.C. Cir.) (*en banc*) (*per curiam*), *aff'd mem. sub nom., Clark v. Kimmit*, 431 U.S. 950, 97 S. Ct. 2667, 53 L. Ed. 2d 267 (1977).

n7 Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 *Harv. L. Rev.* 569, 576-82 (1953). The 1939 and 1945 Reorganization Acts provided for disapproval by a concurrent resolution; the 1949 Act allowed disapproval by either House. *Id.* at 579, 581.

n8 Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 *Calif. L. Rev.* 983, 989 (1975). An appendix to this article lists many statutes giving special effect to

congressional resolutions. Many have been passed in the 1970's and involve veto power over actions of executive agencies or the President. *See id.* at 1089-92 app. A. [\*\*41]

n9 Stewart, *Constitutionality of the Legislative Veto*, 13 *Harv. J. Legis.* 593, 595 (1976).

### III

I agree with the majority that there is scant case authority on the specific issue in [\*782] the United States. Our court, however, has favorably discussed the legislative veto in *Boehl*.

The holding in *Atkins v. United States*, 214 Ct. Cl. 186, 556 F.2d 1028 (Ct. Cl. 1977) (*en banc*) (*per curiam*), *cert. denied*, 434 U.S. 1009, 98 S. Ct. 718, 54 L. Ed. 2d 751 (1978), supports the position taken in this dissent. *Atkins* upheld a statute allowing either House of Congress to veto judicial salary increases recommended by a presidential commission.

In *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), the majority of the United States Supreme Court did not reach the issue of whether regulations promulgated by the Federal Election Commission would become effective within thirty days of filing if either House of Congress did not disapprove them. In his concurrence, Justice White did approve the oversight provision, stating:

I am also of the view that the [\*\*42] otherwise valid regulatory power of a properly created independent agency is not rendered constitutionally infirm, as violative of the President's veto power, by a statutory provision subjecting agency regulations to disapproval by either House of Congress. For a bill to become law it must pass both Houses and be signed by the President or be passed over his veto. Also, "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" is likewise subject to the veto power. Under § 438(c) the FEC's regulations are subject to disapproval; but for a regulation to become effective, neither House need approve it, pass it, or take any action at all with respect to it. The regulation becomes effective by nonaction. This no more invades the President's powers than does a regulation

not required to be laid before Congress. Congressional influence over the substantive content of agency regulation may be enhanced, but I would not view the power of either House to disapprove as equivalent to legislation or to an order, resolution or vote requiring the concurrence of both Houses.

424 U.S. at 284-85, 46 L. Ed. 2d at 838-39 [\*\*43] (emphasis added) (footnotes omitted).

The majority cites *Reith v. South Carolina State Housing Authority*, (Ct. C.P., 11th Jud. Dist., Aug. 28, 1975), *rev'd on other grounds*, 267 S.C. 1, 225 S.E.2d 847, 848 (S.C. 1976), but appropriately concedes that the Supreme Court of South Carolina did not reach the issue with which we are concerned.

Also cited is the New Hampshire case, *Opinion of the Justices*, 96 N.H. 517, 83 A.2d 738 (N.H. 1950), an advisory opinion on whether a reorganization statute violated the state constitution. The statute provided that the reorganization plan proposed by the governor would become law if the two legislative houses did not disapprove it by concurrent resolution. The court concluded that the statute violated the state constitution. *Id.* at 741. Three of the five justices felt the procedure violated the principle of bicameralism because each house "has undertaken in advance to surrender to the other its constitutional authority to veto or refuse assent to action taken or approved by the other." *Id.* at 741-42.

It is also significant that twenty years later the New Hampshire Supreme Court examined a statute requiring certain salary [\*\*44] increases to be approved by a legislative committee prior to submission to the governor for final approval. *Opinion of the Justices*, 96 N.H. 517, 266 A.2d 823 (N.H. 1970). The court, without analysis of its earlier opinion, found no violation of separation of powers, reasoning that since the legislature could delegate its power to fix salaries, it could impose conditions upon the exercise of such delegated authority. *Id.* at 826. In conclusion, it seems to me that what case authority exists is more supportive than not of the concept of legislative annulment.

#### IV

The legislature's participation in the promulgation of regulations is within the core area of legislative power, formulation of [\*\*783] policy. Accordingly, the legislature's power to select the means of participation should be generously construed. n10

n10 We have held that when the legislative exercises power with reference to an essentially executive function those powers should be construed narrowly. *Bradner v. Hammond*, 553 P. 2d 1, 7 (Alaska 1976). Conversely, when, as here, a basically legislative function is involved, the powers of the legislature should be construed broadly.

#### [\*\*45]

The delegation of rule-making authority to executive agencies does not alter the basic legislative nature of the function. Conditioning that delegation on the right of the legislature to review and annul regulations does not infringe on the power of the executive, where, as here, the annulling action is taken at the first session of the legislature following promulgation of the regulation. n11

n11 A long-term scrutiny of executive action taken pursuant to regulations leading to delayed annulment might involve legislative infringement on the executive power to enforce laws. We are not confronted with such a question and need not pass on it because the regulation here in question was annulled at the first legislative session following its promulgation. We are similarly not confronted with an annulment by a single legislator, a committee of the legislature, or by one house.

I believe that a statute can validly condition the delegated power to enact regulations by requiring that the regulations be subject to [\*\*46] annulment by resolution, just as it could limit the effective date of the new regulations or the length of time during which they would be in force. I find no material difference between AS 44.62.320 and other statutes, upheld by the United States Supreme Court, that condition the exercise of rule-making authority by approval of private citizens. n12 If private citizens can exercise such power, then certainly the legislature should be able to exercise the same power.

n12 *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 574-78, 59 S. Ct. 993, 83 L. Ed. 1446, 1470-72 (1939) (upholding federal statute delegating to Secretary of Agriculture authority to issue marketing orders for specified commodities, if approval of producers was secured); *Currin v. Wallace*, 306 U.S. 1, 15-18, 59 S. Ct. 379, 83 L. Ed. 441, 451-52 (1939) (upholding statute authorizing Secretary of Agriculture to regulate marketing of

tobacco if two-thirds of growers in a market requested, by referendum, such action).

V

As the [\*\*47] majority correctly notes, there are two provisions in our constitution which deal specifically with the legislative veto. These are article III, section 23, concerning executive reorganization, which provides that the legislature may veto a reorganization plan by a resolution "in joint session," n13 and article X, section 12, concerning local boundaries, which provides that the legislature may veto by resolution local boundary changes proposed by an executive branch commission. n14

n13 The full text of article III, section 23, provides:

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

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n14 Article X, section 12, provides:

A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective

forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.

The majority concludes that these two express provisions creating a legislative veto by resolution exclude the possibility of an implied legislative veto. They state:

In our view, the specificity with which the constitution deals with the legislative [\*\*784] veto powers it does grant leads logically to the conclusion that no other veto power is implied.

Adopting the majority's logic, however, it might be said [\*\*49] with equal force that the delegation of any rule-making powers to the executive by the legislature would also be unconstitutional. It might be argued that where the constitutional drafters intended to create rule-making power in the executive branch they created it expressly, with specificity, as they did in these two provisions, and that other rule-making powers created by statute cannot be implied.

In my view, the expression of some powers in these provisions does not lead to the conclusion that the constitution forbids either an expansion of rule-making powers in the executive or a denial of the legislative veto. The Alaska Constitution is silent on the question of administrative regulations. It does not say what powers may be delegated, how rules may be promulgated, or whether the legislature may retain a veto power by resolution. Presumably, these were questions that the constitutional drafters thought could best be resolved by the legislature.

There is an aspect of these two provisions, however, that is worthy of some notice. It seems significant that in the only two instances where the constitution does make a specific grant of rule-making power directly to the executive, [\*\*50] it does so with a power reserved in the legislature to veto the rule by resolution. There seems to be little logic to a position that maintains that the constitutional drafters would have sanctioned the use of the resolution here, yet demanded the higher enactment standard when the legislature delegated power on its own.

Finally, the majority argues that where a veto power by resolution exists, it must also specify time limits, the method of voting and so forth. This argument is unconvincing. Having allocated a specific rule-making power to the executive branch, it was appropriate for the constitutional drafters to define in the constitution a specific legislative check to that power. This would seem to be a virtual necessity, because any statute that the legislature might pass to circumscribe these executive powers otherwise would in all likelihood be unconstitutional. But where the legislature delegates rule-making power by statute, the constitutional drafters might well presume that the legislature could also design an appropriate system of checks and balances by statute law, as they have done here in AS 44.62.320(a).

## VI

It is also of significance that the Administrative **[\*\*51]** Procedure Act, chapter 143, SLA 1959, containing an annulment provision, was passed shortly after the drafting of the constitution at the first session of the Alaska State Legislature. Many of the delegates to the Constitutional Convention were among the members of the legislature. <sup>n15</sup> In fact, two of the more active delegates, Hellenenthal and Taylor, introduced House Bill 13 which was enacted as chapter 143, SLA 1959. <sup>n16</sup> The bill was passed by a House vote of 37 to 1, <sup>n17</sup> and by a unanimous Senate vote. <sup>n18</sup>

<sup>n15</sup> Thirteen delegates and Convention Secretary (now Judge) Thomas B. Stewart were legislators in the first session of the Alaska State Legislature.

<sup>n16</sup> 1959 House Journal 52.

<sup>n17</sup> 1959 House Journal 427.

<sup>n18</sup> 1959 Senate Journal 708.

At that time, the governor of Alaska was William A. Egan, who had presided as President over the Constitutional Convention. In signing House Bill 13 into law, Governor Egan delivered the following message to the legislature:

I am signing into law HOUSE BILL **[\*\*52]** NO. 13, the administrative procedures bill. I wish to call attention to the Attorney General's statement that Section 1, Article VI of Chapter 1 thereof may be unconstitutional in its seeking to impose new duties on local governing bodies.

**[\*785]** Because of the bill's separability clause, however, I do not consider this flaw of such seriousness that the bill should not be signed and utilized. <sup>n19</sup>

<sup>n19</sup> 1959 Senate Journal 1092.

Although the governor saw fit to point out a possible constitutional problem with article VI because it required local governing bodies to hold public hearings, no question was raised about the legislature's power to annul regulations by joint resolution. <sup>n20</sup>

<sup>n20</sup> See ch. 143 (ch. I, art. VII, § 1), SLA 1959.

What was said by the United States Supreme Court about legislation passed by Congress **[\*\*53]** shortly after the enactment of the United States Constitution is apropos here:

What, then, are the elements that enter into our decision of this case? We have first a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the Government in accord with the Constitution which had just then been adopted, and in which there were, as representatives and senators, a considerable number of those who had been members of the Convention that framed the Constitution and presented it for ratification. It was the Congress that launched the Government. It was the Congress that rounded out the Constitution itself by the proposing of the first ten amendments, which had in effect been promised to the people as a consideration for the ratification. It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the Government under it. It was a Congress whose constitutional decisions have always been regarded as they should be regarded as of the greatest weight in the interpretation of that fundamental instrument . . . This court has repeatedly laid down the principle that **[\*\*54]** a

contemporaneous legislative exposition of the Constitution, when the founders of our Government and framers of our Constitution were actively participating in public affairs acquiesced in for a long term of years, fixes the construction to be given its provisions.

*Myers v. United States*, 272 U.S. 52, 174-75, 47 S. Ct. 21, 71 L. Ed. 160, 189-90 (1926) (citation omitted).

Finally, I note that the policy of authorizing legislative annulment of regulations is becoming increasingly widespread in Alaska, in other states, and in the federal government. n21 Such a practice, affording a [\*786] practical means of supervision of the broad delegation of legislative powers required by the complexities of modern society, should not be hastily voided.

n21 Numerous other statutes enacted in recent legislative sessions in Alaska provide for some specific legislative review function. See AS 46.03.758(c) (regulations relating to oil spills); AS 46.40.080 (regulations relating to coastal zone management); AS 38.50.140 (regulations pertaining to land exchanges); AS 59.23.080(c) (regulations relating to salary increases); AS 38.06.055(a) (oil and gas dispositions). Some regulations annulled by resolution are the following: regulations relating to nursing home administrators, annulled by Senate Concurrent Resolution No. 94 in 1976; motor vehicle inspection regulations, annulled by Senate Concurrent Resolution No. 62 (HCS CSSCR), in 1976; the prize limit regulation, annulled by Legislative Resolve No. 79 (House Concurrent Resolution No. 60) in 1977; school loan regulations, annulled by Legislative Resolve No. 87 (Senate Concurrent Resolution No. 32) in 1977; and certain regulations adopted by the Department of Community and Regional Affairs,

annulled by Legislative Resolve No. 95 (Senate Concurrent Resolution No. 12) in 1977.

For a review of laws from other states relating to annulment of regulations, see Jackson, *Legislative Review of Administrative Rules and Regulations I* (July 1977) (papers prepared for Southern Legislative Conference). A chart at the end of Professor Jackson's paper indicates that the following states allow regulations to be annulled by means of resolution: Alaska, Connecticut, Idaho, Michigan, Montana, Oklahoma, Tennessee, and Vermont. A New York report gives slightly different figures, stating that fourteen of the twenty-two states with legislative review mechanisms have procedures which can "cause an agency rule to be promulgated, approved, amended, modified, or annulled." Task Force on Critical Problems, Senate Research Service, New York State Legislature, *Administrative Rules . . . What is the Legislature's Role?*, 7 (June 1976). Appellant states that eight states allow nonstatutory legislative annulment -- six by concurrent resolution, two by one-House vetoes.

The states which do not allow annulment of the regulation generally provide that a legislative committee may review regulations to determine if they are consistent with legislative intent, hold hearings on questionable regulations, notify the agencies of its doubts, and sometimes, recommend statutory action by the legislature.

For a discussion of federal laws on the subject, see note 8 *supra*.

[\*\*55]

I conclude that the legislature's annulment of the cash prize regulation, pursuant to AS 44.62.320(a), does not violate the principle of separation of powers, does not provide a means by which the legislature can enact laws without passage of a bill, and does not unconstitutionally encroach on the power of the executive.

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

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Juneau, Alaska 99801-1182  
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## MEMORANDUM

January 17, 2001

**SUBJECT:** Powers of the Administrative Regulation Review Committee  
(Work Order No. 22-LS0383)

**TO:** Representative Lesil McGuire, Chair  
Administrative Regulation Review Committee  
Attn: Jim Pound

**FROM:** Tamara Brandt Cook  
Director *TBC*

In view of the unconstitutionality of AS 44.62.320(a), you ask about what the power of the Administrative Regulation Review Committee is with respect to regulations. AS 44.62.320(a) states "The legislature, by a concurrent resolution adopted by a vote of both houses, may annul a regulation of an agency or department." This legislative veto provision was held invalid in State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980). The court found that, except where specifically permitted in the constitution itself, the legislature has no power to bind those outside of the legislature without following the procedures for enactment of law as set out in the Alaska Constitution, Art. II, secs. 13-18. The court stated "A mere resolution...is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it." (Id. at 773-774)

The Administrative Regulation Review Committee has statutory authority to review regulations and recommend legislative annulment under AS 44.62.320. (AS 24.20.400; AS 24.20.460(5)) The A.L.I.V.E. decision has made this course of action useless. However, nothing prevents the legislature from enacting a law that removes the authority of an agency to adopt a particular regulation or that conflicts with the substance of the regulation so that the regulation is superseded by statute. Obviously, if a bill is used to address the problem, all of the enactment provisions of the constitution will be complied with and the Governor will also have the power to veto the bill. The Administrative Regulation Review Committee has the power to introduce legislation through the Rules Committees under AS 24.08.060 and under AS 24.20.460(7). Thus, if after review of a particular regulation the Administrative Regulation Review Committee determines it is defective as a matter of policy, the Committee may simply introduce a bill that addresses and resolves the policy issue to the satisfaction of the members of the Committee, and then, like any bill sponsor, take appropriate action to attempt to insure enactment of bill.

**LEGAL REVIEW OF COMMITTEE  
POWERS**

Representative Lesil McGuire, Chair

January 17, 2001

Page 2

AS 24.20.445 permits the Administrative Regulation Review Committee to suspend the effectiveness of the adoption of a regulation when the legislature is not in session. In discussing the constitutionality of AS 44.62.320(a), the court in A.L.I.V.E. mentioned the power of the Committee to suspend, under AS 24.20.445, the operation of a regulation. While not specifically ruling AS 24.20.445 unconstitutional, it suggested that because of its primary holding that the legislature may affect a regulation only by law, it may not delegate to a committee the power to affect a regulation by any other method. Nor, indeed, may the legislature delegate its law-making power to a committee. (A.L.I.V.E. at 778; see also Kelly v. Hammond, Alaska Superior Court, First Judicial District at Juneau, Partial Summary Judgment, Case No. C.A. 77-4, April 19, 1978) Thus, the effect of the A.L.I.V.E. case is to strike down the Committee's power under AS 24.20.445.

In addition to the introduction of legislation that changes policy established by regulation, the Administrative Regulation Review Committee may, of course, exercise its political power and communicate its concerns about a regulation, whether adopted or proposed, to the appropriate executive agency or official.

TBC:glc  
01-025.glc

**CS FOR HOUSE BILL NO. 205( )**

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**TWENTY-FOURTH LEGISLATURE - FIRST SESSION**

**BY**

**Offered:**

**Referred:**

**Sponsor(s): REPRESENTATIVES RAMRAS, McGuire**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to review of proposed regulatory actions and regulations, the fiscal**  
2 **effect of proposed regulatory actions, and suspension of regulations."**

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

4 **\* Section 1.** AS 24.20.105(c) is amended to read:

5 (c) Under AS 44.62.190(a)(7), the notice of proposed action, along with a  
6 copy of the proposed regulation, shall be furnished electronically by the state agency  
7 to the

8 (1) Legislative Affairs Agency;

9 (2) chairs of the standing committees with jurisdiction over the subject  
10 of the proposed regulation **for review under AS 24.05.182;**

11 (3) Administrative Regulation Review Committee;

12 (4) legislative council.

13 **\* Sec. 2.** AS 24.20.445(a) is amended to read:

14 (a) **The** [WHEN THE LEGISLATURE IS NOT IN SESSION, THE]

1 Administrative Regulation Review Committee may by an affirmative vote of a  
2 majority [NOT LESS THAN TWO-THIRDS] of the members of the committee  
3 suspend the effectiveness of the adoption, [OF OR] amendment, or repeal of [TO] a  
4 regulation. The suspension is effective until the adjournment of the first regular  
5 session of the legislature that convenes after the date the notice of the suspension  
6 is filed with the lieutenant governor under (b) of this section or until the  
7 suspended regulatory action is annulled or invalidated by law, whichever is  
8 earlier [ADOPTED AFTER ADJOURNMENT OF THE PREVIOUS REGULAR  
9 SESSION OF THE LEGISLATURE, UNTIL 30 DAYS AFTER THE  
10 LEGISLATURE RECONVENES].

11 \* Sec. 3. AS 24.20.445(b) is amended to read:

12 (b) The effectiveness of an adoption, [OR] amendment, or repeal of a  
13 regulation is suspended on the date a resolution of the Administrative Regulation  
14 Review Committee resolving that the regulation be suspended is filed with the  
15 lieutenant governor. If the regulatory action [AN ADOPTION OF OR  
16 AMENDMENT TO A REGULATION] is not effective on the date a resolution is  
17 filed with the lieutenant governor, the effectiveness of the regulatory action  
18 [ADOPTION OR AMENDMENT] that is the subject of the committee's resolution is  
19 suspended from the date the regulatory action [ADOPTION OR AMENDMENT]  
20 would otherwise become effective under AS 44.62.180.

21 \* Sec. 4. AS 24.20.460 is amended to read:

22 Sec. 24.20.460. Powers and duties. (a) The Administrative Regulation  
23 Review Committee shall review all proposed regulatory actions submitted to the  
24 committee under AS 44.62.190(a)(7) and (8), and, if the committee disapproves a  
25 proposed action, give notice to the agency of the disapproval and basis for the  
26 disapproval within 35 days after receipt of the proposed action. The committee  
27 may include recommended changes with a notice of disapproval of the proposed  
28 action. If a notice of disapproval is not received by the agency within the 35-day  
29 deadline, the proposed action is deemed approved by the committee. In  
30 reviewing a proposed action the committee may consider any factor and shall  
31 consider whether

1                   **(1) the public health, safety, or welfare would be significantly**  
2                   **harmed or endangered if the action is not adopted;**

3                   **(2) the action reasonably protects the public health, safety, or**  
4                   **welfare;**

5                   **(3) another, less restrictive method could adequately protect the**  
6                   **public;**

7                   **(4) the action has the effect of directly or indirectly increasing the**  
8                   **costs of goods or services and, if so, to what degree;**

9                   **(5) any increase in cost resulting from the action is more harmful**  
10                   **than the harm that would result if the action is not adopted.**

11                   **(b) The committee** has the following powers:

12                               (1) to organize and adopt rules for the conduct of its business;

13                               (2) to hold public hearings;

14                               (3) to require all state officials and agencies of state government to  
15 give full cooperation to the committee or its staff in assembling and furnishing  
16 requested information;

17                               (4) to examine all administrative regulations, including proposed  
18 regulations, amendments, and orders of repeal, to determine if they properly  
19 implement legislative intent and to provide comments on them to the governor and  
20 state agencies;

21                               (5) [REPEALED

22                               (6)] to prepare and distribute reports, memoranda, or other materials;

23                               **(6) [(7)]** to promote needed revision or repeal of regulations that have  
24 been adopted by state departments and agencies and, when the committee determines a  
25 regulation should be repealed or amended, to introduce a bill that would enact a statute  
26 that would supersede, [OR] nullify, **or require amendment of** the regulation;

27                               **(7) [(8)]** to investigate findings that are transmitted to the committee  
28 by a standing committee in accordance with AS 24.05.182 [AND, AS  
29 APPROPRIATE, TO EITHER INTRODUCE A BILL ANNULING THE  
30 REGULATION OR EXERCISE THE COMMITTEE'S POWER TO SUSPEND THE  
31 EFFECTIVENESS OF THE REGULATION IN ACCORDANCE WITH

1 AS 24.20.445];

2 (8) review regulations submitted by the lieutenant governor under  
3 AS 44.62.320 to determine whether the regulations should be suspended under  
4 AS 24.20.445.

5 \* Sec. 5. AS 44.62.190(a) is amended to read:

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

8 (1) published in the newspaper of general circulation or trade or  
9 industry publication that the state agency prescribes and posted on the Alaska Online  
10 Public Notice System; in the discretion of the state agency giving the notice, the  
11 requirement of publication in a newspaper or trade or industry publication may be  
12 satisfied by using a combination of publication and broadcasting; when broadcasting  
13 the notice, an agency may use an abbreviated form of the notice if the broadcast  
14 provides the name and date of the newspaper or trade or industry journal and the  
15 Internet address of the Alaska Online Public Notice System where the full text of the  
16 notice can be found;

17 (2) furnished to every person who has filed a request for notice of  
18 proposed action with the state agency;

19 (3) if the agency is within a department, furnished to the commissioner  
20 of the department;

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

22 (A) furnished to a person or group of persons whom the agency  
23 believes is interested in the proposed action; and

24 (B) published in the additional form and manner the state  
25 agency prescribes;

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

29 (6) furnished by electronic format, if the state agency has the  
30 technological capability, to all incumbent State of Alaska legislators, and furnished to  
31 the Legislative Affairs Agency; if the state agency does not have the technological

1 capability to furnish the notice by electronic format to the legislators, the state agency  
2 shall furnish the notice to the legislators by other means:

3 (7) furnished by electronic format, along with a copy of the proposed  
4 regulation, amendment, or order of repeal, as required by AS 24.20.105(c), and along  
5 with the fiscal note prepared under AS 44.62.195;

6 (8) if the proposed action is not subject to AS 24.20.105(c),  
7 furnished to the Administrative Regulation Review Committee by electronic  
8 format, along with a copy of the proposed regulation, amendment, or order of  
9 repeal and a copy of the fiscal note prepared under AS 44.62.195.

10 \* Sec. 6. AS 44.62.195 is repealed and reenacted to read:

11 **Sec. 44.62.195. Fiscal notes on proposed actions.** A fiscal note shall be  
12 prepared for each proposed regulatory action submitted to the Administrative  
13 Regulation Review Committee under AS 44.62.190(a)(7) or (8). The fiscal note must  
14 include at least the following information:

15 (1) an explanation of the purpose of the action and the expected benefit  
16 of the action,

17 (2) an explanation of the costs associated with the action and why the  
18 action is considered to be the most cost effective, efficient, and feasible approach for  
19 achieving the stated purpose;

20 (3) a description of the anticipated effect of the action on market  
21 competition with respect to activities affected by the action;

22 (4) a description of the anticipated effect of the regulation on the cost  
23 of living and doing business in the geographical area that will be directly affected by  
24 the action;

25 (5) a description of the anticipated effect of the action on employment  
26 in the geographical area that will be directly affected by the action;

27 (6) the source of revenue to be used for implementing the action;

28 (7) a description of the anticipated short-term and long-term economic  
29 effect the action will have, including an analysis of which persons will bear the costs  
30 of the action and which persons will benefit directly and indirectly from the action;

31 (8) a description of the benefits and burdens of the action, qualitatively

1 and quantitatively, together with a description of the uncertainties associated with the  
2 estimate of benefits and burdens of the action, and the difficulties of comparing,  
3 qualitatively and quantitatively, dissimilar benefits and burdens.

4 \* Sec. 7. AS 24.20.445(c) and 24.20.445(d) are repealed.

Talkeetna Alaskan Lodge  
CIRI Alaska Tourism Corp.

Sharlene Berg  
Director of Hotel Lodging

Fernando Salvador  
Food & Beverage Manager - Talkeetna Alaskan Lodge

Below you will find specific comments on the proposed changes to the Alaska State Food Code. After attending one of your informative sessions some questions were cleared up but others still remain. I would like to take this time to thank Kim Stryker for her presentation. It seems that the people who attended that presentation got a lot of good information regarding the proposed Alaska Food Code.

#### Overall concerns

- ✓ We see the proposed Alaska Food Code as an incredible burden on small business especially. Granted you have taken the time to create a useful CD for the SOP's but have you taken into account that many small business owners might not have computers or access to the internet needed to fulfill all that is required for the new code. Yes, the small business owners that attended the informative sessions thought it would not be such a burden but that does not take into account the 90-95% of owners who were not there at those meetings. The people who attended were definitely more aware than the usual food business owner. I have talked to several businesses after that meeting and many were even unaware of the proposed changes. Yes, an announcement was sent out to each business but in the normal DEC newsletter mailing. Maybe more attention should have been placed on it so that you could get better feedback on what the majority of businesses feel about the proposed food code.
- ✓ The timeline for this whole process is a major concern also. At your meeting it was stated that you had hoped that the information we are looking at now would be out to businesses by last August/September. We did not receive this information until January/February which greatly shortened the input time and time for discussion between businesses. Yet you still plan on pushing this through for approval by this May/June. For a proposal with such changes don't you think it would be wise to hold off on this approval and give the original allotted time for comment and discussion? What of the comments that you receive now? What if they are the voice of only a few businesses? Should we not get the chance to review the further changes again before going to the Lt. Governor for approval? Most approval processes

take into account more than one comment period. With the widespread impact this would have on food businesses there should be several comment periods to really hash out the issues.

#### Specific Comments

- 18 AAC 31.220 (a)(5)(D) – Oppose: We feel this is an unreasonable request. Having no bare hand contact with any ready to eat foods is simply just a logistical nightmare along with a financial drain. Studies have been presented (one article was even released in the ADN on the day we had our informative session) that the risk of food contamination is not lessened by the use of gloves in the workplace. Tell me how a glove is still sterile when you have to reach into the box and pull it out with a bare hand? The minute they put it on then it is no longer a sterile glove due to hand contact. Not to mention the safety issues of workers who are not used to handling knives while wearing gloves and front line workers who would run the risk of more serious burns if hot liquids splash on their gloved hands. Lastly, the financial burden to the business to have available gloves for all workers each shift (many requiring 10-20 changes of gloves per one shift for one employee). Why not concentrate more on better hand-washing techniques and go at the problem from the root?
- 18 ACC 31.240 (b)(11) – Clarification needed: After attending the session this topic was cleared up for most individuals in the fact that what is recommended is already done by most restaurants. (A) is where the language needed to be clarified as if you read the code it seems that (A) is a constant and then you have the choice between (B) or (C). If it was written as (A) or (B) or (C), which is what was explained to us at the session, then it will be fine.
- 18 ACC 31.325 (a)(2) - Oppose: We believe it should be up to the business to choose who will administer the self-assessments and that it should not be defaulted to the "person in charge" for that shift
- 18 ACC 31.330 (a) – Oppose: We oppose the food workers card for several reasons. We question the value of a "20 question test" to determine who receives the card. Shouldn't we put more effort in teaching the correct processes? It seems like this is just a way to get more \$\$\$ into the coffers of the state. The fee is also a burden to both the food worker and the business. Not to mention the logistics of getting the test administered if the business does not have internet etc.

And the fact that the test has not even been written yet and the logistics have not been thought through. It seems like we are pushing this issue through a little to fast.

- 18 ACC 31.900 (f)(1) – Oppose: We oppose the posting of a complaint sign and the most recent inspection report for several reasons. One being, what checks have you instated to be sure that other competing businesses are not using this to their advantage with slanderous claims? The next being, don't you think it is a little overboard to post a number to call in our already overly litigious society today? The average consumer already finds the necessary means for formal complaint without the number staring back at them the entire time during their dining experience. And if we are going to go this far then we should definitely post signs informing the consumer that if they get sick immediately after their meal, that more than likely it is from their previous meal and not the one they just had. Has anyone thought about aesthetics and ambiance lately?
- 18 ACC 31.300 – Oppose: We question the legality of asking a prospective employee about their personal health background. We also question the effectiveness of this as it is a voluntary decision on the employee's part and so therefore feel it would be hard to implement and enforce.
- 18 ACC 31.060 – Oppose: We question the motive of warning labeling of potentially harmful seafood. Pretty soon our menus will start to look like cigarette packaging with all the warnings. Every piece of food is potentially harmful if it is not handled properly. People go to restaurants knowing workers are trained so we do not see the effectiveness of this secondary labeling. It is almost coming off like it is a scare tactic. Do people really want to see this on menus?

Donegan and Associates  
10195 Nantucket Loop  
Anchorage, Alaska 99507

March 15, 2005

Ms. Kristin Ryan  
Director  
Division of Environmental Health  
Department of Environmental Conservation  
555 Cordova St.  
Anchorage, Alaska 99501

Dear Ms. Ryan:

I appreciate the opportunity to comment on the proposed revisions to Title 18 AAC, Chapter 31.

I think others, such as the Food Processors Association (FPA) have done an excellent job of providing detailed comments regarding the proposed changes, therefore my comments are going to be of a more general nature.

**Reasons to Revise Regulations**

The revision of any regulations invariably results in additional expenditures and confusion to the regulated community during the initial implementation period. During the implementation phase, questions regarding interpretation and enforcement arise and further confuse and complicate the adjustment to new rules.

Therefore, regulations should only be revised when they either streamline the existing regulatory language or address actual "problem" areas, not currently addressed.

The proposed revisions to Chapter 31 do not pass either test. They do not streamline or simplify existing regulatory language, and they do not address any area of operations not adequately covered by existing regulations.

**Need for a Study**

My main concern with respect to the newly proposed change to regulations is that they also encompass food services provided at nonpublic seafood processing establishments. Personally, I think this is unnecessary and may actually be counter-productive to the Division's greater goals.

Alternative to working by assumption, I propose that a deliberate and reasonable study be undertaken in order to provide basis, clarity, and defensibility to the proposed regulatory revisions. Instead of working on assumptions, a study could definitively answer fundamental questions regarding what (if any) problem the revisions are designed to address, whether they would address these problems effectively, and identify associated costs.

I propose a study that focuses on seafood operations, but a broader study may be warranted to include public food service and restaurants.

### **Study Elements**

1. History of food borne illness outbreaks.

What is the history of food borne illness outbreaks at seafood processing plants in Alaska during the last ten years? This is a threshold question to determine if the existing regulations are adequate.

2. Current inspection levels by operation type.

What is the historical inspection level (per day of operation) for seafood processor's food service operations versus other food service operations such as restaurants?

3. Is there a reduced risk for seafood food service operations at seafood plants versus restaurants?

What are the differences in risk between the operations of a seafood processor's food service operations and those of a public restaurant? I maintain that seafood processor's operations are fundamentally different than those of a restaurant and that these differences significantly reduce the risk of food borne illnesses at seafood plants. The primary difference is that the seafood processor has a set population to feed and that meals are prepared specifically for that population and then consumed. There is little to no storage of food between or after meals. I think that this is a significant difference between restaurants and seafood processors that inherently makes the seafood processors food service operations substantially safer.

4. What information is there that shows that the proposed regulations will increase food safety over existing requirements?

If the proposed study confirms that there is an existing problem with food borne illness in seafood processing plants, and that the level of risk is the same as a public restaurant; are the proposed regulations an effective way to increase safety?

Is there any evidence to indicate that the proposed revisions will decrease the level of food borne illness outbreaks at seafood plants? If there is no history of food illness at seafood plants, what will the Department use as a measure of program justification and effectiveness?

5. What are the costs to the Division in terms of money and productivity? How much will it cost the division to implement the proposed revisions, both in time and decreased productivity? Based on my experience, inspections that include record reviews versus in-plant inspections, take dramatically longer.

Food service inspections at seafood plants are conducted by professional seafood inspectors during the course of their seafood processor inspection. This is an efficient use of state resources. Will the time spent inspecting the galley increase under the proposed revisions? Will increased time making food service inspection time result in decreased overall rate of seafood processor inspections in the state?

6. Compliance at remote seasonal operations.

Many seafood processors operate in remote areas for brief periods of time. How difficult will it be for them to comply with the new requirements?

7. What are the costs to the processor associated with the revisions?

What are the costs to the industry in implementing these changes? There should be some review of the additional expenses that will have to be borne by the operator in complying with the proposed revisions to determine if they are cost-effective.

I believe that only when these questions are answered through a focused study can the Department, the public, and the regulated community come to an informed decision about whether there is sufficient justification to revise the existing regulations... and further, if the proposed revisions actually reflect what's the most reasonable and economical way to remedy any revealed deficiencies. .

Sincerely,

Douglas Donegan

# FPA



FOOD PRODUCTS  
ASSOCIATION

1600 South Jackson Street  
Seattle, WA 98144  
206-323-3540  
www.fpa-food.org

March 15, 2005

Ms. Kristin Ryan  
Director  
Division of Environmental Health  
Department of Environmental Conservation  
555 Cordova St.  
Anchorage, AK 99501  
Via email: [Kristin.Ryan@dec.state.ak.us](mailto:Kristin.Ryan@dec.state.ak.us)

Dear Kristin-

The Food Products Association (FPA, formerly NFPA) appreciates the opportunity to comment on the proposed changes to Title 18 of the Alaska Administrative Code, dealing with Chapter 31, the Alaska Food Code.

The Food Products Association is the voice of the \$500 billion food processing industry on scientific and public policy issues involving food safety, food security, nutrition, technical and regulatory matters and consumer affairs. FPA's scientific centers and international office (Bangkok, Thailand), its scientists and professional staff represent food industry interests on government and regulatory affairs and provide research, technical assistance, education, communications and crisis management support for the Association's U.S. and international members. FPA members produce processed and packaged fruit, vegetable, and grain products, meat, poultry, and seafood products, snacks, drinks and juices, or provide supplies and services to food manufacturers.

FPA recognizes the Department's efforts to ensure adequate protection of consumer health through revision of the Alaska Food Code requirements in 18 AAC 31. We agree with the utility and concept of conformity with FDA's Model Food Code that facilitates consistency between States and with federal guidelines. We also recognize the scope of the regulation must encompass a broad variety of business and service entities, and therefore should be flexible enough to accommodate different levels of regulatory oversight depending on the nature of the regulated business.

We feel the following comments apply guidance to the proposed revision that will achieve the Departments food safety objectives in the most efficient and practical manner. The specific comments are in chronological order by section, as referenced in the proposed revision of the regulation. Tracking marks are left intentionally to facilitate identification of specific language changes we are recommending. Supplementary explanation intended to provide rationale for the comments are italicized. General comments are included at the end of the document.

WASHINGTON, DC

DUBLIN, CA

SEATTLE, WA

**18 AAC 31.012 (p 5)**

Add subsection (13) ( C) to read: (C) the food service operation of a seafood processing facility permitted under 18 AAC 34, except for fees required by 18 AAC 13.050, Certification of a food protection manager required by 18 AAC 31.320, and food worker cards required by 18 AAC 31.330.

**18 AAC 31.020 (p 10)**

Subsection (f)(2)(B) – Delete the last sentence, so that the subsection reads; “(B) a seafood processor permitted under 18 AAC 34; this exception also applies to a seafood processor permitted under 18 AAC 34 that, in addition to processing seafood, processes non-seafood products at the permitted facility using the same types of processes for the non-seafood products as are permitted under 18 AAC 34 for the seafood products.”

**18 AAC 31.030 (p13)**

Subsection ( c)(2) – Replace the “National Food Processors Association”, with the “Food Products Association”.

**18 AC 31.230 (p 31)**

Subsection (a)(7) – Recommend change to read; “Stored frozen foods shall be maintained frozen.”

*For consistency with the Model Food Code.*

**18 AC 31.320 (p 41)**

Subsection (a) – Recommend change to read; “The operator of a food establishment that serves and prepares unwrapped or unpackaged food, except for a bar or tavern or limited food service, must have at least one certified food protection manager who is ~~involved in the daily~~ responsible for the operations of the establishment.”

*The requirement for a “Person in Charge” sufficiently covers the requirement for direct daily supervision at each establishment.*

**18 AAC 31.330 (p 42)**

Subsection (a) – Recommend change to read; “The operator of a food service establishment shall ensure that each food worker, as defined at 18 AAC 31.990(50), employed in the establishment, within 30 days after the date of hire, holds a valid food worker card issued by the department.

**18 AAC 31.335 (p 45)**

Subsection (d) – Recommend change to read; “The operator of a food establishment shall provide a copy of this chapter and the standard operating procedures described in this section at the food establishment in an area freely and easily accessible to employees for review. In addition, the operator of a food establishment shall ensure that each ~~certified food protection manager or~~ person in charge is designated as responsible for implementing the standard operating procedure.”

**18 AAC 31.400 (p 45)**

Subsection (a)(C) – Recommend change to read; “(C) finished to have a smooth and easily cleanable surface; **a surface that is subject to scratching and scoring, such as a cutting block or board, must be resurfaced or discarded if the surface can no longer be cleaned and sanitized effectively, or discarded if the surface is not capable of being resurfaced;** and”

**18 AAC 31.410 (p 53)**

Subsection (c)(2) – Recommend change to read; “at least one three-compartment sink is installed in the manual warewashing area; the operator of a bar or tavern shall ensure that a fourth sink compartment is installed in addition to those used for washing, rinsing, and sanitizing. the fourth sink may be used for dumping drinks and handwashing.”

**18 AAC 31.515 (p 63)**

Subsection (c)(7) – Recommend review of this subsection. Proposed language appears to indicate that plumbing configuration would allow for the warewashing drain to be connected directly to a sewer line without an interceding trap.

**18 AAC 31.900 (p 81)**

Subsection (b)(3) – Recommend change to read ; “~~examine records relating to the~~ establishment’s standard operating procedures, food manager certification, food worker cards, and food and supplies purchased, received, or used;”

*The Department has assured that additional recordkeeping as related to SOPs would not be required, or accessed in the course of regulatory inspection. The seafood processing industry has been advised that evaluation of compliance with SOPs would be based on review of self assessments, as required by new section 18 AAC 31.420.*

**18 AAC 31.900 (p 82)**

Subsection (f)(2) – Delete this subsection, it is already required by proposed 18 AAC 31.335(d).

**18 AAC 31.915 (p 85)**

Delete this section.

*The Department can levy sufficient regulatory enforcement action through the mechanisms of permit suspension and notice of closures. Added civil fines do nothing to enhance implementation or correction of violations, and may actually inhibit compliance efforts for small, marginally funded establishments.*

**General Comments:**

FPA again commends the Department for their efforts to enhance public health through revision of the Alaska Food Code. Implementing these revisions is a monumental task that will require prioritizing Department resources in the most effective and efficient manner.

Seafood processors complying with 18 AAC 34, have an inherent management system that employs food safety professionals knowledgeable in safe food handling and production. This should be considered as the department determines where inspection and enforcement efforts are focused, and is the basis for our exemption request under 18 AAC 31.012. While management oversight of establishments is sufficient, we agree with the Department that there is value in training individual food service workers and have included the training requirements as an exception to our exemption request.

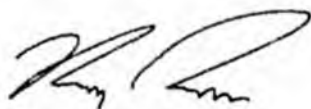
It should also be noted that food service provided at seafood processing operations is unique with regard to preparation, meal disbursement, and management of preparation quantity. This results in large quantity, short prep time meals that are consumed within a time window that does not provide opportunity for food illness pathogens to proliferate. Quantity of prepared food is more closely estimated, as the number of consumers is known which results in minimized food waste and general discard of any previously prepared foods, also minimizing the potential for food related illness.

We are confident that public health is well protected by the food service activities supporting seafood processing operations, and we are not aware of any significant food borne illness outbreaks resulting from consumption of food from these facilities. As mentioned above, we feel this is the result of management by trained food safety professionals, and systems currently in place that mitigate risk factors associated with food borne illnesses. Inspection of these compliant operations would leave diminishing resources to focus on operations that may require additional guidance to ensure the public health mandate is optimally addressed. It would also be counter to the current Administrations efforts to reduce regulatory activity in areas where the regulatory objective is already well established.

We strongly encourage the Department to consider these comments, particularly the exemption request, and welcome any opportunity to further demonstrate the effectiveness of food service programs currently in place in Alaska's seafood processing operations.

Please don't hesitate to contact me if you have any questions regarding these comments. We would also be glad to meet with Department staff to discuss the comments and assist in further refinement of the proposed revisions to 18 AAC 31..

Respectfully,



Kenny Lum  
Vice President and Center Director  
Food Products Association, Center for Northwest Seafood

March 15, 2005

Ms. Kristin Ryan  
Director  
Division of Environmental Health  
Department of Environmental Conservation  
555 Cordova St.  
Anchorage, Alaska 99501

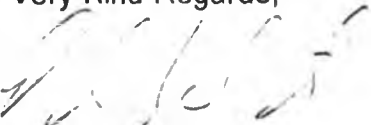
Dear Ms. Ryan:

I appreciate the opportunity to comment on the proposed revisions to Title 18 AAC, Chapter 31.

Being a member of the Food Products Association, FPA has provided comments on our behalf but I wanted to take this opportunity to share with you some additional comments that I had.

I hope you find these comments useful.

Very Kind Regards,



Elizabeth Best

Proposed in AFC	ITEM	COMMENT/SUGGESTION
31.012	There is no form of recognition for food establishments who may be using the FDA food code, CDC food code, HACCP or other programs in place of the proposed AFC.	Include a statement of recognition for other food code programs similar to the proposed AFC for food establishments.
31.060(c)(2)	The reference to labeling adoption of FDA 21 CFR 101.5 specifies "name and address of processor or distributor".	Amend reference to include all labeling options as listed in FDA 21 CFR 101.5.
31.200(b)(4)(B)(iii)	Added recordkeeping requirements section but did not remove 90 day condition of which it also states in referenced section 31.335(b)	Either remove 90 day condition in 31.200 or remove reference to other section as 31.335 (redundant).
Could not find	The comparison document for AFC dated 1/12/2005 p6 references 31.220(a)(2)(iv). Unable to locate this section in the draft. (Existing AFC 31.220(a)(5))	Please indicate proper section in the proposed AFC draft.
31.230(a)(5)(E)	Underlined as new.	Not new. Text is from section 230(a)(12)(A) to (F).
320(d)	In 320(a) it states that the CPPM is involved in daily operations, but then in 320(d) it states that this would only be required under certain conditions.	Which is correct? If both are, please explain.
31.335(a)	The proposed APC requires that a food establishment develop, implement, maintain, and make available to the department written standard operating procedures.	What evidence exists that demonstrates that by requiring SOP's, the risk of foodborne disease will be eliminated or reduced to acceptable levels? Please provide not only historical but scientific support for this claim.
31.335	SOP requirements.	What evidence exists that demonstrates that by including the requirements and measures as outlined in the SOP, foodborne disease will be eliminated or reduced to acceptable levels? Please provide historical as well as scientific support.
31.340	925(a)(3)(C) has been repealed. 925 was the certificate of recognition program of which a food establishment could do more requirements to receive a higher level of approval.	Do not repeal. DEC should continue to provide a recognition program for those food establishments who wish to receive a higher level of certification. Isn't this an AS?

Proposed in AFC	ITEM	COMMENT/SUGGESTION
31.340	Self assessment requirements.	What evidence exists that demonstrates that including self assessment requirements will eliminate or reduce a foodborne disease from occurring? Please provide historical as well as scientific support.
31.410(a)(3)(D)	Specifies slopped drainage requirements for equipment.	31.515(3)(B) already specifies that equipment compartments be self draining (this would include slopped) or complete evacuation by mechanical means.
900(f)(1)	Indicates that there is no equivalent in existing AFC regarding "posting a copy of most recent inspection report".	31.900(k) of existing AFC does already require posting a copy of the most recent inspection report.
900(h)	Specifies that operator may request a consultative inspection for a fee of \$200 and if any critical violations are noted, they are not subject to enforcement action under 31.905 but that the department may conduct another inspection to verify.	Section needs to clarify how much time a firm would have to correct a critical violation before re-inspection under this program. Also would need to establish benefits for using a consultative inspection, such as: reduced enforcement action under 31.905, nominal reduction in fine if re-inspection still indicated some violations but these were corrected, and some type of approval list for those firms who received a consultative inspection with no findings as a form of recognition for them.

Comments regarding the review process:

The underlined text, presented in the "NOTE TO READER" indicates that all new material will be underlined. This did not occur in new sections making it very difficult to review changes accurately.

The proposed sections that have been 'repealed and readopted' indicate old as well as "new text". In the statement under "NOTE TO READER" it indicates that only new text will be shown which made the review process difficult.

**DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION**



**18 AAC 31**

**Alaska Food Code**

**Public Review Draft  
January 12, 2005**

**Comment periods ends March 15, 2005**

**Frank Murkowski  
Governor**

**Kurt Fredriksson  
Acting Commissioner**

**NOTE TO READER:** Underlined text is proposed new material.  
[BRACKETED, ALL-CAPPED TEXT] is material proposed to be deleted.  
When text has been "repealed and readopted," only the new text is shown.

### Chapter 31. Alaska Food Code.

#### Article

1. General Operating and Permit Requirements (18 AAC 31.010 - 18 AAC 31.070)
2. Food Care (18 AAC 31.200 – **18 AAC 31.250** [18 AAC 31.240])
3. **Management and** Personnel (18 AAC 31.300 – **18 AAC 31.340** [18 AAC 31.315])
4. Equipment and Utensils (18 AAC 31.400 - 18 AAC 31.425)
5. Sanitation and Physical Facilities (18 AAC 31.500 - 18 AAC 31.575)
6. Temporary Food Service, Limited Food Service, Mobile Food Units, and Vending Machines  
(18 AAC 31.600 - 18 AAC 31.630)
7. Food Processing (18 AAC 31.700 - 18 AAC 31.770)
8. Markets (18 AAC 31.800 – 18 AAC 31.820)
9. Compliance Procedures and General Provisions (18 AAC 31.900 - 18 AAC 31.990)

**Editor's Notes:** The regulations in this chapter, effective May 18, 1997, and distributed in Register 142, have been renumbered and reorganized. The history notes at the end of each section do not reflect the history of that section as it appeared before May 18, 1997, nor do the article or section titles or numbers reflect previous titles or numbering. Previous amendments to these regulations may be reviewed at the Office of the Lieutenant Governor. Refer to regulations in and amendments to 7 AAC 25 for requirements in effect before the issuance of Executive Order No. 51 which transferred functions from the Department of Health and Social Services to the Department of Environmental Conservation. Previous amendments to some of the regulations in this chapter occurred before those regulations were transferred from 18 AAC 30.

**Article 1. General Operating and Permit Requirements.****Section**

- 10. Purpose and applicability
- 11. Requirements adopted by reference
- 12. Exempt activities and facilities
- 14. Exemption by application
- 15. Confidentiality of trade secrets
- 20. Permit and registration requirements
- 30. Permit application and renewal [REQUIREMENTS]
- 40. Pre-construction and operation plan [PLAN] review and pre-operation inspection
- 50. Fees
- 55. Laboratory fees
- 60. Labeling, [AND] placarding, and consumer advisory
- 70. School food establishments

18 AAC 31.011 is repealed and readopted to read:

**18 AAC 31.011. Requirements adopted by reference.** (a) The following federal requirements are adopted by reference:

(1) the definition of "meat," as set out in 9 C.F.R. 301.2 (Definitions), revised as of January 1, 2004;

(2) the definition of "poultry," as set out in 9 C.F.R. 381.1(b) (Definitions), revised as of January 1, 2004;

(3) 9 C.F.R. 317.2(l) (Labels: Definition; Required Features: Safe Handling Instructions), revised as of January 1, 2004;

(4) 9 C.F.R. 381.125(b) (Special Handling Label Requirements: Safe Handling Instructions), revised as of January 1, 2004;

(5) 21 C.F.R. 101.5 (Food; Name and Place of Business of Manufacturer, Packer, or Distributor), revised as of April 1, 2004;

(6) 21 C.F.R. 101.17(g)(7) (Food Labeling Warning and Notice Statements: Juices That Have Not Been Specifically Processed to Prevent, Reduce, or Eliminate the Presence of Pathogens), revised as of April 1, 2004;

(7) 21 C.F.R. 101.22(b), (c), (k)(2) (Food Labeling: Foods; Labeling of Spices, Flavorings, Colorings, and Chemical Preservatives), revised as of April 1, 2004;

(8) 21 C.F.R. 101.100(a)(2) (Food Labeling: Exemptions from Food Labeling Requirements, Food: Exemptions From Labeling), revised as of April 1, 2004;

(9) 21 C.F.R. 113 (Thermally Processed Low-Acid Foods Packaged in

Hermetically Sealed Containers), revised as of April 1, 2004;

(10) 21 C.F.R. 114 (Acidified Foods), revised as of April 1, 2004;

(11) 21 C.F.R. 130 - 21 C.F.R. 164, revised as of April 1, 2004;

(12) 21 C.F.R. 165.110(a) (Bottled Water: Identity), revised as of April 1, 2004;

(13) 21 C.F.R. 165.110(c) (Bottled Water: Label Statements), revised as of April 1, 2004;

(14) 21 C.F.R. 166 – 21 C.F.R. 186, revised as of April 1, 2004;

(15) 40 C.F.R. 180 (Tolerances and Exemptions from Tolerances for Pesticide Chemicals in Food), revised as of July 1, 2004.

(b) The following publications are adopted by reference:

(1) *Sanitarian & Health Official Guide, Portable Restroom Requirements at Special Events & Crowd Gatherings, Determination of Portable Sanitation Requirements at Large Public Events*, revised as of April 14, 1997, Center for Business and Industrial Studies, University of Missouri-St. Louis;

(2) *Hazard Analysis and Critical Control Point Principles and Application Guidelines*, revised as of August 14, 1997, National Advisory Committee on Microbiological Criteria for Foods;

(3) *International Mechanical Code (I.M.C.)*, 2003 edition, chapter 5, sections 506-509, International Code Council;

(4) *ANSI/NSF International Standard 25 – 2002, Vending Machines for Food and Beverages*, revised as of December 26, 2002, National Sanitation Foundation (NSF);

(5) *Standard for the Sanitary Design and Construction of Food and Beverage Vending Machines* (2003), National Automatic Merchandising Association (NAMA);

(6) *The Seafood List, FDA's Guide to Acceptable Market Names for Seafood Sold in Interstate Commerce 1993*, Food and Drug Administration;

(7) *Standard Methods for the Examination of Water and Wastewater*, 20th edition, January 1, 1999, American Public Health Association, American Water Works Association, & Water Environment Federation. (Eff. 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority:	AS 17.20.005	AS 17.20.040	AS 17.20.290
	AS 17.20.010	AS 17.20.072	AS 44.46.020
	AS 17.20.020	AS 17.20.180	

Editor's Note: The documents adopted by reference in 18 AAC 31.011 may be reviewed at the department's Anchorage, Fairbanks, and Juneau offices. *The Hazard Analysis and Critical Control Point Principals and Application Guidelines* are available from the National Advisory Committee on Microbiological Criteria for Foods at that organization's website: [www.fsis.usda.gov/OPHS/nacmcf/past\\_reports.htm](http://www.fsis.usda.gov/OPHS/nacmcf/past_reports.htm). *Vending Machines for Food and Beverages* may be obtained from NSF International, 75 Plymouth Road, P.O. Box 130140, Ann Arbor, MI 48113-0140, phone (734) 769-8010 or at that organization's website: [www.nsf.org](http://www.nsf.org). *The Standard for the Sanitary Design and Construction of Food and Beverage Vending Machines* may be obtained from the National Automatic Merchandising Association, 20 N. Wacker Drive, Suite 3500, Chicago, IL 60606-3102, phone (312) 346-0370 or at that organization's website: [www.vending.org](http://www.vending.org). *The Sanitarian & Health Official Guide, Portable Restroom Requirements at Special Events & Crowd Gatherings, Determination of Portable Sanitation Requirements at Large Public Events* may be obtained from The Center for Business and Industrial Studies, University of Missouri, 800 Natural Bridge Rd., St. Louis, Missouri 63121-4499; phone: (314) 516-6108. *The Seafood List, FDA's Guide to Acceptable Market Names for Seafood Sold in Interstate Commerce 1993* is available from the department. *Standard Methods for the Examination of Water and Wastewater* may be ordered from the American Public Health Association, Publication Sales, Department 5037 801 I Street N.W., Washington, DC 20001-3710; phone (202) 777-2742 or at that organization's website: [www.apha.org](http://www.apha.org). *The International Mechanical Code* may be ordered from the International Conference of Building Officials (ICBO), 5360 Workman Mill Road, Whittier, CA 90601-2298; phone (800) 284-4406 or (562) 699-0541.

18 AAC 31.012(1), (6), (13), (20)(A), and (22) are amended to read:

**18 AAC 31.012. Exempt activities and facilities.** Except as otherwise provided in this section, the following activities and facilities are not subject to this chapter, but are subject to the prohibitions set out in AS 17.20.290:

(1) custom processing of an individual's sport-caught seafood [FISH] or game meat;

(6) the preparation and serving of [NONPOTENTIALLY HAZARDOUS] snacks at a child care facility if the child care facility is required to have a license from the Department of Education and Early Development under AS 14.37 and 4 AAC 62;

(13) the preparation and serving of food at

(A) a [A] portable field camp that is set up on a transient basis for no more than 14 days at a single location to support a single group on an overnight expedition or recreational activity [ , SUCH AS BACKPACKING, HORSEBACK RIDING, HUNTING, FISHING, RAFTING, SKIING, OR DOG MUSHING]; for purposes of this section, a portable field camp is at a new location if it is moved two miles or more from the original location; or

(B) an auxiliary or satellite structure provided in conjunction with a permitted food establishment that is used for fishing, hunting, or another recreational activity where food is provided to the persons using the structure;

.....

(20) a public open house that serves commercially prepared, packaged, and ready-to-eat appetizers for self-service by the attendees of the open house; an appetizer that contains a potentially hazardous food must be maintained

(A) [EXCEPT AS SPECIFIED IN 18 AAC 31.410(k),] at 41° F or below, if the appetizer is a cold appetizer; or

(B) at 140° F or above, if the appetizer is a hot appetizer;

.....

(22) a temporary food service lasting one day or less if

(A) foods that are commercially prepared, packaged, [AND] ready-to-eat, or are pre-cooked frozen items [FOODS] requiring no more than limited preparation such as reheating and minimal handling, such as assembly, are served;

(B) a handwashing facility is provided for use by employees as described in 18 AAC 31.600(f)(6); and

(C) hot foods are maintained at or above 140° F and cold foods are maintained at 41° F or less[, EXCEPT AS SPECIFIED IN 18 AAC 31.410(k)]. (Eff. 12/19/99, Register 152; amended 6/28/2001, Register 158; amended \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority:	AS 17.20.005	AS 17.20.020	AS 17.20.290
	AS 17.20.010	AS 17.20.180	AS 44.46.020

18 AAC 31.014 is amended to read:

**18 AAC 31.014. Exemption by application.** (a) Upon receiving an application under (b) of this section, the department will exempt a food establishment specified in this subsection from all of the requirements of this chapter, except for fees required by 18 AAC 31.050, food worker card requirements required by 18 AAC 31.330, standard operating procedures requirements required by 18 AAC 31.335, and the self-assessment requirements required by 18 AAC 31.340, if the department determines that an exemption satisfies the requirements of (c) of this section. A food service that has a maximum capacity of 12 that serves 12 or fewer individuals a day may seek an exemption under this subsection. [HOWEVER, A FOOD ESTABLISHMENT MAY NOT SEEK AN EXEMPTION FROM A FEE REQUIRED BY 18 AAC 31.050(h). THE FOLLOWING FOOD ESTABLISHMENTS MAY SEEK AN EXEMPTION UNDER THIS SUBSECTION:

(1) AN ADULT RESIDENTIAL CARE FACILITY, AN INSTITUTION, A LABOR CAMP, OR A SIMILAR FACILITY SERVING 10 OR FEWER RESIDENTS;

(2) A MEAL PROGRAM SERVING 10 OR FEWER SENIOR CITIZENS;

(3) A FOOD SERVICE WITH 10 OR FEWER SEATS THAT SERVES 10 OR FEWER INDIVIDUALS EACH DAY.]

(b) **An applicant** [A PERSON] who seeks an exemption described **under** [in] (a) of this section shall apply to the department, using a form provided by the department. The application must

(1) include

**(A) the application review fee required by 18 AAC 31.050(h); [AND]**

**(B) a plumbing schematic that depicts hot and cold water lines, wastewater lines, floor drains, grease traps and fixtures provided to clean and sanitize equipment;**

**(C) a copy of the standard operating procedures required by 18 AAC 31.335;**

**(D) a copy of a self-assessment form required by 18 AAC 31.340; and**

**(E) a copy of each food worker card required by 18 AAC 31.330;**

(2) describe the establishment's

(A) type, size, layout, and location;

(B) types of meals, preparation methods, and source of food;

(C) equipment used to **cook food and** maintain product temperature **during transportation, preparation, display, and service;**

(D) potable water supply; and

(E) method of wastewater disposal.

(c) The department will issue an exemption described **under** [in] (a) of this section, if the department determines that the exemption serves the interests of public health and consumer protection, and if the information provided under (b) of this section indicates that

(1) food is from an approved source;

(2) food will be served immediately after preparation;

(3) equipment supports the type of food and method of **transportation, preparation, display, and service;**

(4) **fixtures or other approved means are provided for handwashing.**

**cleaning, and sanitizing equipment and utensils, and cleaning the establishment; [WATER IS FROM A PUBLIC WATER SYSTEM THAT THE DEPARTMENT HAS APPROVED UNDER 18 AAC 80; AND]**

(5) **water from an approved public water system, if applicable;**

(6) wastewater is disposed of in an **approved** manner [APPROVED BY THE DEPARTMENT] under 18 AAC 72.

(d) Upon receiving an application under (e) of this section, the department will exempt a business that manufactures ice for onsite retail sale and that is not a food establishment from all of the requirements of this chapter **except for fees required in 18 AAC 31.050, food worker card requirements required by 18 AAC 31.330, standard operating procedure requirements required by 18 AAC 31.335, and self-assessment requirements required by 18 AAC 31.340**, if the department determines that the exemption satisfies the requirements of (f) of this section. [HOWEVER, A BUSINESS DESCRIBED IN THIS SUBSECTION MAY NOT SEEK AN EXEMPTION FROM A FEE REQUIRED BY 18 AAC 31.050.]

(e) A person who seeks an exemption described in (d) of this section shall apply to the department, using a form provided by the department. The application must

(1) include the application review fee required by 18 AAC 31.050(h);

(2) include a copy of a label that complies with 18 AAC 31.060(c);

(3) describe the

(A) room used to manufacture and bag ice;

(B) equipment used to clean and sanitize scoops and other utensils;

(C) location and type of toilet and handwashing fixtures;

(D) storage facilities for utensils and single-service bags;

(E) potable water supply; and

(F) wastewater disposal system; **and**

**(4) include a copy of**

**(A) the standard operating procedures required by 18 AAC 31.335;**

**(B) a self-assessment form required by 18 AAC 31.340; and**

**(C) each food worker card required by 18 AAC 31.330.**

(f) The department will issue an exemption described in (d) of this section if the

department determines that the exemption serves the interests of public health and consumer protection and if the information provided under (e) of this section demonstrates that

(1) ice manufacturing is separated by space or is closed off from any source of contamination;

(2) a sink with two or more compartments is provided to wash, rinse, and sanitize utensils at least once a day;

(3) adequate toilet and handwashing facilities are provided;

(4) utensils and single-service bags are protected from contamination during storage;

(5) water is from a public water system that is [THE DEPARTMENT HAS] approved under 18 AAC 80, if applicable; and

(6) wastewater is disposed of in a manner approved [BY THE DEPARTMENT] under 18 AAC 72.

(g) An exemption issued under this section remains valid unless a significant change occurs in any element of the operation described in (b)(2) or (e)(2)-(3) of this section, as applicable, or unless a change in the law occurs that affects the activity exempted. If a significant change occurs in an element of the operation or a change in the law occurs that affects the activity exempted, a new exemption application must be submitted for department review and must include the fee required by 18 AAC 31.050.

(h) An exemption issued under this section does not relieve the operator from complying with other applicable laws, including AS 17.20 (Food, Drug, and Cosmetic Act), AS 18.60.705 (State Plumbing Code), 18 AAC 30, 18 AAC 32, 18 AAC 34, 18 AAC 50, 18 AAC 60, 18 AAC 72, and 18 AAC 80. (Eff. 12/19/99, Register 152; am 6/28/2001, Register 158)

Authority:	AS 17.20.005	AS 17.20.020	AS 17.20.290
	AS 17.20.010	AS 17.20.180	AS 44.46.020

18 AAC 31.020 is repealed and readopted to read:

**18 AAC 31.020. Permit requirements.** (a) Except as provided by 18 AAC 31.014 or 18 AAC 31.070, a person may not operate a food establishment subject to this chapter, unless

(1) the department has approved plans submitted under 18 AAC 31.040;

(2) that person has paid each applicable fee required by 18 AAC 31.050; and

(3) the department has issued a permit under this section for each applicable separate operation.

(b) A permit issued under this section

- (1) is valid for the calendar year in which the permit is issued;
- (2) may not be transferred; and
- (3) must be posted conspicuously in public view in the establishment.

(c) The operator of a bar or tavern shall obtain a food service permit under this chapter for service of beverages even if other food is not served.

(d) The department will not issue a food establishment permit to a kitchen in an occupied residential dwelling, except for a kitchen at a

- (1) restricted food service transient occupancy establishment;
- (2) child care facility, if the child care facility has a license from the Department of Health and Social Services as required under AS 47.35 and 7 AAC 50; or
- (3) an assisted living facility if that facility has a license from the Department of Health and Social Services as required under AS 47.33 and 7 AAC 75.

(e) Except as otherwise provided in this section, each separate operation within a food establishment must have a separate permit. Operations that require a separate permit include the following:

- (1) a commissary;
- (2) each operation if two or more operations share some facilities, such as warewashing, refrigerator, freezer, or storage areas, but the preparation or processing area and the display or service area of each operation are segregated by distance or time; segregation by time occurs if different operations use the same areas at different times of the day.

(f) A separate

(1) food service permit is not required for

(A) a food establishment permitted under this chapter if

(i) customers serve themselves with individual prepackaged foods that may be heated; and

(ii) single-service tableware and condiments are provided;

(B) service of food at an auxiliary site, such as a banquet room, snack room at a labor camp, additional service area, or pushcart, if

(i) the auxiliary site is located on the same premises as the permitted food service and has the same operator as the permitted food service;

and

(ii) food preparation occurs at the permitted food service;

(C) a food promotion or demonstration station at a market permitted under this chapter if

(i) the market has a permitted food service within the market; and

(ii) all preparation occurs at the permitted food service, except for final cooking or portioning at the station;

(D) a mobile food unit permitted under this chapter that is operating as a temporary food service;

(E) operation by a food service as a caterer outside the establishment, if the food service is permitted under this chapter for a different operation;

(F) a beverage-dispensing portion of a bar or tavern with

(i) a limited food service at the bar or tavern; or

(ii) an additional food service at the bar or tavern;

(2) food processing permit is not required for

(A) a food service permitted under this chapter that is also

(i) manufacturing ice for use within the establishment or for onsite retail sale; or

(ii) roasting coffee for use within the establishment or for onsite retail sale;

(B) a seafood processor permitted under 18 AAC 34; this exception also applies to a seafood processor permitted under 18 AAC 34 that, in addition to processing seafood, processes non-seafood products at the permitted facility using the same types of processes for the non-seafood products as are permitted under 18 AAC 34 for the seafood products; however, the seafood processor must comply with other applicable provisions of this chapter for the non-seafood products; or

(C) a food service or market permitted under this chapter that also

(i) acidifies, cures, dehydrates, or thermal processes low-acid food;

(ii) reduced oxygen packages under 18 AAC 31.760(c);

(iii) conducts a limited amount of processing, such as produce trimming, slicing of processed meat and cheese; or

(iv) provides retail customer self-service, such as for juice squeezing or peanut grinding; and

(3) market permit is not required for a sales counter or other display area

(A) that is used exclusively for the retail sale of products processed within that facility; and

(B) that is located within

(i) a meat processing facility under mandatory or voluntary USDA inspection;

(ii) a seafood processing facility permitted under 18 AAC 34; or

(iii) a processing facility permitted under this chapter.

(g) A permit for a temporary food service, limited food service, kiosk, or mobile food unit issued under this section is valid

(1) only for service of the food approved for that operation at the time of application; and

(2) for a temporary food service, for no more than 28 consecutive days; the department will grant an extension of up to seven days upon application and payment of an additional permit fee as required under 18 AAC 31.050 if the department determines that an extension serves the interests of public health and consumer protection, and if

(A) the department determines after inspection that the establishment is in compliance with this chapter; or

(B) the operator receives approval to self-inspect and conducts a self-inspection of the establishment that confirms compliance with this chapter, using a form provided by the department.

(h) The department will issue a conditional permit if the department determines that a conditional permit serves the interests of public health and consumer protection, and if

(1) for a new or extensively remodeled food establishment, the initial evaluation or plan review indicates

(A) the establishment is not in compliance with this chapter;

(B) a risk factor or intervention violation or imminent health hazard does not exist; and

(C) the operator agrees to correct violations within a specified period of time in accordance with 18 AAC 31.900;

(2) for an existing facility, a letter of agreement, negotiated order, compliance order, uniform summons and complaint, or other enforcement and compliance action has been issued by the department and signed by the operator of the food establishment for one or more violations of 18 AAC 30, 18 AAC 31, 18 AAC 32, 18 AAC 34, 18 AAC 72, or 18 AAC 80;

(3) public water system plans have been submitted for department review as required by 18 AAC 31.030, but have not been reviewed by the department; or

(4) the operator of an existing food establishment makes a written request to the department to establish a fee payment schedule for fees incurred under 18 AAC 31.050 not to exceed six months; a request submitted under this paragraph must include

(A) the reason for the request; and

(B) the proposed fee payment schedule.

(i) In a conditional permit issued under (h) of this section, the department will specify

(1) each violation and the date set under 18 AAC 31.900 by which the violations must be corrected; or

(2) the fee payment schedule agreed upon under (h)(4) of this section.

(j) Before the issuance of a permit under this chapter, the owner and operator of a food establishment are responsible for compliance with this chapter. After issuance of a permit under this chapter, only the operator is responsible for permitted operations. (Eff. 5/18/97, Register 142; am 12/19/99, Register 152; am 12/23/99, Register 152; am 12/31/2000, Register 156; am 6/28/2001, Register 158; am \_\_/\_\_/\_\_, Register \_\_)

Authority:	AS 17.20.005	AS 17.20.180	AS 44.46.020
	AS 17.20.070	AS 17.20.200	AS 44.46.025
	AS 17.20.072		

Editor's note: Operators who process food products that contain meat as an ingredient or that are multi-ingredient meat products that will be sold for resale by another retailer may be subject to the regulations of the United States Department of Agriculture (USDA).

18 AAC 31.030 is repealed and readopted to read:

**18 AAC 31.030. Permit application and renewal.** (a) At least 30 days before the intended operation, an applicant shall apply for a permit for each type of operation at a food establishment subject to the permit requirements of 18 AAC 31.020, using a form provided by the department. A separate form is not required for each type of operation. Within 30 days after a change in the operator of a food establishment with a permit issued under this chapter, the new

operator shall apply for a permit under this section.

(b) Except for a temporary food service subject to (d) of this section, an application submitted under this section must

- (1) identify each type of operation within the food establishment;
- (2) be accompanied by the permit fee required by 18 AAC 31.050 for each type of operation;
- (3) include a copy of standard operating procedures required at 18 AAC 31.335; and
- (4) include a copy of the self-assessment form required at 18 AAC 31.340.

(c) In addition to the requirements of (b) of this section, an application submitted under this section

(1) if required by 18 AAC 31.710, must include a hazard analysis critical control point (HACCP) plan;

(2) as required by 18 AAC 31.720, for thermally processed low-acid food, must include a copy of the canning form submitted to FDA and the scheduled process from a recognized processing authority such as the National Food Processors Association, or from a food science department of an accredited university;

(3) for a new or extensively remodeled food establishment or a change of operator, must also include

- (A) a copy of the structural plans;
- (B) the intended menu; and
- (C) the volume and method of processing and preparation of food;

(4) for a limited food service, mobile food unit, or kiosk, must also

(A) describe food items to be prepared and methods of preparation at the limited food service, mobile food unit, or kiosk;

(B) if a commissary is used,

(i) describe food items to be prepared and methods of preparation at the commissary;

(ii) describe support services to be provided at the commissary;

and

(iii) include a letter from the commissary operator that confirms the information provided under (i) and (ii) of this paragraph; and

(C) if the application is for a kiosk located outside of a building, include a copy of a contract or agreement with a potable water hauler and wastewater hauler that indicates the operator will comply with 18 AAC 31.615;

(5) for a caterer, must also describe the equipment used to protect food from contamination and to maintain product temperature during holding, transportation, and service;

(6) for an operation that will use vending machines that dispense potentially hazardous foods, must also include

(A) the information required at 18 AAC 31.630; and

(B) for each machine,

(i) the exact location address of the machine; and

(ii) identification of the commissary or other approved facility from which the machine will be serviced;

(7) for a mobile retail vendor selling seafood, must also identify the source of seafood, including the source's name, address and, if applicable, the seafood processing permit number issued by the department under 18 AAC 34.035;

(8) if a product requires a label, may also include a food label or representative copy of the label, to ensure compliance with 18 AAC 31.060;

(9) if applicable, must also include a statement that required plans have been submitted for department review and approval for the public water system under 18 AAC 80; and

(10) for an intermittent food establishment, must also include the type of operation category, proposed dates of operation, and proposed number of people served.

(d) An application for a temporary food service permit must include

(1) the permit fee required by 18 AAC 31.050;

(2) the proposed dates of the event;

(3) a sketch of the booth or other enclosure, indicating the

(A) floor, wall, and ceiling finishes; and

(B) location and type of equipment and furnishings;

(4) menu items; and

(5) proposed methods of preparation and service.

(e) To continue operating, an operator must renew a permit each year by December 31 by paying the fee required by 18 AAC 31.050. If the operator operates only during the summer season, the operator must renew a permit each year by May 1 by paying the fee required by 18 AAC 31.050. The department may require an operator who seeks to renew a permit issued under 18 AAC 31.020 to submit information to confirm compliance with this chapter, including copies of

(1) certified food protection manager certification described in 18 AAC 31.320;

(2) food worker cards described in 18 AAC 31.330;

(3) standard operating procedures described in 18 AAC 31.335; and

(4) self-assessments described in 18 AAC 31.340. (Eff. 5/18/97, Register 142; am 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority: AS 17.20.005 AS 17.20.180 AS 44.46.020  
AS 17.20.072

18 AAC 31.040 is amended to read:

**18 AAC 31.040. Pre-construction and operation plan [PLAN] review and pre-operation inspection.** (a) The operator of a food establishment shall submit to the department, on a form provided by the department, plans that comply with (c) of this section, at least 30 days before construction, or if no construction is necessary, before commencing operation if

(1) a food establishment is to be constructed;

(2) an existing structure not currently used as a food establishment is to be converted for use as a food establishment;

(3) an existing food establishment is proposed to be extensively remodeled; or

(4) a new type of operation is to be added to an existing food establishment.

(b) The operator of a food establishment shall obtain [PRIOR DEPARTMENT] approval before [FOR] any proposed significant change to the food establishment's types of food, methods of processing or preparation, style of service, or seating capacity.

(c) Except if plans are for a temporary food service subject to 18 AAC 31.600, plans submitted under this section must include

(1) a plot plan of the entire premises showing the location of buildings, the refuse storage site, the potable [APPROVED] water supply, the [APPROVED] waste disposal system,

and access for deliveries;

(2) a detailed to-scale drawing of the food establishment showing the type, model, and location of equipment, and plumbing fixtures such as sinks and toilets;

(3) a plumbing schematic that depicts hot and cold water lines, wastewater lines, floor drains, and grease traps;

(4) the construction and design specifications for equipment;

(5) the finish materials specifications for floors, walls, and ceilings;

(6) types and location specifications for lighting and ventilation;

(7) a description of food items to be served or sold, projected volumes, methods of preparation and processing, including whether foods will be ready-to-eat, cook and serve, complex, or a combination, and styles of service;

(8) the seating capacity;

(9) a description of equipment used to maintain temperatures during transportation, display, and service; and

(10) the plan review fee required by 18 AAC 31.050.

(d) A food service that has a seating capacity of at least 50 individuals and all markets maintained primarily for the retail sale of food must indicate compliance with AS 18.35.300 relating to the regulation of smoking.

(e) The department will approve plans submitted under this section if the plans show compliance with [MEET THE REQUIREMENTS OF] this chapter.

(f) The department may conduct an inspection of a facility under 18 AAC 31.900 or require a self-inspection to confirm compliance with this chapter and the plans approved under this section[, SUBJECT TO THE AVAILABILITY OF APPROPRIATIONS FROM THE LEGISLATURE AND THE STAFFING NEEDS OF OTHER PROJECTS]. (Eff. 5/18/97, Register 142; am 12/19/99, Register 152; am 12/23/99, Register 152; am 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority:	AS 17.20.005	AS 17.20.072	AS 17.20.200
	AS 17.20.070	AS 17.20.180	AS 44.46.020

18 AAC 31.050(a)(1) is amended by adding a new paragraph and (l) is amended to read:

**18 AAC 31.050. Fees.** (a) Except as otherwise provided in this section, at the time of application for a new permit under 18 AAC 31.030 or within 30 days after receiving the first notice that a fee is due for a permit renewal, the operator of a food establishment subject to the

per requirements of 18 AAC 31.020 shall pay to the department an annual permit fee for each separate type of operation at the food establishment as follows:

(I) for a food service that

....

(J) is an intermittent food establishment: \$125;

....

(I) Unless a fee schedule is agreed upon under **18 AAC 31.020(h)(4)** [18 AAC 31.020(n)], or unless stated otherwise, a fee required under this section is due within 30 days after receiving notice that the fee is due. [UNLESS THE DEPARTMENT DETERMINES GOOD CAUSE EXISTED BEYOND THE OPERATOR'S CONTROL, THE DEPARTMENT WILL ASSESS A LATE FEE NOT TO EXCEED FIVE PERCENT OF THE APPLICABLE FEE IF PAYMENT IS MORE THAN 30 DAYS PAST DUE.]

....

(Eff. 5/18/97, Register 142; am/readopt 12/19/99, Register 152; am 12/23/99, Register 152; am 12/31/2000, Register 156; am 6/28/2001, Register 158; am 7/11/2002, Register 163; am 12/1/2004, Register 172; am \_\_/\_\_/\_\_, Register \_\_)

18 AAC 31.060 is repealed and readopted to read:

**18 AAC 31.060. Labeling, placarding, and consumer advisory.** (a) The operator of a food establishment shall label food products that are offered or displayed for sale and that are enclosed in a package or container as required by this section, except for

(1) individual portions of ready-to-eat food that is

(A) prepared onsite; or

(B) dispensed onsite from a properly labeled master container of a food prepared by a food processing establishment that is permitted or certified by the local, state, or federal agency with jurisdiction; and

(2) distilled spirits, wine, or malt beverages.

(b) The operator of a market shall label bulk food that is displayed for self-service.

(c) The operator of a food establishment shall ensure that each label contains

(1) the common name of the product or the name under which a standard of identity has been adopted in 21 C.F.R. 130 – 21 C.F.R. 164, 21 C.F.R. 165.110(a) and (c), and 21 C.F.R. 166 – 21 C.F.R. 169, adopted by reference in 18 AAC 31.011;

(2) the name and place of business of the manufacturer, packer, or distributor and the name and address of the processor or distributor as required under 21 C.F.R. 101.5, adopted by reference in 18 AAC 31.011;

(3) the net contents of the package by weight or measure;

(4) the common and usual name of each food ingredient in the order of its preponderance by weight in the product; spices, flavorings, and colorings may be designated without naming each one, but each artificial coloring, artificial flavoring, or chemical preservative must be specifically identified; if a salmonid fish containing canthaxanthin or astaxanthin is served, the owner shall display the labeling from the bulk fish container, including a list of ingredients, on the retail container or by other written means that discloses the use of canthaxanthin or astaxanthin;

(5) one of the following product holding statements, as necessary:

(A) "KEEP FROZEN", if keeping the product frozen is required to prevent growth of infectious or toxigenic microorganisms or deterioration of the product;

(B) "KEEP REFRIGERATED", if keeping the product refrigerated is required to prevent growth of infectious or toxigenic microorganisms or deterioration of the product;

(6) the statement "PREVIOUSLY FROZEN" for meat, seafood, or poultry that has been previously frozen and thawed;

(7) a sell-by date under 18 AAC 31.750(d) if the product has been reduced-oxygen packaged;

(8) a product code if required by 18 AAC 31.700(e);

(9) the information required by AS 17.06.020, if the food product is labeled as "organic;" and

(10) safe handling instructions as specified in 9 C.F.R. 317.2(l) and 9 C.F.R. 381.125(b), adopted by reference in 18 AAC 31.011, if meat and poultry are not ready-to-eat foods and are in a prepackaged form when the meat and poultry are offered for consumption.

(d) If evidence from a qualified laboratory demonstrates that a potentially hazardous food is not potentially hazardous as described in 18 AAC 31.200(c), the food must be labeled with

(1) a sell-by date not to exceed the manufacturer's recommendations;

(2) the statement "This product is prepared using a specialized recipe that allows room temperature display. Refrigerate after purchase."; and

(3) a manufacturer's code that identifies the product as the standard formulation approved by the department or the FDA for room temperature display.

(e) The operator of a food establishment

(1) that sells or uses mushrooms picked in the wild shall ensure the mushrooms are conspicuously identified by a label, placard, or menu notation that states

(A) the common and usual name of the mushroom; and

(B) the statement "Wild mushrooms; not an inspected product;"

(2) if the following foods are offered for immediate consumption or served or sold as ready-to-eat, shall ensure that consumers are informed of the significantly increased risk of consuming such foods by way of a disclosure and reminder using brochures, deli case or menu advisories, label statements, table tents, placards, or other effective written means:

(A) raw animal food, including raw marinated seafood;

(B) animal food that is not cooked to the minimum temperatures provided in 18 AAC 31.230, unless the food is prepared in response to a specific adult consumer's request;

(C) animal food that has not otherwise been processed to eliminate pathogens; and

(3) shall ensure that

(A) raw oysters

(i) are identified by the state or country in which the harvest area is located;

(ii) harvested from Alabama, Florida, Louisiana, or Texas are further identified with the following warning: "Eating raw oysters may cause severe illness or death in persons with certain health conditions such as liver disease, cancer, or another chronic illness that weakens the immune system. If you eat raw oysters and become ill, you should immediately seek medical attention. If you are unsure if you are at risk, contact your physician.";

(B) if processed food that contains a sulfiting agent is used, or served, notice is provided to consumers by means of a conspicuous notice placed

(i) next to the food item listing on the menu in a food service that states: "This food contains sulfiting agents. Persons allergic to sulfiting agents should avoid consumption of this food."; or

(ii) on menus, table placards, produce placards, salad bars, or bulk

food display containers that state: "Sulfiting agents were used on \_\_\_\_\_ [specify the food item] served or sold by this establishment. Persons allergic to sulfiting agents should avoid consumption of this food.";

(C) if farmed halibut, salmon, or sablefish product is sold packaged or unpackaged, the fish is labeled or notice is provided to consumers that indicates the fish is farmed as described at AS 17.20.040;

(D) if halibut, salmon, or sablefish products are sold at wholesale or retail and are labeled, advertised, or identified as being or containing a "wild," "antibiotic-free", or "hormone-free" halibut, salmon, or sablefish product, those products are labeled advertised, or identified as described at AS 17.20.048; and

(E) if fish is prepared or served to consumers, the fish is identified as either farmed or wild in a conspicuous notice on the menu as described at AS 17.20.049.

(f) The operator of a food establishment shall ensure that labeling and notice information required by this section is printed

(1) legibly in type of sufficient size and prominence to be easily read under normal conditions of sale and display;

(2) on the main part of the label or notice in a color that contrasts with its background; and

(3) in English; duplicate labeling in other languages is allowed.

(g) The operator of a food establishment may submit an example of a label or notice intended for use under this chapter for department approval before use.

(h) A food is misbranded if it does not comply with this section or AS 17.20. (Eff. 5/18/97, Register 142; am 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority:	AS 17.20.005	AS 17.20.044	AS 17.20.290
	AS 17.20.010	AS 17.20.072	AS 17.20.300
	AS 17.20.040	AS 17.20.049	AS 17.20.180
	AS 44.46.020		

Editor's note: Labeling requirements for distilled spirits, wine, or malt beverages are in 27 C.F.R. and regulated by the United States Bureau of Alcohol, Tobacco, and Firearms.

18 AAC 31.070(b)(5) is amended to read:

**18 AAC 31.070. School food establishments.**

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(b) A school class, school club, or other school organization that seeks an exemption as described in (a) of this section must apply to the department, using a form provided by the department. The application must identify the

....

(5) [THE] location where the food will be served or sold.

....

(Eff. 6/28/2001, Register 158; am \_\_/\_\_/\_\_, Register \_\_)

Authority:	AS 17.20.005	AS 17.20.072	AS 44.46.020
	AS 17.20.010	AS 17.20.180	AS 44.46.025
	AS 17.20.020	AS 17.20.290	

**Article 2. Food Care.**

**Section**

- 200. Food condition and source
- 205. Traditional wild game meat, seafood, plants, and other food donated to an institution or a nonprofit program
- 210. Prohibited food
- 215. Highly susceptible populations
- 220. Food protection
- 230. Temperature and time control
- 240. Display and service
- 250. Parasite control**

18 AAC 31.200(b) is amended to read:

**18 AAC 31.200. Food condition and source.**

....

(b) **The** [IN ADDITION TO THE REQUIREMENTS OF (A) OF THIS SECTION, THE] operator of a food establishment shall

(1) use or sell only

- (A) clean, whole eggs with shell intact;
- (B) pasteurized liquid, frozen, or dry eggs; or
- (C) egg substitutes,

(2) obtain only from an approved source

(A) [ENSURE THAT] hermetically sealed food [IS FROM A FOOD PROCESSING ESTABLISHMENT THAT IS PERMITTED OR CERTIFIED BY THE LOCAL, STATE, OR FEDERAL AGENCY WITH JURISDICITON; and

(B) ice;

(3) obtain raw seafood only

(A) [FISH] from a seafood processor with a current permit issued under 18 AAC 34 or another approved source, unless

(i) the seafood [(A) FISH] sport-caught by a client of a sportfishing enterprise is prepared and served to that client;

(ii)[(B)] the seafood [FISH] is donated to a food service at an

institution or nonprofit program under 18 AAC 31.205;

**(iii) [(C)]** salmon from a hatchery permitted by the Alaska Department of Fish and Game is donated to a food bank; **or**

**(iv) [(D)]** the operator of a food service or market **purchases seafood directly from a local fisher and** obtains a written **variance under 18 AAC 31.936 [EXEMPTION]** from the department after showing that [(i)] the maximum amount of **seafood [FISH]** received in one week does not exceed 500 pounds[;] and **seafood [(ii) FISH]** processing in the food service or market is separated by location or time from other preparation or processing; **and**

**(B) intended for consumption in the raw form, other than molluscan shellfish, from a supplier that freezes the seafood as specified under 18 AAC 31.250 if the operator does not freeze the seafood on the premises;**

(4) ensure that shellfish is from a facility listed in the FDA Interstate Certified Shellfish Shippers List or a facility with a current permit issued under 18 AAC 34, and that

(A) fresh or frozen shucked shellfish in a single-use container is legibly labeled with the processor's name, address, permit number, and either the sell-by date or the date shucked;

(B) each container of fresh or frozen shellstock is identified by a tag or label that

(i) is securely fastened to the container and bears the shipper's permit number, name, and address, the consignee's name and address, the type and amount of shellstock in the container, and the **location of the** harvest area;

(ii) remains on the container until **the container [IT]** is empty;  
and

(iii) is kept on file, **as required by 18 AAC 31.335(b)**, at the food establishment for at least 90 days;

(5) obtain meat, poultry, and game meat from a facility under USDA mandatory or voluntary inspection, except for

(A) traditional wild game meat described in 18 AAC 31.205;

(B) reindeer for retail sale at a market described in 18 AAC 31.820;

(C) meat imported from a foreign country with a program for the inspection of game meat approved by the USDA or the FDA; or

(D) reindeer slaughtered or processed in accordance with 18 AAC 32.600 - 18 AAC 32.695;

(6) ensure that fluid milk and fluid milk products meet the Grade A quality standards set in 18 AAC 32; the operator of a food service may reconstitute the milk with potable water, or Grade A or an equivalent powdered milk; and

(7) ensure that reconstituted powdered milk is used within 24 hours after reconstitution.

....

(Eff. 5/18/97, Register 142; am 5/23/98, Register 146; readopt 12/19/99, Register 152; am 6/28/2001, Register 158; am 9/6/2003, Register 167; am \_\_\_ / \_\_\_ / \_\_\_, Register \_\_\_)

Authority:	AS 17.20.005	AS 17.20.040	AS 17.20.346
	AS 17.20.010	AS 17.20.072	AS 17.20.347
	AS 17.20.020	AS 17.20.180	AS 44.46.020
	AS 17.20.030	AS 17.20.345	

18 AAC 31.215 is amended to read:

**18 AAC 31.215. Highly susceptible populations.** (a) In a food establishment that serves a highly susceptible population in a facility that provides health care, assisted living services, or custodial care, the operator may not serve or offer [SHALL ENSURE THAT] the following foods [ARE NOT SERVED OR OFFERED FOR SALE] in a ready-to-eat form unless the foods are prepared in response to a specific adult [CONSUMER'S] request:

(1) raw animal foods, including raw seafood [FISH], raw marinated seafood [FISH], raw molluscan shellfish, and steak tartar;

(2) animal food that is not cooked to the minimum temperatures provided in 18 AAC 31.230, such as lightly-cooked seafood [FISH], rare meat, soft-cooked eggs that are made from raw shell eggs, and meringue;

(3) raw seed sprouts;

(4) unpasteurized juices.

**(b) In a food establishment that serves a highly susceptible population in a facility that provides health care, assisted living services, or custodial care, the operator shall ensure that pasteurized shell eggs or pasteurized liquid, frozen, or dry eggs or egg products are substituted for raw shell eggs in the preparation of**

**(1) foods that typically have raw shell eggs as an ingredient; and**

**(2) recipes in which more than one egg is broken and the eggs are combined.**

except

**(A) when the foods are prepared in response to a specific adult**

consumer's request; or

(B) the raw eggs are combined as an ingredient and are thoroughly cooked to a ready-to-eat form. (Eff. 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.010 AS 17.20.180 AS 44.46.020  
AS 17.20.020

18 AAC 31.220 is repealed and readopted to read:

**18 AAC 31.220. Food protection.** (a) The operator of a food establishment shall take measures to prevent contamination of food, food ingredients, utensils, equipment, and packaging materials and shall

(1) provide

(A) adequate space for receiving, preparation, processing, packaging, and storage; and

(B) conditions and controls necessary to minimize the potential for growth of pathogenic or spoilage microorganisms, toxin formation, deterioration, or contamination;

(2) inspect raw materials and ingredients to ensure that they are

(A) received at temperatures in accordance with 18 AAC 31.230;

(B) in sound condition; and

(C) free from spoilage, filth, or other contamination;

(3) separate or segregate by partition, location, time, or another effective means

(A) types of operations or other preparation or processing that might be a source of contamination or cross-contamination; and

(B) food, including raw materials and ingredients, that

(i) has not been cooked or held at temperatures or times in accordance with 18 AAC 31.230;

(ii) is not in sound condition;

(iii) is not free from spoilage, filth, or other contamination; or

(iv) is held by the operator for credit, redemption, or return to the

distributor, such as damaged, spoiled, or recalled products;

(4) wash and clean raw ingredients as required to remove soil or other contamination;

(5) ensure that food

(A) meets the temperature and time requirements of 18 AAC 31.230 at all times, including while being prepared, processed, packaged, stored, loaded, transported, displayed, or served;

(B) is covered during storage except during necessary cooling periods for potentially hazardous food; quarters, sides, or large cuts of meat may be hung uncovered on clean hooks if no part of the meat touches walls, floors, boxes, or shelving, and food is not stored under the meat;

(C) that does not require further washing or cooking before display or service is protected from cross-contamination by food that must be washed or cooked;

(D) that is

(i) not in a ready-to-eat form is prepared with the least possible hand contact, by the proper use of utensils; and

(ii) in a ready-to-eat form is prepared with no bare hand contact, by the proper use of utensils;

(E) is prepared on surfaces that have been washed, rinsed, and sanitized;

(6) ensure that food and containers of food are

(A) stored and displayed at least six inches above the floor on storage or display shelving or equipment, except that

(i) food in cases, or large containers of packaged food, such as flour and sugar, may be stored on dollies, skids, or open-ended pallets if that equipment is easily movable by hand or with the use of pallet-moving equipment that is available on the premises at all times; and

(ii) large, impervious, covered containers of food, metal beverage containers, and cased food packaged in cans, glass, or other sealed, waterproof containers need not be elevated if the container is not exposed to floor moisture; and

(B) not stored in a toilet room or under an exposed sewer line, a leaking refrigeration condenser, or a leaking or dripping waterline; and

(7) ensure that

(A) single-use gloves, if used, are used for only one task; the gloves may not be used for any other purpose and must be discarded when damaged or soiled or if an interruption occurs during the task;

(B) cloth and slash-resistant gloves are used in direct contact with food only if that food will be subsequently cooked at the food establishment or by the consumer;

(C) sinks used for warewashing are not used directly for preparation or processing; however, a colander or other container may be used inside the sink if

(i) food preparation that requires washing, trimming, rinsing, or draining is limited;

(ii) the use of the colander or other container does not interfere with normal warewashing; and

(iii) the food does not come in direct contact with the sink, undrained water, or residue;

(D) raw fruits and vegetables are thoroughly cleaned with potable water before preparing, processing, cooking, or serving;

(E) packaged or potentially hazardous food is not stored in water or undrained ice;

(F) raw eggs are not broken and pooled unless the eggs are used immediately or cooked according to 18 AAC 31.230 within 30 minutes after breaking;

(G) egg-breaking procedures keep egg shells separate from eggs; use of an egg breaking machine is prohibited;

(H) whole eggs stored on or adjacent to cooking equipment are used within one hour or discarded; and

(I) ice used to cool food, food containers, or utensils is not served to consumers.

(b) The operator of a food service or market shall ensure that

(1) food with a sulfiting agent is not stored on the premises unless packaged, clearly labeled, and offered for retail sale;

(2) a sulfiting agent is not applied to food in the food service or market;

(3) food, except shellfish subject to 18 AAC 31.200(b)(4), removed from its original container is stored in a clean, covered container and is labeled unless its identity is

unmistakable;

(4) unfinished wood or wicker is not used to hold food unless lined with an impervious single-service liner; dry bread products or chips may be served in unfinished wood or wicker if the container is lined with a single-service liner or a clean and dry napkin or linen; and

(5) containers and covers are nonabsorbent, except a clean and dry napkin or linen may be used to line or cover dry bread products or chip containers. (Eff. 5/18/97, Register 142; readopt 12/19/99, Register 152; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020  
AS 17.20.040

Editor's note: Effective 12/19/99, Register 152, the Department of Environmental Conservation readopted 18 AAC 31.220, without change, to affirm the validity of that section following statutory amendments made in ch. 72, SLA 1998. Chapter 72, SLA 1998 relocated department authority to adopt regulations in 18 AAC 31 from AS 03.05 to AS 17.20.

18 AAC 31.230(a) and (b) are amended and a new subsection is added to read:

**18 AAC 31.230. Temperature and time control.** (a) The operator of a food establishment shall ensure that

(1) a product thermometer that is calibrated in accordance with manufacturer's instructions to ensure accuracy to  $\pm 3^{\circ}$  F is [PROVIDED AND] used to measure the temperature of potentially hazardous food during cooking, reheating, hot-holding, cooling, and cold-holding;

(2) a numerically-scaled, indicating thermometer [THERMOMETERS], calibrated in accordance with the manufacturer's instructions to ensure accuracy to  $\pm 3^{\circ}$  F, is [ACCURATE TO WITHIN  $3^{\circ}$  F, ARE] installed on each piece of cold-holding and hot-holding equipment, unless exempted under (3) of this subsection, so that the thermometer is [THERMOMETERS ARE] easily seen and measures [MEASURE]

(A) the upper one-third of cold-holding equipment; and

(B) the lower one-third of hot-holding equipment;

(3) if, due to the nature of the equipment, it is not practical to install an indicating thermometer on cold-holding or hot-holding equipment, such as an insulated transport container, a salad bar, or steam table, a product thermometer is [MUST BE] used to check food temperatures every four hours;

(4) equipment used to cook, cool, reheat, hot-hold, cold-hold, store, or transport potentially hazardous food is adequate for each menu item, method of preparation, and style of service;

(5) potentially hazardous food is

(A) free of evidence of previous temperature abuse when received at the food establishment; and

(B) received and maintained during cold-holding at 41° F or below, except as specified in 18 AAC 31.410(a)(13) [18 AAC 31.410(k)] or as otherwise provided in this chapter; the requirements of this subparagraph do not apply to synthetic custards and cream fillings, nondairy creaming, whitening, or whipping agents, or similar products if

(i) the product does not require refrigeration and is so labeled by the manufacturer; or

(ii) the operator provides the department with documentation from a qualified laboratory showing that the product will not support the rapid and progressive growth of infectious or toxigenic microorganisms or the slower growth of *Clostridium botulinum*;

[(6) THE INTERNAL TEMPERATURE OF POTENTIALLY HAZARDOUS FOOD DURING HOT-HOLDING IS 140° F OR ABOVE, EXCEPT RARE BEEF, WHICH MUST BE KEPT AT AN INTERNAL TEMPERATURE OF 130° F OR ABOVE;

(7) FROZEN FOOD IS KEPT FROZEN AND STORED AT 0° F OR BELOW;

(8) POTENTIALLY HAZARDOUS FOOD IS]

(C) thawed

(i) [(A)] in a refrigeration unit;

(ii) [(B)] under running potable water at 70° F or below until thawed and then is immediately cooked or refrigerated;

(iii) [(C)] in a microwave oven and then immediately transferred to a conventional cooking unit as part of a continuous cooking process; or

(iv) [(D)] as part of a continuous cooking process;

(D) chilled to 41° F or below before preparation, except as specified in 18 AAC 31.410(a)(13), if [(9) POTENTIALLY HAZARDOUS FOOD] used as an ingredient for food that is in a form to be consumed without further cooking, such as salad, sandwiches, filled pastry, and reconstituted food [, IS CHILLED TO 41° F OR BELOW BEFORE PREPARATION EXCEPT AS SPECIFIED IN 18 AAC 31.410(k)];

(E) cooled from a temperature of 140°F or below to 70°F or below within two hours, and from a temperature of 70°F or below to 41°F or below within

**four additional hours as follows, except as specified in 18 AAC 31.410(k), if the food requires cooling or cold-holding after preparation or processing:**

**(i) place the container in an ice bath or cold running potable water and stir frequently;**

**(ii) separate the food into smaller or thinner portions and refrigerate;**

**(iii) place the food in a shallow pan, refrigerate, stirring occasionally if needed;**

**(iv) use rapid chilling equipment;**

**(v) modify the recipe by adding ice or cold potable water in final stages of preparation; or**

**(vi) use another approved method that will result in compliance with this section; and**

**(F) held at an internal temperature of 140° F or above for hot-holding, except rare beef, which must be kept at an internal temperature of 130° F or above; and**

**(G) if the food requires cooking, all parts [(10) ALL PARTS OF POTENTIALLY HAZARDOUS FOOD THAT REQUIRE COOKING] are cooked with no interruption in the cooking process to the minimum internal temperature, and held at that temperature for the time shown in Table B of this section;**

TABLE B MINIMUM INTERNAL TEMPERATURES AND TIME		
ITEM	TEMPERATURE	TIME
Poultry; stuffed meat, seafood, or poultry; stuffing containing meat, seafood, or poultry; traditional wild game meat; and casseroles containing potentially hazardous food	165° F	15 seconds
Pork; game meat; meat; ground or restructured meat or seafood; and injected	158° F or	one second or

meat; however, ground beef may be cooked to a temperature below 155° F if ordered by an adult consumer	155° F	15 seconds
Other potentially hazardous food requiring cooking; however, eggs may be cooked to a temperature below 145° F if ordered by an adult consumer	145° F	15 seconds
Rare roast beef and rare beef steak; however, beef steak may be cooked to a temperature below 130° F if ordered by an adult consumer	130° F	15 seconds

(6) [(11)] smoking of meat or poultry is done during cooking or, if done after cooking, the meat is kept at a temperature of 140° F or above during the smoking process;

**(7) frozen food is kept frozen and stored at 0° F or below;**

**(8) food containers in which food is being cooled are clearly marked with the date and time the cooling process began.** [(12) POTENTIALLY HAZARDOUS FOOD THAT REQUIRES COOLING OR COLD-HOLDING AFTER PREPARATION OR PROCESSING IS COOLED FROM A TEMPERATURE OF 140° F OR BELOW TO 70° F OR BELOW WITHIN TWO HOURS, AND FROM A TEMPERATURE OF 70° F OR BELOW TO 41° F OR BELOW WITHIN FOUR ADDITIONAL HOURS AS FOLLOWS, EXCEPT AS SPECIFIED IN 18 AAC 31.410(k):]

(b) The [IN ADDITION TO (A) OF THIS SECTION, THE] operator of a food establishment shall ensure that

(1) if potentially hazardous food that has been cooked and then refrigerated is reheated for hot-holding, it is reheated

(A) with no interruption in the reheating process;

(B) within two hours [ONE HOUR] or less to the following temperatures;

(i) except for rare beef, for food prepared in a food service: 165° F or above;

(ii) except for rare beef, for food prepared at a food processing establishment: 140° F or above;

(iii) for rare beef: 130° F or above; and

(C) so as to evenly distribute the heat to the entirety of a liquid or semi-solid potentially hazardous food, such as with frequent stirring; and

(2) if a microwave is used to reheat food for hot-holding, the food must be

(A) reheated with no interruption in the reheating process, except that the food must be rotated or stirred at least once midway through the reheating process to compensate for uneven heat distribution;

(B) covered to retain surface moisture;

(C) heated to a temperature of at least 165° F in all parts of the food; and

(D) allowed to stand covered for two minutes after reheating to obtain temperature equilibrium[; AND

(3) HOT-HOLDING EQUIPMENT SUCH AS STEAM TABLES AND FOOD WARMERS ARE NOT USED TO REHEAT FOOD].

(c) Except for a food establishment that serves a highly susceptible population, time only, rather than time in conjunction with temperature, may be used as the public health control for a working supply of potentially hazardous food before cooking, or for ready-to-eat potentially hazardous food that is displayed or held for service for immediate consumption if

(1) the food

(A) is marked or otherwise identified to indicate the time that is four hours past the point in time when the food is removed from temperature control;

(B) within four hours from the point in time when the food is removed from temperature control, is

(i) cooked and served;

(ii) served if ready-to-eat; or

(iii) discarded; and

(C) marked to exceed a four-hour limit, is discarded; and

(2) the operator develops, maintains, and makes available to the department on request, written procedures as required under 18 AAC 31.335(a)(4)(F) in the food establishment that explain how the operator will comply with (c) of this section and cooling requirements set out in this section. (Eff. 5/18/97, Register 142; am/readopt 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020

Editor's note: Effective 12/19/99, Register 152, the Department of Environmental Conservation readopted 18 AAC 31.230, to affirm the validity of that section following statutory amendments made in ch. 72, SLA 1998. The department also repealed and readopted 18 AAC 31.230(a)(10) and (b), as well as Table B of that section. Chapter 72, SLA 1998 relocated department authority to adopt regulations in 18 AAC 31 from AS 03.05 to AS 17.20.

18 AAC 31.240(b) is amended to read:

**18 AAC 31.240. Display and service.**

....

(b) The operator of a food service or market shall ensure that

(1) after food has been served or sold to a consumer, leftover food is not reserved or resold unless it is nonpotentially hazardous food in an unopened package;[.]

(2) potentially hazardous food is displayed and served at the internal temperature required by 18 AAC 31.230;

(3) cream, half-and-half, dairy, and nondairy creaming or whitening agents are served in individual packages or covered pitchers, or are drawn directly from a refrigerated dispenser;

(4) condiments and seasonings for self-service use are served in individual packages or dispensers with lids;

(5) except for nuts in the shell and whole, raw fruits and vegetables that are intended for hulling, peeling, or washing by the consumer before consumption, food is protected from consumer contamination during display by wrapping, by use of a display case, or by use of a sneeze guard or shield that intercepts the direct line between the consumer's mouth and the food on display;

(6) ice is served to consumers only with a scoop or other utensil dedicated to ice dispensing, or with automatic, self-service equipment;

(7) consumer self-service operations are provided with suitable utensils or effective dispensing methods that protect the food from contamination; in addition, dispensing utensils for self-service of nonpotentially hazardous food are stored between uses in the food, with the handle extended out of the food, or on a clean surface;

(8) dispensing utensils for potentially hazardous food are stored between uses

(A) in the food with the handle extended out of the food;

(B) on a cleaned and sanitized portion of a food-contact surface  
[CLEAN AND DRY];

(C) in running potable water of sufficient velocity to flush particulates to the drain, if used with moist foods; or

(D) in a container of potable water maintained at a temperature of 140° F or above;

(i) each utensil is cleaned or replaced every four hours, or at a frequency necessary to preclude accumulation of soil residues; and

(ii) each container is cleaned or replaced every 24 hours, or when emptied;

(9) liquid heat is not used for hot-holding, except when

(A) displaying food at a banquet or similar event for a limited time; and

(B) the units can effectively hold the food at a temperature of 140° F or above; [AND]

(10) soiled tableware

(A) is not re-used by a self-service consumer [CONSUMERS] who returns [RETURN] to the service area for more food or beverage, except that a drinking cup or container [CUPS AND GLASSES] may be reused if refilling is by an automatic dispensing device designed to prevent contact between the device and the lip-contact surface of the cup or container [GLASS]; and

(B) is removed from consumer eating and drinking areas and handled so that clean tableware is not contaminated;

(11) if tableware is pre-set,

(A) it is protected from contamination by being wrapped, covered, or inverted;

(B) exposed, unused settings are removed when a consumer is seated;  
or

(C) exposed, unused settings are cleaned and sanitized before further use if the settings are not removed when a consumer is seated; and

(12) raw, unpackaged meat, poultry, or seafood is not offered for consumer self-service, except for

**(A) consumer self-service of ready-to-eat foods at a buffet or salad bar that serves food such as sushi or raw shellfish;**

**(B) ready-to-cook individual portions for immediate cooking and consumption on the premises; or**

**(C) raw, frozen, shell-on shrimp or lobster.** (Eff. 5/18/97, Register 142; readopt 12/19/99, Register 152; am \_\_/\_\_/\_\_, Register \_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020

18 AAC 31 is amended by adding a new section to read:

**18 AAC 31.250. Parasite destruction.** (a) Except as specified in (b) of this section, before service or sale in ready-to-eat form, the operator shall ensure that raw, raw-marinated, partially cooked, or marinated-partially cooked seafood, other than molluscan shellfish, are

- (1) frozen and stored at a temperature of -4° F or below for 7 days in a freezer; or
- (2) frozen at -31° F or below until solid and stored at -31° F for 15 hours.

(b) The following species of seafood may be served or sold in a raw, raw-marinated, or partially cooked ready-to-eat form without freezing as specified under (a) of this section:

- (1) Albacore tuna (*Thunnus alalunga*);
- (2) Yellowfin tuna (*Thunnus albacares*);
- (3) Blackfin tuna (*Thunnus atlanticus*);
- (4) Southern bluefin tuna (*Thunnus maccoyii*);
- (5) Bigeye tuna (*Thunnus obesus*);
- (6) Bluefin tuna (*Thunnus thynnus*).

(c) Except as otherwise specified in this section, if raw, raw-marinated, partially cooked, or marinated-partially cooked seafood are served or sold in ready-to-eat form, the operator shall ensure that the freezing temperature and time to which the seafood are subjected is recorded and shall retain records as required under 18 AAC 31.335 for 90 days beyond the time of service or sale of the seafood. If a supplier freezes the seafood, a written agreement or statement from the supplier stipulating that the supplied seafood are frozen to a temperature and for a time specified under this section may substitute for the records. (Eff. \_\_/\_\_/\_\_, Register \_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020

**Article 3. Management and Personnel .**

**Section**

**300. Employee health [DISEASE TRANSMISSION]**

**310. Handwashing [PERSONAL CLEANLINESS]**

**315. Employee practices [AND TRAINING]**

**320. Certified food protection manager**

**325. Person in charge**

**330. Food worker cards**

**335. Standard operating procedures and record management**

**340. Self-assessments**

18 AAC 31.300 is amended to read:

**18 AAC 31.300. Employee health. [DISEASE TRANSMISSION]. (a) An employee**

**(1) [A PERSON] with an infected wound or a disease communicable by food may not work in a food establishment in any capacity that might contaminate food or a food-contact surface of clean equipment or utensils with an infectious or toxigenic micro-organism, or that might transmit disease to others; and**

**(2) experiencing persistent sneezing, coughing, or a runny nose that causes discharges from the eyes, nose, or mouth may not work with exposed food, clean equipment, utensils, linens, or unwrapped single-service or single-use articles.**

**(b) The operator shall ensure that each employee or applicant reports the following information in a manner that allows the person in charge to prevent the likelihood of foodborne illness transmission, including the date of onset, if the employee or applicant**

**(1) is or has been diagnosed with an illness due to**

**(A) *Salmonella Typhi*, within the previous three months;**

**(B) *Shigella spp.*, within the previous three months;**

**(C) Shiga toxin-producing *Escherichia coli*, within the previous three months; or**

**(D) hepatitis A virus;**

**(2) has a symptom caused by illness, infection, or other source that is**

**(A) associated with an acute gastrointestinal illness, such as**

**(i) diarrhea;**

**(ii) fever;**

(iii) vomiting;

(iv) jaundice; or

(v) sore throat with fever; or

(B) a lesion containing pus, such as a boil or infected wound, that is open or draining and is

(i) on the hands or wrists, unless an impermeable cover protects the lesion, and a single-use glove is worn over the impermeable cover;

(ii) on exposed portions of the arms, unless an impermeable cover protects the lesion; or

(iii) on other parts of the body, unless the lesion is protected by a dry, durable, tight-fitting bandage;

(3) meets one or more of the following high-risk conditions:

(A) is suspected of causing, or being exposed to, a confirmed disease outbreak caused by *S. Typhi*, *Shigella* spp., Shiga toxin-producing *Escherichia coli*, or hepatitis A virus because the employee or applicant

(i) prepared food implicated in the foodborne outbreak;

(ii) consumed food implicated in the foodborne outbreak; or

(iii) consumed food at the event prepared by a person who is infected or ill with the infectious agent that caused the foodborne outbreak, or who is suspected of shedding the infectious agent; or

(B) lives in the same household as, and has knowledge about, a person who

(i) is diagnosed with *S. Typhi*, *Shigella* spp., Shiga toxin-producing *Escherichia coli*, or hepatitis A virus; or

(ii) is exposed to or works in a setting where there is a confirmed disease outbreak caused by *S. Typhi*, *Shigella* spp., Shiga toxin-producing *Escherichia coli*, or hepatitis A virus.

(c) The operator of a food establishment shall ensure that

(1) if an employee is diagnosed with an infectious agent specified under (b)(1) of this section, that employee is excluded from working in the establishment;

(2) if an employee is suffering from a symptom specified under (b)(2) of this section or who is not experiencing a symptom of acute gastroenteritis specified under (b)(2) but has a stool that yields a specimen culture that is positive for *S. Typhi*, *Shigella* spp., or Shiga toxin-producing *Escherichia coli*, that employee is restricted from working with exposed food, clean equipment, utensils, and linens, and unwrapped single-service and single-use articles;

(3) if the population served is a highly susceptible population, an employee experiencing one of the following is excluded from the establishment:

(A) a symptom of acute gastrointestinal illness specified under (b)(2) and meets a high-risk condition specified under (a)(4);

(B) not experiencing a symptom of acute gastroenteritis specified under (b)(1) but has a stool that yields a specimen culture that is positive for *S. Typhi*, *Shigella* spp., or Shiga Toxin-producing *Escherichia coli*;

(C) is or has been diagnosed with *S. Typhi* within the previous three months; or

(D) is or has been diagnosed with *Shigella* spp. or Shiga toxin-producing *Escherichia coli* within the previous month; and

(4) if an employee is jaundiced,

(A) if the onset of jaundice occurred within the last seven calendar days, the employee is excluded from the food establishment; or

(B) if the onset of jaundice occurred more than 7 calendar days before

(i) the employee is excluded from the food establishment if the food establishment serves a highly susceptible population; or

(ii) the employee is restricted from activities specified under (2) of this paragraph, if the food establishment does not serve a highly susceptible population.

(d) [AN EMPLOYEE WITH PERSISTENT SNEEZING, COUGHING, OR A RUNNY NOSE MAY NOT WORK IN ANY CAPACITY THAT MIGHT CONTAMINATE FOOD OR FOOD-CONTACT SURFACES OF CLEAN EQUIPMENT OR UTENSILS. (c)] If the department believes a food establishment or an employee might be the source of a foodborne illness, the department will take action, including actions [AS] recommended by the Department of Health and Social Services to control disease transmission, including

(1) suspend the food establishment's permit until the department determines [FINDS] that the danger of further disease transmission no longer exists;

(2) secure an illness history from each employee suspected of transmitting the illness;

(3) restrict a suspect employee's services to an area of the food establishment where there is no danger of transmitting disease;

(4) require medical or laboratory examination of a suspect employee;

(5) secure records or other information that might assist in the positive identification of persons potentially exposed to the disease; and

(6) obtain samples of food for laboratory analysis.

(e) [(d)]The department may release to the public the name of a food establishment found to be the source of a foodborne illness if the release will assist in the diagnosis, prevention, or treatment of the disease or if otherwise required by law. (Eff. 5/18/97, Register 142; readopt 12/19/99, Register 152; am 6/28/2001 Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority:	AS 17.20.005	AS 17.20.072	AS 17.20.290
	AS 17.20.020	AS 17.20.180	AS 44.46.020
	AS 17.20.070	AS 17.20.200	

18 AAC 31.310 is repealed and readopted to read:

**18 AAC 31.310. Handwashing.** (a) The operator of a food establishment shall ensure that employees thoroughly wash their hands and the exposed portions of their arms with soap and warm water for at least 20 seconds before starting work and during work, as often as needed to keep hands and arms clean using the following cleaning procedure:

(1) vigorous friction on the surfaces of the lathered fingers, finger tips, areas between the fingers, hands, and arms for at least 10 to 15 seconds; employees shall pay particular attention to the areas underneath the fingernails:

(2) thorough rinsing under clean, running warm water; and

(3) thorough drying of cleaned hands and arms using

(A) individual, disposable towels;

(B) a continuous towel system that supplies the user with a clean towel;

or

(C) a heated-air hand drying device.

(b) The owner of a food establishment shall ensure that each employee washes their hands

(1) before preparing ready-to-eat food and when switching between working with raw and ready-to-eat food;

(2) after handling raw meat, raw poultry, raw seafood, soiled utensils, chemicals, or garbage; and

(3) after using tobacco, coughing, sneezing, using a handkerchief or disposable tissue, eating, using the toilet, touching the face, mouth, or hair, caring for or handling animals allowed under 18 AAC 31.575, or doing any other unhygienic act;

(4) during food preparation, as often as necessary to remove soil and contamination and to prevent cross-contamination when changing tasks;

(5) after handling soiled equipment or utensils; and

(6) before donning gloves for working with food.

(c) Bacteriocidal and viricidal hand rinses or hand dips

(1) must be located only adjacent to a handwash sink;

(2) may be used in addition to handwashing but not as a substitute for handwashing; and

(3) must be kept clean and maintained at a strength equivalent to at least 100 mg/L chlorine. (Eff. 5/18/97, Register 142; readopt 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority:	AS 17.20.005	AS 17.20.072	AS 17.20.290
	AS 17.20.020	AS 17.20.180	AS 44.46.020

Editor's note: Effective 12/19/99, Register 152, the Department of Environmental Conservation readopted 18 AAC 31.310, without change, to affirm the validity of that section following statutory amendments made in ch. 72, SLA 1998. Chapter 72, SLA 1998 relocated department authority to adopt regulations in 18 AAC 31 from AS 03.05 to AS 17.20.

18 AAC 31.315 is amended to read:

**18 AAC 31.315. Employee practices [AND TRAINING].** (a) The operator of a food establishment shall ensure that employees do not eat in preparation, processing, service, or warewashing areas except to taste food for culinary purposes, using a single-use utensil once. The operator shall ensure that each area designated for employees to eat, drink, or use tobacco are located so that food, equipment, utensils, linens, and single-service and single-use articles are protected from contamination.

(b) Employees may not use or store tobacco in any form in a preparation, processing, display, service, or warewashing area.

(c) The requirements of this section do not bar an employee from eating in the dining area, or smoking in an area of a dining room designated as a smoking area under AS 18.35.320.

(d) Repealed / / [THE OPERATOR OF A FOOD ESTABLISHMENT SHALL TRAIN EMPLOYEES CONCERNING PROPER HYGIENIC PRACTICES TO BE USED WHILE ON DUTY].

**(e) The operator of a food establishment shall ensure that**

**(1) employees keep their fingernails trimmed, filed, and maintained so that the edges and surfaces are cleanable and not rough;**

**(2) unless wearing intact single-use gloves in good repair, employees do not wear fingernail polish or artificial fingernails when working with exposed food;**

**(3) while preparing food, employees do not wear jewelry on their arms and hands, except that a band ring may be worn;**

**(4) employees wear clean outer clothing to prevent contamination of food, equipment, utensils, linens, and single-service and single-use articles; and**

**(5) employees who prepare or serve unwrapped, unpackaged food, or that present a risk of contaminating food or food-contact surfaces, wear hair restraints and clothing that covers body hair that are designed and worn effectively to keep their hair from contacting food or food-contact surfaces.** (Eff. 5/18/97, Register 142; readopt 12/19/99, Register 152; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020

18 AAC 31 is amended by adding a new section to read:

**18 AAC 31.320. Certified food protection manager.** (a) The operator of a food establishment that serves and prepares unwrapped or unpackaged food, except for a bar or tavern or limited food service, must have at least one certified food protection manager who is involved in the daily operations of the establishment.

(b) A copy of the certified food protection manager certificate shall be kept on file at the food establishment as required under 18 AAC 31.335(b)(3).

(c) If the certified food protection manager terminates employment with a food establishment required to have a certified food protection manager under (a) of this section, the operator of the food establishment shall comply with the requirements of this section within 30 days after that manager's termination.

(d) The department may require that the operator of a food establishment have a certified food protection manager present at all times during operation if there is a

- (1) foodborne outbreak associated with the facility;
- (2) more than one risk factor or intervention violation of this chapter; or
- (3) another factor that the department determines significantly increases the risk to consumers of a foodborne illness. (Eff. \_\_/\_\_/\_\_, Register \_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020

18 AAC 31 is amended by adding a new section to read:

**18 AAC 31.325. Person in charge.** (a) The operator of a food establishment shall designate a person in charge and shall ensure that a person in charge is present at the food establishment during all hours of operation who

(1) implements the standard operating procedures described at 18 AAC 31.335, recognizes hazards that may contribute to foodborne illness, and takes appropriate preventive and corrective actions; and

(2) conducts the self-assessment described at 18 AAC 31.340.

(b) The certified food protection manager described at 18 AAC 31.320 may also be the person in charge when the certified food protection manager is on duty. (Eff. \_\_/\_\_/\_\_, Register \_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020

18 AAC 31 is amended by adding a new section to read:

**18 AAC 31.330. Food worker cards.** (a) The operator of a food establishment shall ensure that each food worker employed in the establishment, within 30 days after the date of hire, holds a valid food worker card issued by the department.

(b) An applicant for a food worker card shall demonstrate knowledge of safe food handling practices by satisfactorily completing an examination conducted by the department.

(c) The examination developed by the department will include questions covering the following subjects:

- (1) food conditions and source;
- (2) food protection;
- (3) temperature control;

- (4) display and service;
- (5) personal cleanliness;
- (6) employee illness;
- (7) employee practices; and
- (8) equipment and utensil cleaning and sanitizing.

(d) The department may approve, in writing, a third-party proctor to administer the examination described in (c) of this section.

(e) A food worker card issued by the department is valid for three years from the date of issue.

(f) An operator of a food establishment shall keep on file a copy of the food worker card issued by the department for each employed food worker and make the copy available to the department upon request.

(g) The department may issue a restricted card to a food worker with special needs who has ceased to make progress toward successfully completing the examination described in (c) of this section. A restricted food worker card will identify the specific duties that may be performed by the food worker. Restrictions may be removed when the food worker successfully completes the examination described in (c) of this section. (Eff. \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020

18 AAC 31 is amended by adding a new section to read:

**18 AAC 31.335. Standard operating procedures and record management.** (a) The operator of a food establishment shall develop, implement, maintain, and make available to the department written standard operating procedures that describe methods used to ensure that

- (1) food is obtained from an approved source, as required under 18 AAC 31.200;
- (2) consumers are advised of risks, if food products subject to an advisory are served, as required under 18 AAC 31.060;
- (3) food products are received and stored as required under 18 AAC 31.220;
- (4) potentially hazardous food meets temperature and time requirements specified at 18 AAC 31.230, if any of the following processes are conducted within the establishment:

(A) cooking;

- (B) cooling;
- (C) reheating for hot-holding;
- (D) cold-holding;
- (E) hot-holding;
- (F) time as a public health control;

(5) ill employees do not work in a capacity that might contaminate food, required under 18 AAC 31.300;

(6) employees will utilize the handwashing procedures as required under 18 AAC 31.310;

(7) utensils, equipment, and food-contact surfaces are cleaned and sanitized as required under 18 AAC 31.420;

(8) employees do not use bare hands when handling ready-to-eat food as required under 18 AAC 31.200;

(9) each food worker obtains a card as required under 18 AAC 31.330, and the establishment has at least one certified food protection manager, if required under 18 AAC 31.320;

(10) requirements for highly susceptible populations are met, as required under 18 AAC 31.215; and

(11) if received, donated foods are received, stored, and processed as required under 18 AAC 31.205.

(b) The operator of a food establishment shall keep records for the following:

- (1) if served, shellfish source at 18 AAC 31.200;
- (2) employee health at 18 AAC 31.300;
- (3) certified food protection manager certificates if obtained under 18 AAC 31.320;
- (4) food worker cards obtained under 18 AAC 31.330;
- (5) self-assessments required under 18 AAC 31.340; and
- (6) parasite destruction if required under 18 AAC 31.250.

(c) The operator of a food establishment shall keep records required under (b) of this

section at the facility for one year, except records for shellfish and raw seafood intended for consumption in the raw form which must be kept for 90 days. If, during the required retention time, a food establishment is closed for a prolonged period, or if record storage capacity is limited, the records required in (c) of this section may be transferred to some other reasonably accessible location. If requested by the department, the operator shall return the records to the establishment or another agreed-upon location for department review within 24 hours after receiving the request unless the department agrees to a longer period.

(d) The operator of a food establishment shall provide a copy of this chapter and the standard operating procedures described in this section at the food establishment in an area freely and easily accessible to employees for review. In addition, the operator of a food establishment shall ensure that each certified food protection manager or person in charge is designated as responsible for implementing the standard operating procedure. (Eff. \_\_/\_\_/\_\_, Register \_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020

18 AAC 31 is amended by adding a new section to read:

**18 AAC 31.340. Self-assessments.** The operator of a food establishment shall conduct a self-assessment using a form developed by the department, or an approved form, at least once every three months that evaluates compliance with the following:

- (1) certified food protection manager and food worker card records are on file;
- (2) employee health records are on file and current;
- (3) handwash sinks are properly equipped, are accessible, used for no other purpose, and water temperature and pressure are adequate;
- (4) employees are properly washing hands;
- (5) no-bare hand contact with ready-to-eat foods;
- (6) food is from approved source;
- (7) shellfish and raw seafood records are on file;
- (8) product is received at required temperature and in sound condition;
- (9) stored food is protected from contamination;
- (10) food-contact surfaces are cleaned and sanitized at required frequency;
- (11) warewashing equipment is properly operated and maintained;
- (12) food is cooked, cooled, reheated for hot-holding, hot-held, cold-held, and thawed at required temperatures and times, and under required conditions;

- (13) consumer advisory labels, placards, and statements are provided;
- (14) where time is used as a public health control, food is appropriately marked and discarded as required;
- (15) if donated food is received, food is appropriately received, stored, and processed;
- (16) if highly susceptible population is served, restricted foods are not used or served;
- (17) ready-to-eat foods are protected from contamination during preparation, display, and service;
- (18) employees observe personal cleanliness requirements;
- (19) toilet facilities are clean, properly equipped, and well-maintained;
- (20) insects, rodents, and other pests are controlled and outer openings are protected from pest entry;
- (21) pesticides and other toxic chemicals are properly used and stored;
- (22) garbage is properly stored;
- (23) walls, floors, and ceilings are maintained and clean; and
- (24) lighting and ventilation is adequate and maintained (Eff. \_\_\_/\_\_\_/\_\_\_,

Register \_\_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020

18 AAC 31.400(a) is amended to read:

**18 AAC 31.400. Materials.** (a) The operator of a food establishment shall ensure that

(1) materials used in the construction of utensils and food-contact surfaces of equipment are **designed and maintained to be**

(A) safe, durable, corrosion resistant, and nonabsorbent;

(B) sufficient in weight and thickness to withstand repeated washing;

(C) finished to have a smooth and easily cleanable surface; **a surface that is subject to scratching and scoring, such as a cutting block or board, must be resurfaced if the surface can no longer be cleaned and sanitized effectively, or**

**discarded if the surface is not capable of being resurfaced; and**

(D) **except as provided in (C) of this paragraph,** resistant to pitting, chipping, scratching, scoring, distortion, and decomposition;

(2) solder is safe and corrosion resistant; **solder and flux containing lead in excess of 0.2% may not used as a food-contact surface:**

- (3) only a safe lubricant is used on equipment or food-contact surfaces;
- (4) plastic liners or containers used for food storage are made of safe materials;
- (5) cast iron is used only

(A) as a cooking surface; or

(B) in utensils for serving food if the utensils are used only as part of an uninterrupted process from cooking through service;

(6) ceramic, china, crystal, and decorative utensils, including hand-painted ceramic and china that contact food, are lead-free or contain levels of lead that do not exceed the limits set in Table C of this subsection; the operator shall purchase utensils specified as lead-free, or use a commercial lead test kit to test the food-contact surfaces of utensils;

TABLE C MAXIMUM LEAD CONTENT	
UTENSIL CATEGORY	MAXIMUM LEAD (milligrams per liter - mg/l)
Coffee or other hot beverage mugs	0.5
Bowls larger than 1.1 liter (1.16 quart)	1.0
Bowls smaller than 1.1 liter	2.0
Plates, saucers, and other flat utensils	3.0

(7) copper and copper alloys, such as brass,

(A) do not contact food with a pH below six, such as vinegar, fruit juice, or wine, except that copper or copper alloys may, in the pre-fermentation or fermentation stage of beer brewing, contact beer brewing ingredients that have a pH below six; and

(B) are not used for fittings or tubing between a backflow prevention device, such as a double check valve, and a carbonator; [AND]

(8) enamelware is not used as a food-contact surface;

(9) multi-use utensils, that have a perfluorcarbon resin coating are used only with non-scoring or non-scratching utensils and cleaning aids;

(10) galvanized metal is not used for utensils or food-contact surfaces of equipment that are used in contact with food having a pH below six, such as vinegar, fruit juice, or wine,; and

(11) materials used to make single-service and single-use articles

(A) do not allow the migration of deleterious substances, or impart colors, odors, or tastes to food; and

(B) are safe and clean.

....

(Eff. 5/18/97, Register 142; am/readopt 12/19/99, Register 152; am \_\_/\_\_/\_\_, Register \_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020

18 AAC 31.410 is repealed and readopted to read:

**18 AAC 31.410. Design and construction.** (a) The operator shall ensure that

(1) multi-use food-contact surfaces are

(A) smooth and easily cleanable;

(B) free of breaks, open seams, and hard-to-clean internal corners and crevices;

(C) finished to have smooth welds and joints;

(D) easily accessible for cleaning; and

(E) maintained in good repair;

(2) nonfood-contact surfaces of equipment that are exposed to splash, spillage, or other food soiling, or that require frequent cleaning are

(A) constructed of a corrosion resistant, nonabsorbent, and smooth material, except that unfinished wood may be used for nonfood-contact surfaces in a dry food storage room, walk-in freezer, or utility room;

(B) free of unnecessary ledges, projections, or crevices; and

(C) easily accessible for cleaning;

(3) equipment

(A) intended for in-place cleaning is constructed so that

(i) washing, rinsing, and sanitizing solutions can be circulated throughout the closed system and contact all interior food-contact surfaces; and

(ii) the system is self-draining or capable of complete evacuation by mechanical means;

(B) that is designed for use with a cover or lid

(i) has an opening located within the top of the unit that is flanged upward at least two-tenths of an inch; and

(ii) has a cover or lid that overlaps the opening and is sloped to drain;

(C) is designed so that fixed piping, temperature measuring devices, rotary shafts, and other parts extending into equipment are provided with a watertight joint at the point where the item enters the equipment, except that if a watertight joint cannot be provided, the equipment

(i) is designed so that the piping, temperature measuring devices, rotary shafts, and other parts extending through the openings are equipped with an apron designed to deflect condensation, drips, and dust from openings into the food; and

(ii) has an opening located within the top of the unit that is flanged upward at least two-tenths of an inch; and

(D) compartments that are subject to accumulation of moisture due to conditions such as condensation, food or beverage drip, or water from melting ice are sloped to an outlet that allows complete draining;

(4) tubing carrying beverage ingredients to dispensing heads does not contact ice that is to be consumed unless the tubing is grommeted at entry and exit points of the ice bin to prevent condensation from entering the ice bin;

(5) hood filters are easily cleanable and readily removable for cleaning;

(6) at least one utility sink, or curbed cleaning unit with a floor drain, for cleaning mops, filling mop buckets, and disposing of mop water and similar liquid waste is provided; in addition, a utility sink or curbed cleaning unit with a floor drain is not used in a preparation, processing, or warewashing area, or any other location that could cause it to be a source of contamination to food, clean utensils, single-service items, or equipment;

(7) if the establishment is extensively remodeled or began construction after May 27, 1983, at least one three-compartment sink is installed in the warewashing area; the operator of a bar or tavern that is extensively remodeled or that began operation after May 27, 1983 shall ensure that a fourth sink compartment that may be used for dumping drinks and handwashing is installed in addition to those used for washing, rinsing, and sanitizing; the department will allow the installation of a two-compartment sink at a limited food service as provided in 18 AAC 31.610(b)(4);

(8) each warewashing sink compartment is adequate for the complete immersion of most equipment and utensils, with each compartment supplied with hot and cold potable running water under pressure;

(9) each handwash sink is equipped with

(A) hot and cold running water under pressure that can be tempered to a temperature between 100 - 120° F by a mixing valve or combination faucet;

(B) if installed, self-dispensing, slow-closing, or metering faucets that provide a flow of water for at least 15 seconds without the need to reactivate the faucet; and

(C) installed in conjunction with each sink, either sanitary towels in a dispenser or a hand-drying device that provides heated air;

(10) if the establishment is extensively remodeled, has a significant change in its method of preparation or processing, or began operation after May 18, 1997, a separate preparation sink is installed if the menu or method of preparation or processing requires frequent soaking, rinsing, culling, or cleaning of raw ingredients or produce;

(11) each sink is self-draining;

(12) each warewashing machine is equipped with

(A) a properly installed device that automatically washes, rinses, and sanitizes equipment and utensils that is maintained in good repair, and operated in accordance with the machine's data plate and other manufacturer's instructions;

(B) a one-quarter inch iron pipe size valve installed immediately upstream from the fresh hot water sanitizing rinse control valve of a warewashing machine to ensure that the pressure is between 15 and 25 pounds per square inch during the sanitizing rinse;

(C) machine-mounted or waterline-mounted, numerically-scaled, indicating thermometers that

(i) are calibrated in accordance with manufacturer's instructions to ensure accuracy to  $\pm 3^{\circ}$  F;

(ii) continuously measure the water temperature in each tank; and

(iii) are installed immediately upstream of the final rinse water entering the manifold;

(D) self-draining drainboards on both sides of the warewashing machine, adequate in size for stacking soiled utensils and air drying cleaned utensils after sanitization; this requirement does not preclude the use of additional easily cleanable dishtables for the storage of soiled utensils or for the storage of cleaned utensils after sanitization and air-drying;

(E) if installed after *{the effective date of these regulations}*, an easily accessible and readable data plate affixed to the machine by the manufacturer that indicates the machine's design and operating instructions, including the

(i) temperatures required for washing, rinsing, and sanitizing;

(ii) pressure required for the fresh water sanitizing rinse unless the machine is designed to use only a pumped sanitizing rinse; and

(iii) conveyor speed for conveyor machines or cycle time for stationary rack machines; and

(F) if installed after *{the effective date of these regulations}*, a visual means to verify that detergents and sanitizers are delivered, or a visual or audible alarm to signal if the detergents and sanitizers are not delivered to the respective washing and sanitizing cycles;

(13) if existing refrigeration equipment is in place and in use on June 28, 2001, and is not capable of maintaining food at 41° F or less, the equipment maintains potentially hazardous food at 41° F - 45° F until June 28, 2006, at which time all food establishment operators shall ensure that potentially hazardous food is maintained at 41° F or less; and

(14) shelving used in a refrigeration or freezer unit is slotted or perforated to enhance air circulation; the use of unfinished wood shelving in a reach-in refrigeration or freezer unit is prohibited except that unfinished wood may be used as shelving in a walk-in freezer.

(b) The operator of a food establishment that has a system for holding live shellstock or crustaceans shall ensure that

(1) systems for holding live shellstock and crustaceans

(A) have tanks that

(i) have smooth, cleanable surfaces;

(ii) are durable and accessible for washing, rinsing, and sanitizing;

(iii) have plumbing and spray nozzles that are cleanable and made from safe materials; and

(iv) hold at least 100 gallons of water per 75 pounds of shellfish;

(B) have plumbing that

(i) will not be a source of contamination;

(ii) does not have dead-end pipes or hoses that can fill with stagnant water; and

(iii) has a backflow prevention device to protect the potable water supply;

(C) have a recirculation system that includes

(i) filtration to remove particulate matter and ammonia;

(ii) a disinfection system to remove coliform bacteria from the water; if a UV light system is used, the UV lights are cleaned at least every 6-8 weeks and the bulbs are replaced at least yearly; and

(iii) a refrigeration unit to maintain water at 40 - 60° F; and

(2) employees who work in an establishment where a system for holding live shellstock or crustaceans is used

(A) do not mix shellstock with crustaceans;

(B) do not co-mingle different lots of shellstock in the tank;

(C) use vertical dividers or mesh bags for separating lots;

(D) wash shellstock free of mud or other debris and cull dead, broken, or weak shellstock before placing shellstock in the tank;

(E) cull shellstock at least daily to remove dead or weak shellstock;

(F) wash, rinse, and sanitize the tank and recirculation system at least once each week;

(G) ensure that tanks and recirculation systems that have been used for other species are washed, rinsed, and sanitized before use for mollusks;

(H) ensure that defoamers, if used, are of food-grade quality; and

(1) follow the manufacturer's guidelines for maintaining the water's salinity in the tanks; and

(c) The operator of a food service shall ensure that

(1) except for a specific food service operation listed in 18 AAC 31.525(b), at least one handwash sink is provided

(A) in the preparation area, except as provided in (2) of this subsection;

(B) in the warewashing area if the same employee who handles soiled utensils also handles cleaned utensils; the department will allow the installation of a single handwash sink to satisfy the requirements of this paragraph and (1) of this subsection if the operator demonstrates to the department's satisfaction that the single sink is convenient to the food preparation and the warewashing area; and

(C) in or next to the exit of each toilet room;

(2) at least one three-compartment sink is installed in the warewashing area; the operator of a bar or tavern shall ensure that a fourth sink compartment is installed in addition to those used for washing, rinsing, and sanitizing; the fourth sink may be used for dumping drinks and handwashing.

(d) The operator of a market or food processing establishment

(1) constructed or extensively remodeled after May 18, 1997 shall provide at least one handwash sink

(A) in the processing area; and

(B) in or next to the exit of each toilet room.

(2) that uses multi-use utensils, or equipment that must be disassembled for cleaning, and that was extensively remodeled or began operation after May 18, 1997 shall ensure that at least one three-compartment sink is installed in the warewashing area. (Eff. 5/18/97, Register 142; am/readopt 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority:	AS 17.20.005	AS 17.20.072	AS 17.20.290
	AS 17.20.020	AS 17.20.180	AS 44.46.020

Editor's note: Effective 12/19/99, Register 152, the Department of Environmental Conservation readopted 18 AAC 31.410, to affirm the validity of that section following statutory amendments made in ch. 72, SLA 1998. The department also amended 18 AAC 31.410(h). Chapter 72, SLA 1998 relocated department authority to adopt regulations in 18 AAC 31 from AS 03.05 to AS 17.20.

18 AAC 31.415(b) is amended to read:

**18 AAC 31.415. Equipment installation and location.**

....

(b) The operator of a bar or tavern who serves food as described in **18 AAC 31.020(d)(1)(F)** [18 AAC 31.020(d)(6)] shall ensure that the areas and equipment used to prepare and serve food and beverages and used for warewashing are adequate to support the types and volume of food and beverages and methods of preparation and service.

....

(Eff. 5/18/97, Register 142; readopt 12/19/99, Register 152; am 12/31/2000, Register 156; am 6/28/2001, Register 158; am \_\_/\_\_/\_\_, Register \_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020

18 AAC 31.420 is repealed and readopted to read:

**18 AAC 31.420. Cleaning and sanitizing.** (a) The operator of a food establishment shall ensure that cleaning and sanitizing is performed as follows:

(1) except as otherwise specified in this section, multi-use utensils, including tableware, and food-contact surfaces of equipment are washed, rinsed, and sanitized after each use; fixed equipment or equipment too large to be cleaned in sinks must be washed, rinsed, and sanitized by hand or by pressure spraying;

(2) food-contact surfaces of equipment and multi-use utensils

(A) are washed, rinsed, and sanitized or replaced with clean and sanitized equipment and utensils

(i) before each use with a different type of raw animal food;

(ii) each time there is a change from working with raw foods to working with ready-to-eat foods;

(iii) between uses with raw fruits and vegetables and with potentially hazardous food; and

(iv) at any time during the operation when contamination may have occurred;

(B) used in portioning or baking nonpotentially hazardous foods are washed, rinsed, and sanitized at least every 24 hours;

(C) used to prepare or serve potentially hazardous food on a continuous

or production-line basis

(i) are washed, rinsed, and sanitized at least every four hours during production or replaced with clean and sanitized equipment and utensils; or

(ii) in a refrigerated room maintained at 50° F or below must be washed, rinsed, and sanitized at least every 24 hours;

(3) nonfood-contact surfaces of equipment are kept free of dust, dirt, food particles, grease, and other debris;

(4) if used, a reservoir that is used to supply water to a device such as a produce fogger is maintained in accordance with manufacturer's instructions and cleaned at least once per week in accordance with manufacturer's instructions or as follows:

(A) drain and complete disassemble of the water and aerosol contact parts;

(B) brush-clean the reservoir, aerosol tubing, and discharge nozzles with a suitable detergent solution;

(C) flush the complete system with water to remove the detergent solution and particulate accumulation;

(D) rinse by immersing, spraying, or swabbing the reservoir, aerosol tubing, and discharge nozzles with at least 50 mg/L hypochlorite solution;

(5) each warewashing machine, the compartments of sinks, basins, or other receptacles used for washing and rinsing equipment, utensils, or raw foods, or laundering wiping cloths, and drainboards or other equipment used to substitute for drainboards are cleaned:

(A) before use;

(B) throughout the day at a frequency necessary to prevent recontamination of equipment and utensils and to ensure that the equipment performs its intended function; and

(C) if used, at least every 24 hours;

(6) temperature probes or thermometers used in a food product are cleaned and sanitized

(A) before the internal food temperature is taken;

(B) after use, and before storage; and

(C) between use with raw and with ready-to-eat foods;

(7) food-contact surfaces of grills and griddles are cleaned at least once each day;  
and

(8) the cavities and door seals of microwave ovens are cleaned at least once each day by using the manufacturer's recommended cleaning procedure.

(b) The operator of a food establishment shall ensure that food-contact surfaces of equipment and utensils that are manually washed are sanitized only

(1) by using one of the following methods:

(A) immersion for at least 30 seconds in clean water at a temperature of 170° F or above;

(B) immersion for at least 30 seconds in a clean sanitizing solution at a temperature of 75° F or above when using one of the following sanitizing solutions:

(i) 50 ppm of available chlorine as hypochlorite;

(ii) 12.5 - 25 ppm of available iodine with a pH no higher than 5.0;

(iii) quaternary ammonium compound at a concentration specified by the manufacturer on the label, with a pH no less than 6.0, water hardness no greater than 500 ppm, and following the manufacturer's recommendations regarding use of a final rinse after sanitization; or

(iv) any other approved sanitizing agent that will provide the same bactericidal effect as the solutions described in (A) - (C) of this paragraph;

(C) treatment for at least 30 seconds with steam that is free from harmful substances;

(D) rinsing, spraying, or swabbing with a clean sanitizing solution described in (B) of this subsection if the equipment is too large for immersion; and

(2) if chemicals are used for sanitizing, a test kit, test strips, or another device, such as a product thermometer, is provided and used often to ensure compliance with the concentration and temperature requirements of (3) of this section; and

(3) if hot water is used for sanitizing,

(A) an integral heating device is installed that will maintain the water at a temperature of 170° F or above;

(B) a numerically-scaled, indicating thermometer calibrated in accordance with manufacturer's instructions to ensure accuracy to  $\pm 3^{\circ}$  F is installed; and

(C) dish baskets are used that allow complete immersion of tableware, kitchenware, and equipment in the hot water.

(c) The operator of a food establishment shall ensure that food-contact surfaces of equipment and utensils that are machine-washed are sanitized only

(1) if chemicals are used for sanitizing,

(A) the temperature of the wash water is 120° F or above;

(B) the wash water is clean;

(C) the sanitizer is automatically dispensed;

(D) utensils and equipment are exposed to the sanitizing solution according to the manufacturer's instructions;

(E) the sanitizing solution temperature is at least the temperature specified by the manufacturer; and

(F) a test kit, test strip, or another device to accurately measure the concentration of the sanitizing solution accurately is provided and used often to ensure compliance with the concentration requirements of this section;

(2) if hot water is used for sanitizing,

(A) wash water and rinse water are clean;

(B) the temperature on the utensil surface is raised to 160° F or above at the end of the sanitizing cycle as measured by an irreversible registering temperature indicator; and

(C) the temperatures of the wash and rinse waters are maintained as required by Table D of this section;

<b>TABLE D TEMPERATURE REQUIREMENTS FOR MACHINES USING HOT WATER FOR SANITIZING</b>	
<b>Single-tank, stationary-rack, dual-temperature machine:</b> Wash temperature Final rinse temperature	150° F 180° F
<b>Single-tank, stationary-rack, single-temperature machine:</b> Wash temperature Final rinse temperature	165° F 165° F
<b>Single-tank, conveyor machine:</b> Wash temperature Final rinse temperature	160° F 180° F
<b>Multi-tank, conveyor machine:</b> Wash temperature Pumped rinse temperature Final rinse temperature	150° F 160° F 180° F
<b>Single-tank, pot, pan, and utensil washer:</b> Wash temperature Final rinse temperature	140° F 180° F

(d) The operator of a food establishment shall ensure that the following procedures are used to wash, rinse, and sanitize utensils and equipment:

(1) for manual washing, rinsing, and sanitizing

(A) clean each sink compartment;

(B) pre-rinse, scrape, or soak each utensil and equipment as necessary to remove large food particles;

(C) wash thoroughly in the first compartment of the sink with a detergent solution maintained at a temperature not less than 110° F, or the temperature specified on the cleaning agent manufacturer's label instructions; the detergent solution must be changed frequently to maintain cleanliness;

(D) rinse thoroughly in the second compartment in warm water that is changed frequently to maintain cleanliness;

(E) sanitize in the third compartment as described in (c) of this section;

and

(F) air-dry, except that utensils that have been air-dried may be polished with a cloth that is kept clean and dry;

(2) for mechanical washing, rinsing, and sanitizing,

(A) pre-rinse, scrape, or soak each utensil and equipment as necessary to remove large food particles before utensils or equipment are washed, unless a prewash cycle is used;

(B) place soiled items to be cleaned in racks, trays, or baskets, or onto conveyors in a manner that exposes the items to the unobstructed spray from all cycles and allows the items to drain; and

(C) air-dry, except that utensils that have been air-dried may be polished with a cloth that is kept clean and dry.

(e) The operator of a food establishment shall ensure that

(1) cloths used to wipe food spills on tableware are clean, dry, and used for no other purpose;

(2) moist cloths are

(A) cleaned and rinsed frequently or stored in a clean sanitizing solution that is 100 ppm of available chlorine as hypochlorite or if another sanitizing solution is used, in a concentration as specified by manufacturer's instructions;

(B) used for no other purpose;

(C) laundered daily; if air-dried, the cloths must be air-dried in a location and in a manner that prevents contamination of food, equipment, utensils, linens, and single-service and single-use articles and the cloths; and

(D) if used with raw animal foods, kept separate from cloths used for other purposes, and kept in a separate sanitizing solution;

(3) sponges are not used in contact with cleaned and sanitized or in-use food-contact surfaces; and

(4) if dry cleaning methods, including brushing, scraping, and vacuuming, are used,

(A) the dry cleaning method is only used on surfaces that are soiled with dry food residues that are not potentially hazardous; and

(B) cleaning equipment used in dry cleaning food-contact surfaces is not used for any other purpose. (Eff. 5/18/97, Register 142; am/readopt 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020

Editor's note: Effective 12/19/99, Register 152, the Department of Environmental Conservation readopted 18 AAC 31.420, to affirm the validity of that section following statutory amendments made in ch. 72, SLA 1998. The department also amended 18 AAC 31.420(a). Chapter 72, SLA 1998 relocated department authority to adopt regulations in 18 AAC 31 from AS 03.05 to AS 17.20.

18 AAC 31.500 is amended to read:

**18 AAC 31.500. Water supply.** (a) Except for a food establishment described in (e) of this section, the operator of a food establishment shall

(1) provide an adequate supply of potable water from a source constructed and operated [AS] if required by 18 AAC 80;

(2) ensure that potable water that is not piped to the food establishment is transported, delivered, and stored as required by 18 AAC 80; and

(3) ensure that steam used in contact with food or food-contact surfaces is free from harmful substances and is from a potable water source.

(b) The operator of a mobile food unit or kiosk shall ensure that potable water tanks, plumbing, and hoses that come in contact with potable water on the unit or kiosk

(1) consist of materials approved for that use by the National Sanitation Foundation [(NSF)], FDA, or an organization recognized as equivalent by the department;

(2) are used for no purpose except to hold, carry, or dispense potable water; and

(3) are protected from contamination during storage.

(c) The operator of a mobile food unit or kiosk shall ensure that

(1) the potable water inlet of the mobile food unit or kiosk is

(A) capped and cannot be contaminated by waste discharge, road dust, oil, or grease; and

(B) three-fourths inch in inner diameter or less; and

(2) potable water tanks supply a sufficient amount of water between refilling and hold at least one day's supply.

(d) The operator of a mobile food unit or kiosk, except a pushcart, shall

(1) take the following actions at least annually and before seasonal startup:

(A) superchlorinate each potable water tank for at least two hours with 50 ppm chlorine solution; and

(B) drain, thoroughly rinse, and refill the tank[; AND

(C) SUBMIT WATER SAMPLES TO A CERTIFIED LABORATORY FOR COLIFORM ANALYSIS

(I) BEFORE INITIAL STARTUP AND BEFORE SEASONAL STARTUP; AND

(II) EVERY THREE MONTHS DURING OPERATION; AND

(2) TAKE THE FOLLOWING ACTIONS IF NOTIFIED THAT A WATER SAMPLE EXCEEDS THE MAXIMUM CONTAMINANT LEVEL FOR COLIFORM BACTERIA AS SET OUT IN 18 AAC 80.300(b)(5):

(A) IMMEDIATELY SUPERCHLORINATE THE TANK AS DESCRIBED IN (1)(A) AND (B) OF THIS SUBSECTION; AND

(B) SUBMIT ANOTHER WATER SAMPLE TO A CERTIFIED LABORATORY FOR COLIFORM ANALYSIS WITHIN 24 HOURS AFTER SUPERCHLORINATION].

(e) The operator of a food establishment placed under a boil water notice under 18 AAC 80[, OTHER THAN A MOBILE FOOD UNIT OR KIOSK SUBJECT TO (C) OR (D) OF THIS SECTION.] shall take the applicable actions listed in Table E of this subsection as directed by the department.

<b>TABLE E REQUIREMENTS FOR OPERATING UNDER A BOIL WATER NOTICE</b>		
	<b>Total Coliform Exceedance</b>	<b>Fecal Coliform Exceedance</b>
Water supply	Use boiled water or an alternate potable water supply	Use boiled water or an alternate potable water supply
Food, drink, ice	Use food, drink, and ice prepared prior to notice	Destroy food, drink, and ice prepared prior to notice. Limit menu and type of food preparation depending on volume available from alternate potable water supply
Water use equipment	Disconnect equipment. Clean and sanitize before reuse	Disconnect equipment. Clean and sanitize before reuse
Wiping cloths	Rinse in 100 ppm chlorine solution	Rinse in 100 ppm chlorine solution
Tableware	Continue to use	Use single-service
Other utensil washing	Use automatic warewasher or add sanitizer to all sinks	Use automatic warewasher or add sanitizer to all sinks
Handwashing stations	Use existing handwash sinks	Set up temporary handwash sinks using alternate water source

- (f) The requirements of this section do not apply to a
- (1) temporary food service subject to 18 AAC 31.600;
  - (2) limited food service that dispenses only prepackaged food and that meets the requirements of 18 AAC 31.610(c);
  - (3) mobile food unit that dispenses only prepackaged food and that meets the requirements of 18 AAC 31.620(g);
  - (4) mobile retail food vendor that sells only prepackaged food and that meets the requirements of 18 AAC 31.625(1); or
  - (5) kiosk that sells only prepackaged food and that meets the requirements of 18 AAC 31.615(c).

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(g) An exemption in (f) of this section does not relieve an operator from complying with requirements of the Department of Labor and Workforce Development. (Eff. 5/18/97, Register 142; am/readopt 12/19/99, Register 152; am \_\_/\_\_/\_\_, Register \_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020

18 AAC 31.510 (a) is amended to read:

**18 AAC 31.510. Wastewater.** (a) Except for a food establishment described in (c) of this section, the operator of a food establishment shall ensure that wastewater from the establishment is discharged into a public sewer or a wastewater disposal system built and operated if [AS] required by 18 AAC 72.

....

(Eff. 5/18/97, Register 142; am/readopt 12/19/99, Register 152; am \_\_/\_\_/\_\_, Register \_\_)

Authority: AS 17.20.005 AS 17.20.180 AS 44.46.020  
AS 17.20.072

18 AAC 31.515(c)(7) is amended to read:

**18 AAC 31.515. Plumbing.**

(c) The operator of a food establishment shall ensure that

....

(7) sinks and machines used for warewashing are [WAREWASHING MACHINES ARE NOT] directly connected to the sewage system; a floor drain must be provided adjacent to the fixture, and the fixture must be connected on the sewer side of the floor drain trap, provided that no other drainage line is connected between the floor drain waste connection and the fixture drain; in addition, the fixture and floor drain must be trapped and vented as required by applicable state and local plumbing codes [IF A WAREWASHING MACHINE IS LOCATED NEXT TO A FLOOR DRAIN WITH A TRAP, THE WAREWASHER'S WASTE OUTLET MAY BE CONNECTED DIRECTLY ON THE INLET SIDE OF THE FLOOR DRAIN TRAP];

(8) drain lines from equipment do not discharge wastewater directly on a floor;  
and

....

(Eff. 5/18/97, Register 142; am/readopt 12/19/99, Register 152; am \_\_/\_\_/\_\_, Register \_\_)

Authority: AS 17.20.005 AS 17.20.180 AS 44.46.020  
AS 17.20.072 AS 17.20.290

18 AAC 31.520(e)(4) is amended to read:

**18 AAC 31.520. Toilet facilities.**

....

(c) The operator of a food establishment shall ensure that

....

(4) easily cleanable waste containers are provided and emptied at least once each day; in a toilet room used by females, the operator provides a covered waste container for sanitary napkins.

....

(Eff. 5/18/97, Register 142; am/readopt 12/19/99, Register 152; am \_\_/\_\_/\_\_, Register \_\_)

Authority:	AS 17.20.005	AS 17.20.180	AS 18.35.120
	AS 17.20.072	AS 18.35.100	AS 44.46.020

18 AAC 31.525(a)(1) is amended to read:

**18 AAC 31.525. Handwash facilities.** (a) Except for a food establishment described in (b) of this section, the operator of a food establishment shall ensure that

(1) handwash sinks are provided as required by 18 AAC 31.410(a)(9) [18 AAC 31.410(b)] and are

....

(Eff. 5/18/97, Register 142; am/readopt 12/19/99, Register 152; am \_\_/\_\_/\_\_, Register \_\_)

Authority:	AS 17.20.005	AS 17.20.180	AS 18.35.120
	AS 17.20.072	AS 18.35.100	AS 44.46.020

18 AAC 31.535 is repealed and readopted to read:

**18 AAC 31.535. Insect and rodent control.** (a) The operator of a food establishment shall ensure that the presence of insects, rodents, and other pests is controlled to minimize their presence on the premises by:

- (1) routinely inspecting incoming shipments of food and supplies;
- (2) routinely inspecting the premises for evidence of pests;
- (3) using methods, if pests are found, such as trapping devices or other means of pest control allowed under this chapter and in accordance with 18 AAC 90; and

(4) eliminating conditions that contribute to the harboring of pests.

(b) The department may require the operator to hire a commercial pest control applicator certified under 18 AAC 90 to handle an insect, rodent, or other pest problem if the operator does not demonstrate to the department's satisfaction that the operator has adequately controlled the problem with pesticides and traps, or if an imminent health hazard exists. If the department requires a certified commercial pest control applicator under this section, the operator shall provide documentation to the department detailing the actions taken by the applicator.

(c) The operator of a food establishment shall ensure that insect light traps and flypaper, if used in the establishment, are

(1) located so that dead insects cannot fall on food, food-contact surfaces, or clean equipment or utensils; and

(2) changed often enough to prevent a heavy accumulation of insects in the traps or on the flypaper.

(d) The operator of a food establishment shall ensure that

(1) food, utensils, and food-contact surfaces are completely protected while pesticides are used;

(2) pesticides and pesticide use comply with 18 AAC 90;

(3) pesticides are not stored

(A) next to or above food; or

(B) over a working surface, a food-contact surface, utensils, an ice maker, or other food equipment;

(4) automatic dispensing aerosol units, if used, are

(A) prohibited in areas where food is prepared or served;

(B) installed and used only in areas beyond the influence of a ventilation system; and

(C) at least 20 feet from any processing, preparation, food or utensil storage, or warewashing area;

(5) dead or trapped birds, insects, rodents, and other pests are removed from control devices and the premises at a frequency that prevents their accumulation, decomposition, or the attraction of other pests;

(6) rodent bait is contained in a covered, tamper-resistant bait station; and

(7) a tracking powder pesticide is not used in a food establishment; a nontoxic tracking powder such as talcum or flour may not contaminate food, equipment, utensils, linens, or single-service and single-use articles.

(e) The operator of a food establishment shall ensure that openings to the outside are effectively protected against the entrance of rodents, insects, and other pests by tight-fitting, self-closing doors, closed windows, screening, controlled air currents, or other means. Screening material must be tight-fitting, free from breaks, and not less than 16 mesh to the inch.

(Eff. 5/18/97, Register 142; am/readopt 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority:	AS 17.20.005	AS 17.20.072	AS 17.20.290
	AS 17.20.010	AS 17.20.180	AS 44.46.020

Editor's note: Effective 12/19/99, Register 152, the Department of Environmental Conservation readopted 18 AAC 31.535, to affirm the validity of that section following statutory amendments made in ch. 72, SLA 1998. The department also amended 18 AAC 31.535(a). Chapter 72, SLA 1998 relocated department authority to adopt regulations in 18 AAC 31 from AS 03.05 to AS 17.20.

18 AAC 31.540(6) is amended to read:

**18 AAC 31.540. Floors.** Except for a temporary food service subject to 18 AAC 31.600, the operator of a food establishment shall ensure that

....

(6) mats, duckboards and nonslip floor coverings are made of nonabsorbent and grease-resistant materials and are designed to be removable and easily cleanable;

....

(Eff. 5/18/97, Register 142; readopt 12/19/99, Register 152; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority:	AS 17.20.005	AS 17.20.072	AS 17.20.290
	AS 17.20.020	AS 17.20.180	AS 44.46.020

18 AAC 31.545 is amended by adding new paragraphs to read:

**18 AAC 31.545. Walls and ceilings.** The operator of a food establishment shall ensure that

....

(4) studs, joists, and rafters are not exposed in preparation or processing areas; if studs, joists, or rafters are exposed in other areas, they must be clean and in good repair; [AND]

(5) exposed utility service lines and pipes do not obstruct the cleaning of walls and ceilings;

(6) perimeter walls and roofs of a food establishment effectively protect the establishment from the weather and the entry of insects, rodents, and other animals; and

(7) servicing areas are provided with overhead protections, except for areas used only for the loading of water or the discharge of sewage and other liquid waste, through the use of a closed system of hoses. (Eff. 5/18/97, Register 142; readopt 12/19/99, Register 152; am \_\_/\_\_/\_\_, Register \_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020

18 AAC 31.550 is amended to read:

**18 AAC 31.550. Cleaning.** The operator of a food establishment shall ensure that

(1) cleaning required by 18 AAC 31.540 - 18 AAC 31.545 is conducted when the least amount of food is exposed, except for emergency cleaning of floors;

(2) cleaning is performed by a dustless method; and

(3) wastewater from cleaning required by 18 AAC 31.540 - 18 AAC 31.545 is not disposed of in a preparation sink, handwash sink, or a sink used to wash utensils or equipment. (Eff. 5/18/97, Register 142; readopt 12/19/99, Register 152; am \_\_/\_\_/\_\_, Register \_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020

18 AAC 31.560(1) and (3) are amended to read:

**18 AAC 31.560. Ventilation.** The operator of a food establishment shall ensure

(1) that equipment that produces excessive heat, steam, condensation, vapors, noxious odor, smoke, or fumes is adequately vented to outside air through a hood and filter system that complies with 18 AAC 31.400 - 18 AAC 31.420, and that prevents grease, condensation, or other filth from collecting on walls and ceilings or from draining or dripping onto food, equipment, utensils, linens, single-service, single-use articles, or food-contact surfaces;

....

(3) that commercial cooking equipment that produces grease-laden vapors is vented through a hood and grease collection system designed and installed in accordance with the *International Mechanical Code, 2003 edition* [2000 EDITION], chapter 5, sections 506-509, adopted by reference in 18 AAC 31.011;

....

(Eff. 5/18/97, Register 142; am 12/19/99, Register 152; am 6/28/2001, Register 158; am  
 \_\_/\_\_/\_\_, Register \_\_)

Authority: AS 17.20.005 AS 17.20.180 AS 44.46.020  
 AS 17.20.072

18 AAC 31.575(7) is amended to read:

**18 AAC 31.575. Premises.** The operator of a food establishment shall ensure that

...

**(7) maintenance tools, including brooms, mops, vacuum cleaners, and similar items, are**

**(A) stored so the tools do not contaminate food, equipment, utensils, linens, and single-service and single-use articles;**

**(B) stored in an orderly manner that facilitates cleaning the area used for storing the maintenance tools; and**

**(C) placed in a position that allows tools and items, if wet, to air-dry without soiling walls, equipment, or supplies**[STORAGE OF MAINTENANCE TOOLS AND CLEANING EQUIPMENT CANNOT CONTAMINATE FOOD, UTENSILS, EQUIPMENT, OR LINEN AND WILL NOT OBSTRUCT CLEANING];

...

(Eff. 5/18/97, Register 142; readopt 12/19/99, Register 152; am \_\_/\_\_/\_\_, Register \_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 44.46.020  
 AS 17.20.020 AS 17.20.180

18 AAC 31.600 is amended to read:

**18 AAC 31.600. Temporary food service.** (a) In addition to the other applicable requirements of this chapter, the operator of a temporary food service shall comply with this section.

(b) Food must be prepared at the temporary food service unless the department approves prior preparation at a permitted food establishment or another facility under (c)(5) of this section.

(c) For a temporary food service, depending on the adequacy of facilities, equipment, and utensils for the types and volume of food and methods of preparation and service, and based on information provided by the operator on an application form provided by the department, the

department will, as the department determines necessary to serve the interests of public health and consumer protection,

- (1) limit the food items to be prepared and sold;
- (2) limit preparation steps;
- (3) prohibit the sale of potentially hazardous food;
- (4) except for the fee required by 18 AAC 31.050, grant a variance from [WAIVE] a requirement of this chapter under 18 AAC 31.930 if the variance [WAIVER] will not threaten public health and consumer protection;
- (5) authorize prior preparation of food at a permitted food establishment or another approved facility if
  - (A) that establishment or facility has adequate equipment for the type and volume of food and methods of preparation;
  - (B) a letter of agreement signed by the operator of the establishment or facility
    - (i) is attached to the temporary food service application;
    - (ii) specifies the food, and the dates and times the food will be prepared; and
    - (iii) confirms that the establishment or facility has adequate equipment and utensils for the type and volume of food and methods of preparation; and
  - (C) food is maintained at temperatures required by 18 AAC 31.230 and protected from contamination during transportation to the temporary food service; and
- (6) deny a temporary permit required under 18 AAC 31.020 if the applicant, within the two years before the application date, received
  - (A) two or more temporary food service inspections noting risk factor and intervention violations that the department determines, based on the nature or number of violations, threaten food safety [TWO OR MORE CRITICAL VIOLATIONS]; or
  - (B) a temporary food service permit suspension or establishment closure.
- (d) The operator of a temporary food service at an event that lasts four or more days shall,
  - (1) within three calendar years before the event, have attended [ATTEND] the

National Restaurant Association's ServSafe course for employees or a training course that provides equivalent information about food condition and source, food protection, temperature control, display and service, **handwashing** [PERSONAL CLEANLINESS], employee practices, and equipment and utensil cleaning and sanitizing; [ TRAINING may be presented as a class with an instructor, a video training course, a home study training course, or a class provided by the department [ VIDEO TRAINING COURSES ARE AVAILABLE FOR REVIEW AT THE DEPARTMENT'S ANCHORAGE, FAIRBANKS, AND JUNEAU OFFICES]; or

**(2) be a certified food protection manager or hold a food worker card issued by the department under 18 AAC 31.330.**

(e) If the department issues an operator the temporary food service permit under 18 AAC 31.020 – 18 AAC 31.030 for an event that lasts four or more days, and that permit is the first that the operator has received for an event of that length, the operator's failure to obtain training timely as required under (d) of this section does not affect the validity of that permit. However, the operator of a temporary food service at an event that lasts four or more days who does not attend the training required under (d) of this section may not obtain an extension of that permit under 18 AAC 31.020(g), and may not obtain a subsequent temporary food service permit for an event of any length, until the operator obtains the training required under (d) of this section and presents a certificate of successful completion to the department.

(f) In addition to the other requirements of this chapter, including the temperature and time requirements in 18 AAC 31.230, the operator of a temporary food service shall ensure that

(1) potentially hazardous food is not reused after being cooked or hot-held;

(2) mechanical refrigeration units are provided to keep potentially hazardous food at 41° F or below, except as specified in 18 AAC 31.410(a)(13) [18 AAC 31.410(k)], and except that

(A) ice cream may be stored on dry ice; and

(B) if approved by the department, at events of one to three days' duration, hamburger patties, precooked meat, raw seafood, and ready-to-eat packaged, potentially hazardous food, such as milk and sandwiches, may be stored in an insulated container using a coolant, such as blue ice or drained ice, to keep the temperature at 41° F or below;

(3) cured food products, such as hot dogs, sausage, or pepperoni, that will not support the rapid or progressive growth of infectious or toxigenic microorganisms or slower growth of *Clostridium botulinum* may be stored in properly insulated containers using a coolant, such as blue ice or drained ice, to keep the temperature at 41° F or below;

(4) packaged food is not stored in undrained ice or iced water except for pressurized containers of nonpotentially hazardous beverages if the water or ice

(A) contains at least 10 ppm of available chlorine; and

(B) is changed frequently to keep the water and container clean;

(5) only single-service articles are provided for use by consumers;

(6) a handwashing facility is provided for employees, including

(A) a container with a minimum capacity of two gallons, equipped with a faucet-type spigot, and filled with warm water; if a container is uninsulated, a means to heat water must also be provided;

(B) a container to catch wastewater from handwashing; and

(C) soap and single-service towels;

(7) at least three basins, deep enough for immersion of utensils and equipment, and a means to heat water are provided to wash, rinse, and sanitize utensils and equipment that will be reused or used on a production-line basis; the requirements of this paragraph do not apply for an event of one-day duration if adequate extra utensils are provided;

(8) a supply is provided of potable drinking water that is

(A) from a public water system approved under 18 AAC 80, if required; and

(B) adequate to meet preparation, handwashing, warewashing, and cleaning needs;

(9) if water is from a [(A) CLASS B] public water system, coliform samples are in compliance with 18 AAC 80; and [(B) CLASS C PUBLIC WATER SYSTEM, A WATER SAMPLE FOR COLIFORM ANALYSIS IS SUBMITTED TO A CERTIFIED LABORATORY AT LEAST 30 DAYS BEFORE THE EVENT, AND THAT, IF A COLIFORM SAMPLE IS POSITIVE,

(i) DISINFECTION TREATMENT IS PROVIDED AS THE DEPARTMENT DETERMINES NECESSARY TO SERVE THE INTERESTS OF PUBLIC HEALTH AND CONSUMER PROTECTION; AND

(ii) AFTER DISINFECTION AS REQUIRED IN (i) OF THIS SUBPARAGRAPH, THE SYSTEM IS RESAMPLED AT LEAST ONCE; AND

(10) a container used to haul potable drinking water is made of materials approved for that use by the National Sanitation Foundation (NSF), the FDA, or an organization recognized as equivalent by the department, is used for no other purpose, and is protected from contamination during storage.

(g) The operator of a temporary food service shall ensure that wastewater is disposed of

into a wastewater disposal system approved under 18 AAC 72, **if required to be approved**, and that holding tanks and direct connections to disposal systems are constructed, maintained, and operated as required in 18 AAC 72. The department will approve a manual hauling system if limited amounts of wastewater are generated and an approved wastewater disposal system is in the vicinity and used by the operator. The operator shall keep wastewater containers covered and label them "For Wastewater Only."

(h) For an event of

**(1)** one to three days' duration, a temporary food service may have a floor consisting of grass, gravel graded to drain, sawdust, or a similar material if dust and mud are controlled; **and**

**(2)** [. FOR AN EVENT OF] four to 28 days' duration, **a temporary food service must have a floor consisting of** concrete, asphalt, tight-fitting wood, or another cleanable material [MUST BE USED].

(i) The operator of a temporary food service shall ensure that walls and ceilings are constructed to protect the interior of the temporary structure from the elements and to restrict access, are cleanable, and are kept clean.

(j) The operator of a temporary food service shall ensure that public toilets and handwashing facilities are provided at events open to the public for two hours or longer and ensure that

(1) the number of toilets furnished is adequate based on the peak crowd anticipated;

(2) if running **potable** water is not practically available,

(A) privies or portable toilets are provided instead of flush toilets; to determine the number of portable toilets that are required, the operator shall use the *Sanitarian & Health Official Guide, Portable Restroom Requirements at Special Events & Crowd Gatherings, Determination of Portable Sanitation Requirements at Large Public Events*, published by The Center for Business and Industrial Studies, University of Missouri-St. Louis, adopted by reference in 18 AAC 31.011; and

(B) lavatories are supplied for washing hands from an approved storage tank, or from an insulated container with a minimum capacity of two gallons each, equipped with a faucet-type spigot and filled with warm water;

(C) bacteriocidal hand rinses are installed

(i) at each privy or portable toilet; or

(ii) in locations that are conveniently accessible to the public after using the privy or portable toilet and the number is adequate based on the peak crowd anticipated;

(3) privies, if used, are designed and constructed as required in 18 AAC 72 and are located so there is no danger in contaminating groundwater; and

(4) privies and portable toilets, if used,

(A) have cleanable interior surfaces, screened openings for ventilation, self-closing doors, and otherwise prohibit the entrance of insects and rodents; and

(B) are serviced as often as necessary to remove accumulated wastes, are kept clean, and are supplied with toilet paper. (Eff. 5/18/97, Register 142; am 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority:	AS 17.20.005	AS 17.20.180	AS 18.35.220
	AS 17.20.020	AS 17.20.290	AS 44.46.020
	AS 17.20.072	AS 18.35.200	

Editor's note: The National Restaurant Associations' ServSafe Course may be obtained from the National Restaurant Association Education Foundation, 175 West Jackson Blvd., Suite 1500 [250 SOUTH WACKER DRIVE, SUITE 1400], Chicago IL 60604-2814 [60606-5834]; phone: (800)765-2122.

Information about how to review or obtain a copy of [A] the requirements referred to in 18 AAC 31.600 and adopted by reference in 18 AAC 31.011 is set out in the editor's note to 18 AAC 31.011.

Video training courses are available for review at the department's Anchorage, Fairbanks, and Juneau offices.

18 AAC 31.610(b) is amended to read:

**18 AAC 31.610. Limited food service.**

....  
(b) At a limited food service, depending on the adequacy of facilities, equipment, and utensils for the types and volume of food and methods of preparation and service, and based on information provided by the operator on the application form by the department, the department may [WILL, AS THE DEPARTMENT DETERMINES NECESSARY TO SERVE THE INTERESTS OF PUBLIC HEALTH AND CONSUMER PROTECTION],

(1) restrict [LIMIT THE NUMBER AND TYPE OF] food items and preparation steps to [BE PREPARED AND SOLD];

(A) service of ready-to-eat packaged food prepared at another permitted establishment under the same ownership;

(B) service of commercially-prepared, ready-to-eat foods, requiring no more than limited preparation, including reheating and minimal handling, such as assembly; or

(C) espresso drinks and other non-potentially hazardous beverages, except for alcoholic drink ;

(2) require the exclusive use of single-service tableware [LIMIT PREPARATION STEPS];

(3) allow the use of an approved commissary or other approved facility located in the same structure or within a reasonable distance to resupply food and single-service items; and

(4) allow the installation of a sink with at least two compartments and one drainboard for air drying clean utensils, in place of the sinks and drainboards required by 18 AAC 31.410(a)(7) and (a)(12), if very few utensils are used to prepare or serve food, and the utensils may be properly washed, rinsed, sanitized, and air-dried [18 AAC 31.410(e) AND (j), IF

(A) ONLY SINGLE-SERVICE ITEMS ARE PROVIDED FOR USE BY CONSUMERS;

(B) ALL OR MOST MENU ITEMS ARE PREPACKAGED OR NONPOTENTIALLY HAZARDOUS FOOD; AND

(C) VERY FEW UTENSILS ARE USED TO STORE, PREPARE, OR DISPENSE FOOD].

....

(Eff. 5/18/97, Register 142; am/readopt 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 17.20.290  
AS 17.20.020 AS 17.20.180 AS 44.46.020

18 AAC 31.625(a)(2) is amended to read:

**18 AAC 31.625. Mobile retail vendors.** (a) In addition to the other applicable requirements of this chapter, a mobile retail vendor selling

....

(2) whole, gutted, or gilled seafood [FISH] that has not been further processed

(A) shall wash raw seafood [FISH] at

(i) a seafood processing facility permitted under 18 AAC 34; or

(ii) a commissary approved by the department under 18 AAC 31.620(b)(3);

(B) shall provide adequate refrigerator, freezer, or ice chests of adequate capacity to store all seafood products and maintain refrigeration temperatures of 41° F or below or freezer temperatures of 0° F or below, except as specified in 18 AAC 31.410(a)(13) [18 AAC 31.410(k)];

....

(Eff. 5/18/97, Register 142; am/readopt 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_/\_\_/\_\_, Register \_\_)

Authority:	AS 17.20.005	AS 17.20.072	AS 17.20.290
	AS 17.20.020	AS 17.20.180	AS 44.46.020

18 AAC 31.630(b)(8) is amended to read:

**18 AAC 31.630. Machines vending potentially hazardous food.**

....

(b) The operator of an establishment providing machines vending potentially hazardous foods shall ensure that

....

(8) the temperature of potentially hazardous food is kept at 41° F or below for cold-held food or 140° F or above for hot-held food except during the time required to load or service the machine and no more than 30 minutes after loading or servicing, except as specified in 18 AAC 31.410(a)(13) [18 AAC 31.410(k)]; and

....

(Eff. 5/18/97, Register 142; am/readopt 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_/\_\_/\_\_, Register \_\_)

Authority:	AS 17.20.005	AS 17.20.072	AS 17.20.290
	AS 17.20.020	AS 17.20.180	AS 44.46.020

18 AAC 31.700(e)(2) is amended to read:

**18 AAC 31.700. Food processing establishment design and control.**

....

(e) In addition to the labeling requirements listed under 18 AAC 31.060, the operator of

a food processing establishment shall ensure that food products made by the processor after January 1, 2001, unless the date is extended by the department as provided under 18 AAC 31.060, are labeled

....

(2) so that the known allergens, including seafood [FISH], tree nuts, mollusks, wheat, milk, crustacea, eggs, and legumes, particularly peanuts and soybeans, used in food product formulations are declared on the label, even if a processing or incidental additive; the name of the ingredient may be accompanied by a parenthetical statement such as "processing aid" for clarity.

....

(Eff. 5/18/97, Register 142; am/readopt 12/19/99, Register 152; am \_\_/\_\_/\_\_\_\_, Register \_\_)

Authority:	AS 17.20.005	AS 17.20.040	AS 17.20.290
	AS 17.20.010	AS 17.20.072	AS 17.20.300
	AS 17.20.020	AS 17.20.180	AS 44.46.020

18 AAC 31.720(a)(3) is amended to read:

**18 AAC 31.720. Thermal processing and acidified food.** (a) An operator of a food establishment who thermally processes low-acid foods packaged in hermetically-sealed containers shall

....

(3) ensure that water used to cool a product thermally processed in a retort is chlorinated or otherwise sanitized, using a sanitizing solution listed in 18 AAC 31.420(b) [18 AAC 31.420(c)(2)] to provide a measurable residual of free available chlorine or its equivalent at the discharge of the cooling system.

....

(Eff. 5/18/97, Register 142; readopt 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_/\_\_/\_\_\_\_, Register \_\_)

Authority:	AS 17.20.005	AS 17.20.072	AS 17.20.290
	AS 17.20.020	AS 17.20.180	AS 44.46.020

18 AAC 31.740(b), (c)(1), (i), and (k) are amended and the editor's note is changed to read:

**18 AAC 31.740. Bottled drinking water.**

....

(b) If the food processing establishment is also the operator of the [CLASS A] public

water system used as the source of the bottled water, a copy of one of the following must be on file at the processing establishment:

- (1) a valid interim approval to operate, issued under 18 AAC 80.210(i);
- (2) a valid final approval to operate, issued under 18 AAC 80.210(k).

(c) In addition to the requirements of this section, an operator of a food processing establishment who bottles drinking water in this state shall ensure that

(1) water to be bottled is obtained only from a source that meets the requirements for a [CLASS A] public water system in compliance with 18 AAC 80;

....

(i) If the presence of fecal coliform or *E. coli* is verified, the [OWNER OR] operator shall immediately recall the contaminated lot.

....

(k) If test results under (j) of this section indicate the presence of coliform bacteria, the [OWNER OR] operator shall review the transportation, storage, and bottling procedures to find the source of contamination and immediately correct any deficiencies found. Records of any review conducted under this subsection must be kept as required under (n)(2) of this section.

....

(Eff. 5/18/97, Register 142; am 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority:	AS 17.20.005	AS 17.20.070	AS 17.20.290
	AS 17.20.010	AS 17.20.072	AS 17.20.300
	AS 17.20.020	AS 17.20.180	AS 44.46.020
	AS 17.20.040	AS 17.20.200	

Editor's Note: An [OWNER OR] operator who bottles drinking water for interstate commerce may also be subject to 21 C.F.R. 129 and should contact the FDA.

18 AAC 31.760(b)(5)(B) and (f)(4) are amended to read:

**18 AAC 31.760. Reduced oxygen packaging at food services or markets.**

....

(b) The operator of a food service or market may reduce oxygen package the following without developing a HACCP plan under 18 AAC 31.710:

....

(5) food that is rapidly frozen prior to or as part of a reduced oxygen packaging process and stored frozen until reheated or thawed for immediate use; food described in this paragraph and (4) of this subsection must meet the following continuous cooling and freezing requirements:

....

(B) the food must be cooled from 70° to 41° F or below within four hours, except as specified in 18 AAC 31.410(a)(13) [18 AAC 31.410(k)]; and

....

(f) In addition to the requirements in (a) - (e) of this section, the operator of a food service or market shall ensure that

....

(4) potentially hazardous food approved for reduced oxygen packaging is refrigerated at a temperature of 41° F or below or frozen at a temperature of 0° F or below, as appropriate, at all times except as specified in 18 AAC 31.410(a)(13) [18 AAC 31.410(k)] or during short periods of processing not to exceed 30 minutes;

....

(Eff. 5/18/97, Register 142; readopt 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority:	AS 17.20.005	AS 17.20.072	AS 17.20.290
	AS 17.20.010	AS 17.20.180	AS 44.46.020
	AS 17.20.020		

18 AAC 31.810(d)(3) is repealed:

**18 AAC 31.810. Retail seafood products.**

....

(d) In addition to the requirements of (a) - (c) of this section, the operator of a market shall ensure that

(1) refrigerated display cases or ice-cooled display cases or bins

(A) are durable and able to withstand the weight of seafood products and display ice;

(B) have a drain system adequate to remove fluids from condensation, melting ice, and the product;

(C) if permanently installed, are indirectly plumbed to the sewer;

(D) with condenser coils or cooling fins located at the top of the case, have catchment covers that remove any possible condensation or drippage above the product; and

(E) are cleaned of ice, and washed, rinsed, and sanitized at least three times each week, or more often if needed to control odor; and

(2) storage pans are perforated[;]

(3) repealed / / [SYSTEMS FOR HOLDING LIVE SHELLFISH

(A) HAVE TANKS THAT

(I) HAVE SMOOTH, CLEANABLE SURFACES;

(II) ARE DURABLE AND ACCESSIBLE FOR WASHING, RINSING, AND SANITIZING;

(III) HAVE PLUMBING AND SPRAY NOZZLES THAT ARE CLEANABLE AND MADE FROM SAFE MATERIALS; AND

(IV) HOLD AT LEAST 100 GALLONS OF WATER PER 75 POUNDS OF SHELLFISH;

(B) HAVE PLUMBING THAT

(I) WILL NOT BE A SOURCE OF CONTAMINATION;

(II) DOES NOT HAVE DEAD-END PIPES OR HOSES THAT CAN FILL WITH STAGNANT WATER; AND

(III) HAS A BACKFLOW PREVENTION DEVICE TO PROTECT THE POTABLE WATER SUPPLY;

(C) HAVE A RECIRCULATION SYSTEM THAT INCLUDES

(I) FILTRATION TO REMOVE PARTICULATE MATTER AND AMMONIA;

(II) A DISINFECTION SYSTEM TO REMOVE COLIFORM BACTERIA FROM THE WATER; AND

(III) A REFRIGERATION UNIT TO MAINTAIN WATER AT 40 - 60° F; AND

(D) HAVE UV LIGHTS FOR DISINFECTION

(I) THAT ARE CLEANED AT LEAST EVERY 6-8 WEEKS;  
AND

(II) THE BULBS FOR WHICH ARE REPLACED AT LEAST  
YEARLY; AND

(4) EMPLOYEES

(A) DO NOT MIX MOLLUSCAN SHELLFISH WITH CRUSTACEAN  
SHELLFISH;

(B) DO NOT CO-MINGLE DIFFERENT LOTS OF SHELLFISH IN  
THE TANK;

(C) USE VERTICAL DIVIDERS OR MESH BAGS FOR  
SEPARATING LOTS;

(D) WASH SHELLFISH FREE OF MUD OR OTHER DEBRIS AND  
CULL DEAD, BROKEN, OR WEAK SHELLFISH BEFORE PLACING SHELLFISH  
IN THE TANK;

(E) CULL SHELLFISH AT LEAST DAILY TO REMOVE DEAD OR  
WEAK SHELLFISH;

(F) WASH, RINSE, AND SANITIZE THE TANK AND  
RECIRCULATION SYSTEM AT LEAST ONCE EACH WEEK;

(G) ENSURE THAT TANKS AND RECIRCULATION SYSTEMS  
THAT HAVE BEEN USED FOR OTHER SPECIES ARE WASHED, RINSED, AND  
SANITIZED BEFORE USE FOR MOLLUSKS;

(H) ENSURE THAT DEFOAMERS, IF USED, ARE OF FOOD-GRADE  
QUALITY; AND

(I) FOLLOW THE MANUFACTURER'S GUIDELINES FOR  
MAINTAINING THE WATER'S SALINITY IN THE TANKS]. (Eff. 5/18/97, Register  
142; readopt 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_,  
Register \_\_\_)

Authority:	AS 17.20.005	AS 17.20.072	AS 17.20.290
	AS 17.20.020	AS 17.20.180	AS 44.46.020
	AS 17.20.040		

**Article 9. Compliance Procedures and General Provisions.**

**Section**

- 900. Inspections **and audits**
- 905. Permit suspension, revocation, or establishment closure
- 910. Examination, detention, and destruction of food
- 915. Civil fines**
- 920. **(Repealed)** [FOOD PROTECTION MANAGERS]
- 925. **(Repealed)** [FOOD SERVICE ESTABLISHMENT RECOGNITION PROGRAM]
- 930. **Variance from** [WAIVER OF] requirements
- 940. Right to appeal noncompliance decision
- 945. **(Repealed)** [DELEGATION OF AUTHORITY]
- 990. Definitions

18 AAC 31.900 is repealed and readopted to read

**18 AAC 31.900. Inspections and audits.** (a) The department may conduct inspections or audits to determine compliance with this chapter and will record the findings.

(b) The operator of a food establishment shall allow an employee or agent of the department, after proper identification, to enter and have free access to the establishment during reasonable hours to

- (1) inspect all or any portion of the establishment, including each type of operation required to have a permit under 18 AAC 31.020;
- (2) inspect all or any portion of any commissary, servicing area, or other facility supporting or operating in conjunction with the food establishment, including areas supporting vending machines;
- (3) examine records relating to the establishment's standard operating procedures, food manager certification, food worker cards, and food and supplies purchased, received, or used;
- (4) examine self-assessments conducted by the establishment;
- (5) investigate any employee illness or absenteeism; and
- (6) examine food, observe procedures, obtain samples, or conduct tests to assure compliance with this chapter.

(c) After an inspection, the operator of a food establishment shall correct violations as follows:

- (1) a risk factor or intervention violation must be corrected immediately; if the department agrees that immediate correction is not possible and that interim measures can be

initiated to satisfy the purpose of the requirement and protection of public health, the department may designate a correction period of up to 15 days on the form; and

(2) a good retail practice violation must be corrected immediately; if the department agrees that immediate correction is not possible and that interim measures can be initiated to satisfy the purpose of the requirement and protection of public health, the department may designate a correction period of up to 30 days on the form.

(d) The operator of a food establishment shall notify the department in writing when the operator has corrected a violation. The department may conduct an inspection to confirm correction.

(e) The department will review inspection findings under 18 AAC 31.940 if the operator of a food establishment submits a written request within 10 days after receiving the finding.

(f) The operator of a food establishment shall

(1) post a copy of the most recent inspection report and a sign provided by the department posted in conspicuous location in public view measuring at least 8 inches by 10 inches with lettering of at least two inches high that reads "If you have a complaint regarding the sanitation of this establishment, contact the Department of Environmental Conservation, Food Safety & Sanitation Program at 1 (877) 835-5332 (1 (877) TELL DEC)"; and

(2) provide a copy of this chapter for review by employees.

(g) The completed inspection report is a public record. The department will, if it determines that publication serves the interests of public health and consumer protection, publish reports or ratings in a newspaper or on the department's internet website.

(h) If an operator of a food establishment requests that the department conduct a consultative inspection to determine compliance with this chapter, the operator shall pay to the department \$200 before the inspection. A violation noted during a consultative inspection is not subject to enforcement action under 18 AAC 31.905 but the department may conduct an inspection to verify correction of a violation. (Eff. 5/18/97, Register 142; am 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_/\_\_/\_\_, Register \_\_)

Authority:	AS 03.05.011	AS 17.20.020	AS 17.20.200
	AS 03.05.040	AS 17.20.070	AS 17.20.220
	AS 17.20.005	AS 17.20.072	AS 17.20.290
	AS 17.20.010	AS 17.20.180	AS 44.46.020

18 AAC 31.905 is repealed and readopted to read:

**18 AAC 31.905. Permit suspension and establishment closure.** (a) The department may, without prior warning, notice, or hearing, suspend a permit and require that the food establishment immediately stop operating if

(1) an imminent health hazard exists where no alternative for immediate

correction or containment that is acceptable to the department is available;

(2) during an inspection conducted under 18 AAC 31.900, risk factor or intervention violation is found that the department determines, based on the nature or number of violations, threaten food safety;

(3) the operator or an employee interferes with a department employee or agent in the performance of official duties;

(4) a food establishment is placed under a boil water notice under 18 AAC 80.635 because of a violation of the maximum contaminant level for coliform bacteria, and the operator fails to take the actions required by 18 AAC 31.500(e);

(5) the department advises the operator under 18 AAC 80 that one or more samples of the food establishment's public water system are positive for fecal coliforms,

(6) the operator fails to comply with the terms of a conditional permit issued under 18 AAC 31.020(h);

(7) multiple or repeated violations of a requirement of this chapter occur; or

(8) a risk factor or intervention violation is not corrected within the time frame designated during an inspection conducted under 18 AAC 31.900.

(b) The department may, without prior warning, notice, or hearing, issue a notice of closure to a food establishment and require that the food establishment immediately stop operating if a person is operating a food establishment without a valid permit issued under 18 AAC 31.020.

(c) After the department suspends a permit or issues a notice of closure, the operator may request an informal review under 18 AAC 15.185 or an adjudicatory hearing under 18 AAC 15.200. This subsection does not affect a person's right to a hearing under AS 44.62 (Administrative Procedures Act).

(d) The department may suspend a conditional permit issued under 18 AAC 31.020 if

(1) the department determines that a suspension would serve the interests of public health or consumer protection;

(2) each violation specified under 18 AAC 31.020(j) is not corrected by the date indicated on the conditional permit;

(3) the operator does not make fee payments in compliance with a fee schedule established under 18 AAC 31.020(i)(4) and (j)(2); or

(4) drinking water plans or wastewater plans submitted as required by 18 AAC 31.030 are not approved.

(e) If the department requires a food establishment to stop operating, the operator may not resume operating until a reinspection shows that the conditions that caused the stoppage no longer exist. The department may, if public health is protected and the purpose of this chapter is otherwise satisfied, accept a written agreement with the operator that establishes a schedule for correcting deficiencies that cannot reasonably be corrected before the scheduled reinspection. (Eff. 5/18/97, Register 142; am 12/19/99, Register 152; am 12/30/2000, Register 156, am 6/28/2001, Register 158; am 7/11/2002, Register 163; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority: AS 17.20.005 AS 17.20.020 AS 17.20.180  
AS 17.20.010 AS 17.20.072 AS 44.46.020

18 AAC 31.910 is amended to read:

**18 AAC 31.910. Examination, detention, and destruction of food.** (a) The department may examine and obtain samples of food offered or displayed for sale to the public.

(b) The department may detain a food product or food ingredient if the department determines, or has cause to believe, that the food product or food ingredient is adulterated, misbranded, or processed or harvested in violation of this chapter. Detention under this subsection is subject to the following procedures:

(1) the department will

(A) order affixed in a conspicuous place to the food product or food ingredient a "detained" tag or other appropriate marking that gives notice that the food product or food ingredient has been detained, and that warns against the removal or disposal of the food product or food ingredient without permission from the department or a court; a person may not move, reprocess, relabel, destroy, or otherwise terminate detention of the food product or food ingredient without the department's written consent;

(B) issue a notice of detention and inform the immediate custodian or operator [OWNER] of conditions under which the detention can be terminated; and

(C) notify the immediate custodian or operator [OWNER] of the results of any laboratory analysis conducted by the department;

(2) the immediate custodian or operator [OWNER] may request a hearing in writing within 30 days after receipt of the notice of detention; the department will hold a hearing within seven days after receipt of a request and will issue its final decision within seven days after the hearing, or within 35 days after the date of the notice of detention, whichever is later;

(3) if, after issuing a notice of detention, the department determines that the food product or food ingredient is not adulterated, misbranded, or processed or harvested in violation of this chapter, the department will notify the immediate custodian or operator [OWNER] and order the detention terminated; and

(4) if the department determines that the food product or food ingredient is adulterated, misbranded, processed, or harvested in violation of this chapter, the department will

notify the immediate custodian or **operator** [OWNER] by personal service or certified mail of the corrective action necessary, which may include destruction of the food product or food ingredient. (Eff. 5/18/97, Register 142; am 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_/\_\_/\_\_, Register \_\_)

Authority:	AS 03.05.011	AS 17.20.070	AS 17.20.240
	AS 17.20.005	AS 17.20.072	AS 17.20.250
	AS 17.20.010	AS 17.20.180	AS 17.20.270
	AS 17.20.020	AS 17.20.200	AS 17.20.290
	AS 17.20.040	AS 17.20.230	AS 44.46.020

18 AAC 31 is amended by adding a new section to read:

**18 AAC 31.915. Civil fines.** (a) The department may, without prior warning, notice, or hearing, assess a civil fine of not more than \$1000 per violation for a violation of this chapter.

(b) For the purpose of determining the amount of a civil fine assessed under this section, the department will consider the following:

- (1) the history of previous violations by the operator or establishment;
- (2) the seriousness of the violation, including actual or potential hazard to the health and safety of the public;
- (3) whether the violation occurred due to negligence or intentional conduct;
- (4) whether the operator has demonstrated good faith efforts to achieve rapid compliance after notification of violation, including the operator's current status of compliance and the number of continuing violations;
- (5) the actual or potential economic gain to the operator by violating a provision of this chapter;
- (6) enforcement costs incurred by the department relating to the violation;
- (7) payment of civil fines previously assessed for same violation.

(c) After the department assesses a civil fine under this section, the operator may request an informal review under 18 AAC 15.185 or an adjudicatory hearing under 18 AAC 15.200. This subsection does not affect a person's right to a hearing under AS 44.62 (Administrative Procedures Act). (Eff. \_\_/\_\_/\_\_, Register \_\_)

Authority:	AS 17.20.005	AS 17.20.190	AS 17.20.365
	AS 17.20.072	AS 17.20.315	AS 44.46.020
	AS 17.20.180		

18 AAC 31.920 is repealed:

**18 AAC 31.920. Food protection managers. Repealed.** [(a) THE DEPARTMENT WILL REQUIRE THAT THE OPERATOR OF A FOOD ESTABLISHMENT HAVE A QUALIFIED FOOD PROTECTION MANAGER PRESENT AT ALL TIMES IF THERE IS DOCUMENTED INABILITY TO MAINTAIN SAFE AND SANITARY FOOD HANDLING PRACTICES, AS DEMONSTRATED BY

- (1) **FOODBORNE ILLNESS OUTBREAKS ASSOCIATED WITH THE FACILITY;**
- (2) **MORE THAN ONE CRITICAL VIOLATION OF THIS CHAPTER; OR**
- (3) **OTHER FACTORS THAT THE DEPARTMENT DETERMINES SIGNIFICANTLY INCREASES THE RISK TO CONSUMERS OF A FOODBORNE ILLNESS.**

**(B) IF UNDER (a) OF THIS SECTION THE DEPARTMENT REQUIRES THE OPERATOR TO PROVIDE A QUALIFIED FOOD MANAGER, THE OPERATOR SHALL**

**(1) DEMONSTRATE TO THE DEPARTMENT'S SATISFACTION THAT THE QUALIFIED FOOD PROTECTION MANAGER**

**(A) HAS A VALID CERTIFICATE OR OTHER DOCUMENTATION OF SUCCESSFUL COMPLETION OF A FOOD SAFETY EXAMINATION FOR FOOD PROTECTION MANAGERS FROM ONE OF THE FOLLOWING ORGANIZATIONS:**

- (i) THE NATIONAL RESTAURANT ASSOCIATION;**
- (ii) EXPERIOR ASSESSMENTS;**
- (iii) THE DIETARY MANAGER'S ASSOCIATION;**
- (iv) PROFESSIONAL TESTING, INC.; OR**

**(B) HAS KNOWLEDGE OF SAFE AND SANITARY FOOD HANDLING PRACTICES SUFFICIENT TO SERVE THE INTERESTS OF PUBLIC HEALTH AND CONSUMER PROTECTION; AND**

**(2) RETAIN A COPY OF A CERTIFICATE OR OTHER DOCUMENTATION REQUIRED UNDER THIS SUBSECTION ON FILE AT THE FOOD ESTABLISHMENT.]**  
(Eff. 5/18/97, Register 142; am 12/19/99, Register 152; repealed \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

18 AAC 31.925 is repealed:

**18 AAC 31.925. Food service establishment recognition program. Repealed.** [(a) UNDER THE DEPARTMENT'S FOOD SERVICE ESTABLISHMENT RECOGNITION PROGRAM, AN OPERATOR MAY APPLY FOR A CERTIFICATE OF RECOGNITION FROM THE DEPARTMENT FOR A FOOD SERVICE ESTABLISHMENT. THE

DEPARTMENT WILL ISSUE A CERTIFICATE OF RECOGNITION TO A FOOD SERVICE ESTABLISHMENT IF

(1) THE OPERATOR SUBMITS TO THE DEPARTMENT

(A) AN APPLICATION FOR RECOGNITION ON A FORM PROVIDED BY THE DEPARTMENT;

(B) A LIST OF INDIVIDUALS WORKING AT OR EMPLOYED BY THE ESTABLISHMENT WHO ARE QUALIFIED FOOD PROTECTION MANAGERS UNDER 18 AAC 31.920;

(C) DETAILS OF THE EMPLOYEE TRAINING COURSE PROVIDED UNDER (3)(B) OF THIS SUBSECTION;

(D) A COPY OF EACH MONTHLY-SELF INSPECTION FORM THAT THE OPERATOR HAS COMPLETED WHEN PERFORMING MONTHLY SELF-INSPECTIONS UNDER (3)(C) OF THIS SUBSECTION; AND

(E) THE FEE, IF ANY, REQUIRED UNDER 18 AAC 31.050;

(2) DURING THE 12 MONTHS BEFORE THE DATE THAT THE DEPARTMENT RECEIVES THE OPERATOR'S SUBMISSION UNDER (1) OF THIS SUBSECTION,

(A) FOR EACH INSPECTION IN WHICH A SCORED FORM IS USED, THE OPERATOR MAINTAINS A MINIMUM SCORE OF 92 AT THE ESTABLISHMENT WITH IMMEDIATE CORRECTION OF CRITICAL VIOLATIONS;

(B) FOR EACH INSPECTION IN WHICH A NON-SCORED FORM IS USED, THE OPERATOR DRAWS NO MORE THAN

(i) TWO CRITICAL VIOLATIONS AT THE ESTABLISHMENT WITH IMMEDIATE CORRECTION OF THE CRITICAL VIOLATIONS; OR

(ii) ONE CRITICAL VIOLATION AT THE ESTABLISHMENT WITH IMMEDIATE CORRECTION OF THE CRITICAL VIOLATION, AND NO MORE THAN TWO NON-CRITICAL ITEMS; FOR PURPOSES OF THIS SUB-SUBPARAGRAPH, A "NON-CRITICAL ITEM" IS THE NEED TO PROPERLY THAW POTENTIALLY HAZARDOUS FOODS, THE NEED TO PROVIDE ACCURATE THERMOMETERS TO MEASURE FOOD TEMPERATURES DURING COOKING, COOLING, HOLDING AND REHEATING, THE NEED TO PROVIDE ACCURATE TEST STRIPS TO MEASURE LEVELS OF SANITIZING SOLUTIONS, OR THE NEED TO PROTECT FOOD FROM CONTAMINATION DURING STORAGE, PREPARATION, AND SERVICE;

(C) A KNOWN FOODBORNE ILLNESS OUTBREAK WAS NOT ASSOCIATED WITH THE ESTABLISHMENT; AND

(D) THE DEPARTMENT DID NOT PURSUE OR UNDERTAKE A COMPLIANCE ACTION AGAINST THE ESTABLISHMENT; FOR PURPOSES OF THIS SUBPARAGRAPH, A COMPLIANCE ACTION INCLUDES A MODIFICATION OR SUSPENSION OF THE FOOD ESTABLISHMENT PERMIT, A NOTICE OF VIOLATION UNDER 18 AAC 31.900 – 18 AAC 31.905, A NEGOTIATED ORDER, A UNIFORM SUMMONS AND COMPLAINT, OR A COMPLIANCE ORDER UNDER AS 46.03;

(3) CURRENTLY AND ON A CONTINUAL BASIS, THE OPERATOR

(A) HAS AT LEAST ONE EMPLOYEE ON EACH SHIFT WHO IS THE PERSON-IN-CHARGE AT THE ESTABLISHMENT AND WHO IS A QUALIFIED FOOD PROTECTION MANAGER UNDER 18 AAC 31.920; A NEW MANAGER HAS 120 DAYS FROM THE DATE THAT THE MANAGER BEGINS EMPLOYMENT IN THAT CAPACITY TO OBTAIN CERTIFICATION;

(B) PROVIDES ONSITE, OR THROUGH A COURSE OFFERING, AND WITHIN 30 DAYS OF HIRE, FOOD SAFETY TRAINING TO EACH EMPLOYEE; TRAINING MUST INCLUDE, AT A MINIMUM, INFORMATION ABOUT FOOD CONDITIONS AND SOURCE, FOOD PROTECTION, TEMPERATURE CONTROL, DISPLAY AND SERVICE, PERSONAL CLEANLINESS, EMPLOYEE ILLNESS, EMPLOYEE PRACTICES, AND EQUIPMENT AND UTENSIL CLEANING AND SANITIZING;

(C) CONDUCTS ROUTINE SELF-INSPECTIONS AT LEAST ONCE A MONTH ON A FORM PROVIDED BY THE DEPARTMENT; THE COMPLETED SELF-INSPECTION FORMS MUST BE AVAILABLE FOR DEPARTMENT REVIEW UPON REQUEST;

(D) USES WATER FROM A PUBLIC WATER SYSTEM APPROVED BY THE DEPARTMENT UNDER 18 AAC 80; AND

(E) DISPOSES OF WASTEWATER IN A SYSTEM APPROVED BY THE DEPARTMENT UNDER 18 AAC 72; AND

(4) THE DEPARTMENT DETERMINES THAT RECOGNITION SERVES THE INTERESTS OF PUBLIC HEALTH AND CONSUMER PROTECTION.

(b) IF THE DEPARTMENT DETERMINES THAT THE REQUIREMENTS OF (a) OF THIS SECTION ARE MET, THE DEPARTMENT WILL

(1) ISSUE TO THE FOOD SERVICE ESTABLISHMENT A CERTIFICATE OF RECOGNITION AND LOGOS FOR POSTING AT THE ESTABLISHMENT AND FOR USE IN ADVERTISING OR ON THE MENU; AND

(2) LIST THE FOOD SERVICE ESTABLISHMENT

(A) IN A MONTHLY DEPARTMENT PRESS RELEASE OF ESTABLISHMENTS RECOGNIZED DURING THAT MONTH; AND

(B) ON THE INTERNET WEBSITE OF THE DEPARTMENT.

(c) IF A FOOD SERVICE ESTABLISHMENT WITH A CERTIFICATE OF RECOGNITION UNDER THIS SECTION FAILS TO MAINTAIN STANDARDS AS REQUIRED IN THIS SECTION, THE DEPARTMENT WILL NOTIFY THE OPERATOR IN WRITING OF THE ACTIONS REQUIRED TO MAINTAIN RECOGNITION, AND WILL PROVIDE THE ESTABLISHMENT WITH A SCHEDULE TO MEET THE STANDARDS. IF THE ESTABLISHMENT FAILS TO COMPLETE THE ACTIONS REQUIRED TO MAINTAIN RECOGNITION WITHIN THE SCHEDULED TIME FRAME, THE DEPARTMENT WILL IMMEDIATELY WITHDRAW THE ESTABLISHMENT'S CERTIFICATE OF RECOGNITION.

(d) A CERTIFICATE OF RECOGNITION UNDER THIS SECTION IS VALID FOR ONE YEAR. AN OPERATOR WHOSE FOOD SERVICE ESTABLISHMENT HAS NOT BEEN RECOGNIZED UNDER THIS SECTION OR WHOSE RECOGNITION HAS EXPIRED OR BEEN WITHDRAWN BY THE DEPARTMENT MAY NOT USE THE LOGO ISSUED UNDER THIS SECTION OR ASSERT OR IMPLY THAT THE ESTABLISHMENT HAS A CERTIFICATE OF RECOGNITION UNDER THIS SECTION]. (Eff 12/19/99, Register 152; am 6/28/2001, Register 158; repealed \_\_/\_\_/\_\_, Register \_\_)

18 AAC 31.930 is amended to read:

**18 AAC 31.930. Variance from [WAIVER OF] requirements.** (a) Except for a fee required by 18 AAC 31.050, the department will grant a variance from [WAIVE] a requirement of this chapter if the department [IT] finds that public health is protected and the purpose of the requirement is otherwise satisfied.

(b) An application for a variance [WAIVER] must be submitted in writing to the department, on a form supplied by the department, and must

(1) specify the requirement for which the variance [WAIVER] is sought;

(2) state the reason why the requirement cannot be met; and

(3) describe the alternative method proposed to meet the purpose of the requirement.

(c) Repealed \_\_/\_\_/\_\_ [THE DEPARTMENT WILL GRANT OR DENY A WAIVER APPLICATION, WITH OR WITHOUT CONDITION, IN WRITING WITHIN 30 DAYS AFTER IT IS RECEIVED.

(d) A variance granted under this section is valid only when the operator is complying with the terms agreed upon in the variance. A variance may not be transferred.

(Eff. 5/18/97, Register 142; readopt 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority: AS 17.20.005 AS 17.20.020 AS 17.20. 80  
AS 17.20.010 AS 17.20.072 AS 44.46.020

18 AAC 31.945 is repealed and readopted to read:

**18 AAC 31.945. Delegation of authority.** (a) Except as provided in (h) of this section, the department may delegate to a local government the authority to implement the requirements of this chapter that apply to a food service or to a market, upon approval of an application for delegation.

(b) A local government seeking delegation must provide documentation to the department that demonstrates that the local government's proposed program has

(1) funding, staff, and equipment necessary to accomplish compliance with the terms and conditions of the delegation;

(2) an inspection and enforcement program that determines and documents compliance;

(3) insurance to cover any personal injury or property damage that adequately protects the state;

(4) a quality assurance program that ensures uniformity among regulatory staff in the interpretation and application of laws; and

(5) regulatory requirements that include provisions at least as protective of public health as those contained in this chapter.

(c) The department may request information in addition to (b) that the director considers necessary to determine whether the department will delegate authority to the local government.

(d) For a delegation that the department has approved under this section to be valid, the department and the individual with administrative management authority for the local government must sign the delegation. The delegation must include, at a minimum, terms and conditions that set out the following:

(1) the right of the department periodically to audit the local government to ensure compliance with the terms and conditions of the delegation;

(2) the right of the department to require an annual report summarizing the establishments that the local government permitted or otherwise approved or inspected, including information on the findings of the inspections to allow the department to report on food safety statewide;

(3) the requirement that the local government enforce regulatory requirements that are at least as protective of public health as those contained in this chapter;

(4) indemnification of the state against any liability, losses, or damages arising out of or in any manner connected with the department's delegation under this section; and

(5) the right of the department to terminate the delegation if the department determines

(A) a threat to public health or consumer protection exists; or

(B) that the delegation is not in the public interest.

(e) If the department determines, based on an audit conducted under (d) of this section or other information, that the local government is not in compliance with the terms and conditions of the delegation or with this chapter, the department will

(1) notify the local government in writing of

(A) the areas in which the department has determined that the local government is failing to comply; and

(B) the reasons for the department's determination; and

(2) provide the local government 30 days after receiving the notification under (1) of this subsection to

(A) explain why the local government disagrees with the department's determination; or

(B) outline the steps that the local government is taking or proposes to take to correct the areas of noncompliance.

(f) After reviewing the information received under (e) of this section, the department may, as necessary to serve the interests of public health and consumer protection,

(1) revoke the delegation if the department finds that the local government is not in compliance with the terms and conditions of the delegation, or with this chapter, and that the local government is not likely to come into compliance;

(2) periodically review the actions of the local government until compliance is achieved if the department finds that the local government is not in compliance with the terms and conditions of the delegation but that the local government is taking sufficient steps to come into compliance; or

(3) modify the delegation.

(g) If the department modifies or revokes a delegation under this section, the department will send a notice to the local government stating that, based on the department's written findings under (f) of this section, that the delegation will be revoked or modified, effective immediately, unless the notice gives a specific date on which the revocation or modification becomes effective.

(h) A delegation under this section does not apply to food that is processed and intended for interstate commerce.

(i) A local government may not further delegate a delegation under this section. (Eff. 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register \_\_\_)

Authority: AS 17.20.005 AS 17.20.072 AS 44.46.020

18 AAC 31.990 is repealed and readopted to read:

**18 AAC 31.990. Definitions.** Unless the context indicates otherwise, in this chapter

(1) "acid food" means a food that has a natural pH of 4.6 or below;

(2) "acidified food"

(A) means a low-acid food to which acid or acid food is added; low-acid foods that are frequently acidified include beans, cucumbers, cabbage, artichokes, cauliflower, peppers, tropical fruits, and puddings, singly or in combination; some of these foods may be called "pickles" or "pickled \_\_\_ [*insert name of food*]"; and

(B) does not include

(i) carbonated beverages;

(ii) jams, jellies, or preserves;

(iii) acid food such as food dressings and condiment sauces that contain small amounts of a low-acid food and have a resultant finished equilibrium pH that does not differ from the predominant acid or acid food; and

(iv) foods that are stored, distributed, and displayed under refrigeration;

(3) "adequate" means that which is necessary to accomplish the intended purpose, in keeping with good public health practices, while complying with this chapter;

(4) "adulterated" has the meaning given in AS 17.20.020 and AS 17.20.030;

(5) "approved" means acceptable to the department or its authorized agent, based upon conformance with applicable local, state, and federal standards and good public health practices;

(6) "approved facility" means a place other than a commissary or residence that is acceptable to the department for a specific activity in support of a temporary food service, a limited food service, or a mobile food unit;

(7) "approved source" means a food establishment or facility that is permitted or certified by the local, state, or federal agency with jurisdiction;

(8) "bottled water" means water that is sealed in bottles or other containers and intended for human consumption;

(9) "bulk food" means processed or unprocessed nonpotentially hazardous food displayed in containers from which consumers withdraw desired amounts;

(10) "caterer" means

(A) a person who uses a specified and permitted food service to prepare food for service and consumption at another public or private event; or

(B) a permitted food service that, in addition to preparing food for service and consumption at the food service, also prepares food for service and consumption at another public or private event;

(11) "certified food protection manager" means a person who has passed a food safety certification examination and received a certificate or other documentation from an certification program accredited by the Conference for Food Protection;

(12) "certified laboratory" means a laboratory certified under 18 AAC 80.1100-18 AAC 80.1110;

(13) "cold-hold" and "cold-holding" means to maintain the temperature of a potentially hazardous food at 41°F or below while that food is being held during transportation, storage, preparation, processing, display, and service, except as specified in 18 AAC 31.410(a)(13);

(14) "commercially prepared" means prepared at an approved food processing establishment;

(15) "commissary" means a food establishment where support services are provided to one or more vending machines, mobile food units, limited food services, or temporary food services; these support services may include

(A) food preparation, handling, packaging, or storage;

(B) storage of utensils, including single-service items, or supplies;

(C) washing, rinsing, and sanitizing of equipment and utensils;

(D) storage of a mobile food unit when the unit is not in use; and

(E) cleaning of a mobile food unit;

(16) "complex" means food is cooked, cooled, and reheated;

(17) "contamination" means contact with dust, insects, rodents, or other pests, unsanitary equipment or utensils, coughing, sneezing, spitting, unnecessary handling, flooding, draining, leakage from overhead, condensation, poisonous or toxic materials, or any substance, organism, or entity that might threaten public health;

(18) "continental breakfast" means a morning meal consisting of ready-to-eat packaged products from an approved source such as pastries, cold cereals, dairy products, juices, coffees and teas, and cut fruit;

(19) "convenience store" means a small market selling predominantly prepackaged ready-to-eat food in individual portions; "convenience store" may include self-service beverage dispensers such as coffee, hot chocolate, or carbonated beverages;

(20) "corrosion resistant" means that quality of a material that allows the material to keep its original surface characteristic under prolonged contact with food, normal use of cleaning compounds and sanitizing solutions, and other conditions of use;

(21) "critical control point" means a point, step, or procedure in a food processing establishment at which control can be applied, and a food safety hazard can, as a result, be prevented, eliminated, or reduced to acceptable levels;

(22) "cross-contamination" means the process by which a disease-causing organism or other contaminant is transferred from raw or other food to equipment or ready-to-eat food;

(23) "cure" or "cured" means to preserve by means of salting, smoking, or aging;

(24) "custom processing" means the processing of a customer's sport-caught seafood or game meat for the consumption of that customer, and which will not be subsequently sold or distributed in commerce for human consumption;

(25) "department" means the Alaska Department of Environmental Conservation;

(26) "disease communicable by food" means a physical condition that can be transmitted from one individual to another, including amebiasis, cholera, colds, diarrhea, hepatitis A, hepatitis type unspecified, influenza, salmonellosis, shigellosis, Shiga toxin-producing *Escherichia coli*, staphylococcal skin infections, streptococcal infections, and vomiting;

(27) "distressed food commodities" means food that has been subjected to possible damage from an accident, fire, flood, adverse weather, or similar cause;

(28) "dormitory" means a room with more than two beds;

(29) "durable" means capable of withstanding expected use and remaining easily cleanable;

(30) "dwelling" means a building or portion of a building that contains living facilities, including provisions for sleeping, eating, cooking, and sanitation;

(31) "easily cleanable" means readily accessible, with materials and finish fabricated to allow complete removal of residue by normal cleaning methods;

(32) "embargo" means an order issued by the department that restricts service, use, or movement of food until laboratory tests or further examination confirms the food is free from spoilage, filth, or other contamination;

(33) "employee" means a person working in a food establishment, including the operator, the manager, and the owner;

(34) "equipment" means stoves, ovens, hoods, slicers, grinders, mixers, meat-blocks, tables, counters, shelving, ice machines, refrigerators, microwave ovens, sinks, warewashing machines, steam tables, and other items, used in a food establishment, but does not include utensils;

(35) "event" means an organized occurrence that is promoted for a special purpose, has a definite time limit, and generally includes activities other than food sales;

(36) "extensively remodeled" means a modification or improvement that entails an expense equal to or exceeding 25 percent of the taxable value of the food establishment before the modification or improvement;

(37) "FDA" means the United States Food and Drug Administration;

(38) "farmers' market" means a seasonal market operated under the sponsorship of a community organization, the main purpose of which is to provide an opportunity for producers to sell agricultural products directly to consumers;

(39) "fixture" means a plumbing fixture such as a lavatory;

(40) "food" means a liquid or solid substance consumed by humans, including water or another beverage, a conffection, condiment, food ingredient, food additive, or ice, or a substance that enters into the composition of these things, whether simple, blended, mixed, or compounded;

(41) "food bank" has the meaning given in AS 17.20.347;

(42) "foodborne illness" means an illness associated with consuming food;

(43) "foodborne outbreak" means an incident in which

(A) two or more individuals experience a similar illness after consuming a common food or food served at a common food establishment or event;

(B) one or more individuals experience illness from botulism or chemical

poisoning; or

(C) an epidemiological analysis indicates that a food or an employee is the source of an illness;

(44) "food-contact surface" means the surface of equipment and utensils with which food normally comes in contact, or from which drippage, drainage, or splashback onto a surface that contacts food might occur;

(45) "food demonstration" means to serve without charge samples of food to publicize, advertise, or promote the sale of that food or associated food preparation equipment;

(46) "food establishment" means the premises where any activity occurs that is related to the preparation, processing, packaging, storage, transportation, display, sale, service, or salvaging of food for human consumption; "food establishment" includes various types of operations, singly or in combination, within the categories of food service, food processing establishment, and market; "food establishment" does not include a private dwelling, including a vessel used solely as a private dwelling, where food is prepared for consumption by family members or nonpaying guests;

(47) "food processing establishment" means a food establishment

(A) where food intended for human consumption is processed for distribution to a food service, market, or another consumer outlet; "food processing establishment" includes the following types of operations:

(i) acidifying, curing, or dehydrating of food, thermal processing of low-acid food, and reduced oxygen packaging;

(ii) bakeries, except retail bakeries;

(iii) bottling water or other beverages;

(iv) ice manufacturing;

(v) jam, jelly, syrup, or confection manufacturing; and

(vi) other food processing; and

(B) where acidifying, curing, dehydrating, or reduced oxygen packaging of food, or thermal processing of low-acid food occurs for sale or use in that establishment;

(48) "food salvager" means a type of market where distressed food commodities are reconditioned so they comply with this chapter; "food salvager" includes repackaging, relabeling, inspecting food and packaging for wholesomeness, cleaning, or restoring the integrity of the packaging if food contents have not been altered or adulterated;

(49) "food service" means a food establishment where food intended for service to individuals for consumption is prepared and provided, or simply provided ready-to-eat, whether consumption is on or off the premises, with or without charge as described in 18 AAC 31.010;

(50) "food worker" means an individual working with unpackaged food, potentially hazardous food, food equipment or utensils, or food-contact surfaces; "food worker" does not include cashiers, checkers, courtesy clerks, delivery drivers, residents in residential or institutional care, nurse's aides who assist patients with eating, volunteers, shelf-stockers, warehouse workers, and children under the age of 18 who are assisting in the school kitchen;

(51) "game meat" means the flesh and organs of animals that are not classified as "meat" in 9 C.F.R. 301.2, as adopted by reference in 18 AAC 31.011, or "poultry" in 9 C.F.R. 381.1(b), as adopted by reference in 18 AAC 31.011; "game meat" includes

(A) warm-blooded animals, including seals, whales, caribou, moose, bears, squirrels, musk oxen, and rabbits;

(B) cold-blooded animals, including snakes, lizards, turtles, crocodiles, and alligators;

(C) exotic animals, including reindeer, elk, deer, antelope, water buffalo, and bison; and

(D) game birds, including pheasant, grouse, quail, squab, migratory water fowl, emu, rhea, and ostrich;

(52) "glacier" means a large body of ice moving slowly down a slope or valley or spreading outward on a land surface; "glacier" does not include a snow field or a frozen or ice-covered stream, river, lake, spring, or other water body;

(53) "good retail practices" means preventive measures to control the addition of pathogens, chemicals, and physical objects into foods;

(54) "grocery" means a type of market where a variety of food commodities, including dry, refrigerated, and frozen items, are offered for retail sale to consumers and intended for off-premises consumption; a limited amount of processing may occur at a grocery including produce trimming, processed meat slicing, cheese slicing, and providing retail customer self-service to change the form of a food such as juice squeezing or peanut grinding;

(55) "guestroom" means a room used or intended to be used by a guest for sleeping purposes; every 100 square feet of floor area in a dormitory is considered a guestroom;

(56) "HACCP plan" means a written document that delineates the formal procedures for following the *Hazard Analysis and Critical Control Point Principles and Application Guidelines*, by the National Advisory Committee on Microbiological Criteria for Foods; the *Hazard Analysis and Critical Control Point Principles and Application Guidelines*, as adopted by reference in 18 AAC 31.011;

(57) "hazard" means a biological, chemical, or physical property that might make food unsafe for human consumption;

(58) "herb vinegar" means commercial vinegar to which a small amount of one or more herbs has been added, with a resultant pH not significantly different from the vinegar to which the herb was added;

(59) "hermetically sealed" means a container that is secure against the entry of microorganisms to maintain the commercial sterility of its contents after thermal processing;

(60) "highly susceptible population" means a group of persons who are more likely than other populations to experience foodborne illness because they are immunocompromised, preschool aged children, or older adults obtaining food at a facility that provides services such as custodial care, health care, or assisted living;

(61) "hot-hold" or "hot-holding" means to maintain the temperature of potentially hazardous food at 140°F or above while the food is being held, whether during transportation, storage, preparation, processing, display, or service, except that for rare beef, "hot-hold" or "hot-holding" means to maintain the temperature at 130°F or above;

(62) "ice" means the product that results from freezing water by natural, chemical, or mechanical means;

(63) "imminent health hazard" means any condition with the potential to affect public health adversely, including the extended loss of a potable water supply, an extended power outage, a sewage backup into a food establishment or onto the grounds of a food establishment, a natural disaster, one or more employees sick with a disease communicable by food, a major insect or rodent problem, or a foodborne outbreak;

(64) "injected" means to tenderize meat through deep penetration, including needling, pinning, stitch pumping, or otherwise injecting the meat with juice or some other substance;

(65) "institution" means a place of confinement such as a correctional facility;

(66) "intermittent food establishment" means a permitted food establishment that serves no more than 24 persons and operates on an annual basis no more than 720 person days per calendar year;

(67) "intervention" means control measures to prevent foodborne illness or injury;

(68) "juice" means the aqueous liquid expressed or extracted from one or more fruits or vegetables, a puree of the edible portions of one or more fruits or vegetables, or a concentrate of that liquid or puree;

(69) "kiosk" means a semi-permanent structure that is constructed on a

nonpermanent foundation;

(70) "kitchenware" means multi-use utensils, other than tableware, used to prepare, serve, transport, or store food;

(71) "limited food service" means a type of food service operation restricted to service of specific food because of the food establishment's size, equipment size and type, or type of sanitary facilities and controls provided; "limited food service" includes most concession stands, permanently installed espresso carts, kiosks, limited food service operations at bars, machines vending potentially hazardous food;

(72) "liquid heat" means a product used to maintain potentially hazardous food at required hot-holding temperatures during display or service and includes commercial products;

(73) "lot" means a collection of primary containers of the same size, type, and style produced under conditions as nearly uniform as possible and usually designated by a common code or marking, or a day's production;

(74) "low-acid food" means food, other than alcoholic beverages, with a finished equilibrium pH greater than 4.6 and a water activity greater than 0.85;

(75) "market" means a food establishment where food commodities are offered for retail sale to consumers and intended for off-premises consumption, distributed to the needy by nonprofit organizations, or stored prior to sale or distribution as described in 18 AAC 31.010

(76) "meat" has the meaning set out in 9 C.F.R. 301.2, as adopted by reference in 18 AAC 31.011;

(77) "ml" means milliliters;

(78) "mobile food unit" means a type of food service located in a vehicle, trailer, or cart that may have one ice chest and one barbecue grill placed immediately adjacent to the mobile food unit and

(A) is capable of easily moving daily for servicing of water and wastewater holding tanks;

(B) operates out of an approved commissary (unless it is a self-contained mobile food unit);

(C) has a menu that is usually restricted to service of specific food;

(D) other than a pushcart, is capable of being registered by the state as a motor vehicle;

(E) is capable of moving without special conditions, such as a pilot car, flagging, or restricted hours of movement; and

- (iv) cut melons;
- (v) shell eggs; and
- (vi) garlic-in-oil mixtures; and

(B) does not include

- (i) food with a pH level of 4.6 or below when measured at 75° F, or a water activity value of 0.85 or less;
- (ii) food that is thermally processed under 18 AAC 31.720 and that remains in an unopened hermetically sealed container;
- (iii) food for which evidence from a qualified laboratory demonstrates that rapid and progressive growth of infectious or toxigenic microorganisms or the slower growth of *Clostridium botulinum* cannot occur; or
- (iv) hard-boiled eggs with shell intact that have been air-cooled;

(90) "poultry" has the meaning set out in 9 C.F.R. 381.1(b), adopted by reference in 18 AAC 31.011;

(92) "ppm" means parts per million;

(93) "premises" means a place or location used in conjunction with the activities of a food establishment, including all or portions of land, docks, structures, vessels, vehicles, mobile food units, equipment, utensils, food, supplies, water supply, wastewater system, and plumbing;

(94) "prepackaged" means packaged by a food salvager permitted by the department or a manufacturer or food processor permitted or certified by the national, federal, state, or local government or agency with jurisdiction, whether in the United States or another country;

(95) "preparation" means to thaw, marinate, cook, heat, reheat, smoke as part of the cooking process, cool, freeze, construct, assemble, combine, cut, slice, divide, mix, portion, or package food for consumption as ready-to-eat food;

(96) "processing" means to

(A) thaw, butcher, cut, slice, portion, grind, extract, cook, bake, cool, freeze, or package

- (i) raw food for retail sale to consumers; or
- (ii) raw or ready-to-eat food for distribution to a food service,

market, or another consumer outlet; and

(B) acidify, cure, dehydrate, thermally process low-acid food, or reduce oxygen package;

(97) "product thermometer" means a quick-registering, metal-stem, numerically-scaled thermometer, digital thermometer, thermocouple, thermistor, or other device that, when the sensor is inserted into food or other substances, indicates the temperature accurate to  $\pm 2^\circ \text{F}$ ;

(98) "public open house" means a business or organization that invites the general public to that business or organization as part of a special event at which food is served;

(99) "public water system" has the meaning given in 18 AAC 80.1990;

(100) "pushcart" means a wheeled, nonmotorized mobile food unit, manually movable by one or two persons, capable of easily moving daily, operating out of an approved commissary, and containing on or within the cart sufficient food, utensils, paper products, cleaning supplies, potable water supply, and wastewater holding capacity necessary for operating daily, except that a pushcart may use one additional ice chest and one additional barbecue grill placed immediately adjacent to the pushcart;

(101) "qualified laboratory" means a laboratory that uses the procedures in the *Standard Methods for the Examination of Water and Wastewater* to analyze physical, chemical, or microbial constituents of food; the *Standard Methods for the Examination of Water and Wastewater* is adopted by reference in 18 AAC 31.011;

(102) "ready-to-eat" means food that is in a form that is edible without further cooking or additional processing or preparation, and that is reasonably expected to be consumed in that form; "ready-to-eat" includes

- parasites:
- (A) animal foods that have been properly cooked or frozen to destroy
  - (B) raw fruits and vegetables that are washed;
  - (C) fruits and vegetables that are cooked for hot holding;
  - (D) plant food for which further washing, cooking, or other processing is not required for food safety, and from which rinds, peels, husks, or shells if naturally present, are removed;
  - (E) substances derived from plants such as spices, seasonings, and sugar;
  - (F) a bakery item such as bread, cake, pie, filling, or icing for which further cooking is not required for food safety;
  - (G) dry, fermented sausages;

(H) salt-cured meat and poultry products; and

(I) dried meat and poultry products and low acid foods that have been thermally processed and packaged in hermetically sealed containers;

(103) "recognized processing authority" means a qualified person with expert knowledge acquired through appropriate training and experience in the specific process that person is evaluating, including acidification, thermal processing, or atmosphere packaging;

(104) "reconstituted" means dehydrated food combined with potable water or another liquid;

(105) "reduced oxygen packaging" means the reduction of the amount of oxygen in a package by mechanically evacuating the oxygen, displacing the oxygen with another gas or combination of gases, or otherwise controlling the oxygen content in a package to a level below that normally found in the surrounding atmosphere, which is 21 percent; "reduced oxygen packaging" includes methods that might be referred to as altered atmosphere, modified atmosphere, controlled atmosphere, low oxygen, and vacuum packaging, including *sous vide*; for purposes of this paragraph, "*sous vide*" means a specialized process of reduced oxygen packaging for partially-cooked ingredients that require refrigeration or frozen storage until the package is thoroughly heated immediately before service;

(106) "refrigeration" means a mechanical means to maintain product temperatures at 41° F or below, except as specified in 18 AAC 31.410(a)(13);

(107) "restricted food service transient occupancy establishment" means a business establishment with 12 guestrooms or less that

(A) provides, for compensation, overnight transient occupancy accommodations for no more than 24 individuals; and

(B) serves to the guests only a continental breakfast or a breakfast that is cooked and immediately served, the cost of which is included in the charge for the accommodations;

(108) "restructured" means potentially hazardous food that is processed and formed in a manner that might cause surface contaminants to become incorporated inside the final product;

(109) "retail bakery" means a type of market where baked food items, such as breads, cookies, rolls, muffins, pies, and cakes, are processed for onsite retail sale to consumers;

(110) "retail meat market" means a type of market where limited processing of meat for onsite retail sale to consumers occurs, including cutting and trimming carcasses, halves, quarters, or wholesale cuts into retail cuts, such as steaks, chops, and roasts; grinding; thawing; freezing; portioning; and packaging;

(111) "retail seafood market" means a type of market where raw or ready-to-eat

seafood products are displayed for onsite retail sale to consumers; "retail seafood market" includes limited processing, such as cutting whole fish into retail cuts; preparing retail products from raw or precooked ingredients; and breaking bulk shipments and repackaging seafood products, except for repackaging shellfish subject to 18 AAC 34;

(112) "risk factor" or "risk factors" means improper practices or procedures identified as the most prevalent contributing factors of foodborne illness or injury; "risk factors" are the following categories: unsafe sources, inadequate cooking, improper holding, contaminated equipment, and poor personal hygiene;

(113) "risk factor or intervention violation" or "risk factor and intervention" means

(A) food from an unapproved source as required by 18 AAC 31.200;

(B) food that is unwholesome, adulterated, or not safe for human consumption as required by AS 17.20.020, AS 17.20.030, and 18 AAC 31.200;

(C) potentially hazardous food that is not cooked, cooled, or held at required temperatures and times during receiving, storage, preparation, processing, display, service, and transportation as required by 18 AAC 31.230 and 18 AAC 31.240;

(D) potentially hazardous food not discarded after four hours where time is used as a public health control as required by 18 AAC 31.230;

(E) ready-to-eat food that is not protected from contamination from raw food requiring further cooking as required by 18 AAC 31.220;

(F) consumer advisories not provided when required under 18 AAC 31.060;

(G) food and food preparation not modified where required for a highly susceptible population as required by 18 AAC 31.215;

(H) handwashing facilities not installed, maintained, or accessible as required by 18 AAC 31.410 and 18 AAC 31.525;

(I) insufficient facilities and equipment to maintain product temperatures as required by 18 AAC 31.230, 18 AAC 31.240, and 18 AAC 31.410;

(J) re-service of potentially hazardous food or unwrapped food that has previously been served or sold to a consumer as required by 18 AAC 31.240;

(K) food establishment that serves and prepares unwrapped or unpackaged food that is not exempt and does not have a certified food manager as required by 18 AAC 31.320;

(L) handling ready-to-eat food with bare hands as required by 18 AAC

31.220;

(M) an employee who handles food who has a disease communicable by food as described in 18 AAC 31.300;

(N) a person working in a food establishment who is not practicing strict standards of cleanliness and personal hygiene, including handwashing, the results of which might be a disease communicable by food as required by 18 AAC 31.310 and 18 AAC 31.315;

(O) food-contact surfaces of equipment or utensils that are not washed, rinsed, and sanitized effectively and that might contaminate food as required by 18 AAC 31.420;

(P) water from a public water system that is not approved, if required to be approved as required by 18 AAC 31.500;

(Q) a water system that does not provide hot and cold running water under pressure as required by this chapter, or that has a cross-connection with a nonpotable supply or a back siphonage potential;

(R) sewage or liquid waste not disposed of in an approved manner as required by 18 AAC 31.510;

(S) insects, rodents, or other animals that are on the premises as required by 18 AAC 31.535 and 18 AAC 31.575, except as allowed by 18 AAC 31.575(8);

(T) poisonous or toxic material that is improperly labeled, stored, or used as required by 18 AAC 31.570;

(U) HACCP plan described under 18 AAC 31.710 not provided;

(V) a foodborne illness associated with operation of the food establishment;

(W) required records or self-assessment not maintained as required by 18 AAC 31.335 and 18 AAC 31.340;

(X) standard operating procedures not provided or available as required by 18 AAC 31.335;

(114) "spp." means species;

(115) "safe" means nontoxic and free of substances that might make food injurious to health or adversely affect the flavor, color, or microbial quality of food;

(116) "sanitization" or "sanitized" means the application of heat or a chemical to yield a reduction of five logs, which is equal to a 99.999% reduction, of representative disease

microorganisms of public health importance;

(117) "scheduled process" means the process selected by the operator of a food processing establishment as adequate under the conditions of manufacture for a given product to achieve commercial sterility, and which is at least equal to the process established by a recognized processing authority to achieve commercial sterility;

(118) "seafood" means any species of aquatic organism, including salt water fish, freshwater fish, amphibians, crustaceans, mollusks, and aquatic plants; "seafood" includes any part or byproduct of any species of aquatic organism;

(119) "sealed" means free from cracks or other openings that might allow entry or passage of moisture, grease, or other liquid;

(120) "shellfish" means edible species of oyster, clam, mussel, and scallop whether shucked, in the shell, fresh, frozen in whole or in part; "shellfish" does not include the shucked scallop abductor muscle;

(121) "shellstock" means shellfish that remain in the shell;

(122) "Shiga toxin-producing *Escherichia coli*" means *E. coli* capable of producing Shiga toxins, also called verocytotoxins or "Shiga-like" toxins; "Shiga toxin-producing *Escherichia coli*" includes *E. coli* reported as serotype O157:H7, O157:NM, and O157:H-;

(122) "single-service" means items that are provided to the consumer and designed to be used by one person and then discarded, such as disposable cups, containers, lids, closures, plates, knives, forks, spoons, stirrers, paddles, straws, napkins, placements, and toothpicks;

(123) "single-use" means utensils and food containers that are used by employees in a food establishment and that are designed and constructed to be used once and then discarded; "single-use" utensils and containers include wax paper, butcher paper, plastic wrap, formed aluminum food containers, jars, plastic tubs or buckets, bread wrappers, pickle barrels, milk bottles, and juice containers;

(124) "snack" or "snacks" means food served between meals consisting of prepackaged nonpotentially hazardous food that requires minimal handling or fruits and vegetables that require only washing or peeling;

(125) "standard operating procedure" means a written document that specifies practices to address measure to prevent food from becoming contaminated due to various aspects of food environment at an establishment;

(126) "sulfiting agent" means a chemical that contains sulfur and that is used to treat food to increase shelf life and enhance appearance; "sulfiting agent" includes sulfur dioxide, sodium sulfite, sodium bisulfite, potassium bisulfite, sodium metabisulfite, and potassium metabisulfite;

(127) "supermarket" means a food establishment that contains a grocery and that also contains two or more other types of operations that are subject to the permit and fee requirements of this chapter;

(128) "sushi" means an assembled food product, usually containing rice wrapped in seaweed, that may or may not contain raw seafood;

(129) "tableware" means multi-use eating and drinking utensils;

(130) "temporary food service" means a type of food service that is kept at one location for no more than 21 consecutive days in conjunction with a single event, or for no more than 28 consecutive days if an extension is granted by the department;

(131) "thermal processing" means the application of heat to render food free of microorganisms that are capable of reproducing in the food under normal nonrefrigerated conditions of storage or distribution;

(132) "traditional wild game meat" means game meat that is from wild animals commonly found in and consumed by people in this state; "traditional game meat" includes reindeer, caribou, moose, whale, beaver, muskrat, hare, squirrel, duck, and geese;

(133) "USDA" means the United States Department of Agriculture;

(134) "unpasteurized juice" means juice that has not been specifically processed to prevent, reduce, or eliminate the presence of pathogens, either through heat pasteurization or in another manner allowed under 21 C.F.R. 101.17(g)(7), adopted by reference in 18 AAC 31.011; "unpasteurized juice" includes a beverage containing juice if the juice ingredient or the beverage has not been processed as described in this paragraph;

(135) "utensil" means an implement used to eat, drink, serve, prepare, transport, or store food;

(136) "vending machine" means a self-service device that, upon insertion of a coin, paper currency, token, card, or key, dispenses a unit serving of food, whether in a package or into a container, without the necessity of replenishing the device between each vending operation; "vending machine" does not include a semi-automated espresso machine described in 18 AAC 31.630(c);

(137) "warehouse" means a type of market used exclusively to store food commodities before distribution;

(138) "water activity" means the measure of unbound, free water in a food available to support biological and chemical reactions and is the quotient of the water vapor pressure of the substance divided by the vapor pressure of pure water at the same temperature; and

(139) "wholesale" means a food establishment that manufactures, packages,

stores, repackages, or transports food to another entity for resale or redistribution;

(140) "wholesome" means in sound condition and free from spoilage, filth, and microbial or chemical contamination. (Eff.5/18/97, Register 142; am 5/23/98, Register 146; am/readopt 12/19/99, Register 152; am 6/28/2001, Register 158; am \_\_\_/\_\_\_/\_\_\_, Register

Authority:	AS 03.05.011	AS 17.20.190	AS 17.20.346
	[AS 17.05.050]	AS 17.20.200	AS 18.35.100
	AS 17.20.005	AS 17.20.220	AS 18.35.120
	AS 17.20.010	AS 17.20.230	AS 18.35.200
	AS 17.20.020	AS 17.20.270	AS 18.35.220
	AS 17.20.040	AS 17.20.290	AS 18.25.300
	AS 17.20.070	AS 17.20.300	AS 44.46.020
	AS 17.20.072	AS 17.20.340	AS 44.46.025
	AS 17.20.180		

Editor's note: Effective 12/19/99, Register 152, the Department of Environmental Conservation readopted 18 AAC 31.990, to affirm the validity of that section following statutory amendments made in ch. 72, SLA 1998. The department also repealed 18 AAC 31.990(8), amended 18 AAC 31.990(12), (46)(F), (61), and (81) and added new paragraphs (114) - (127). Chapter 72, SLA 1998 relocated department authority to adopt regulations in 18 AAC 31 from AS 03.05 to AS 17.20.

Information about how to review or obtain a copy of a requirement referred to in 18 AAC 31.990 and adopted by reference in 18 AAC 31.011 is set out in the editor's note to 18 AAC 31.011.

Representative Jay Ramras  
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## Alaska State Legislature



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House District 10

## MEMO

To: Representative Lesil McGuire, Chair House Judiciary Committee

Fm: Jim Pound, Chief of Staff

Cc:

Date: March 17, 2005,

Re: Request for hearing of HB 205

---

Please accept this Memo as a request for the House Judiciary Committee to hear HB 205, "An Act relating to review of proposed regulatory actions and regulations, fiscal effect of proposed regulatory actions, and suspension of regulations." HB 205 will assure that future regulations promulgated by the Administrative Department's meet the intent of the law and are not overly burdensome on Alaskans.

Thank you in advance for scheduling HB 205 before the House Judiciary Committee.

Attachments: Sponsor Statement, HB 205, Sectional, statutory reference, Example of memos written regarding problems with regulations

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Thank you

**Representative Jay Ramras**  
Co-Chair, House Resources  
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**Tourism & Trade**

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### House of Representatives

#### Sponsor Statement

#### HB 205

"An Act relating to review of proposed regulatory actions and regulations, fiscal effect of proposed regulatory actions and suspension of regulations."

Everyday Alaskans are advised that they have broken a government rule. They often come to us in the legislature and ask for help with a problem created by their government, and want to know why lawmakers would every pass such law. The fact is, lawmakers didn't.

The Alaska Administrative Code is a set of rules conceived, promulgated, and enforced by the various administration departments. When the authority was first proposed by the legislature it was aimed at allowing the government to operate with part time legislators. At that time the agencies took statutory language and clarified it for their operational needs. Today, many times regulations do not conform to statute and often project a political agenda often in sharp contrast with the legislature.

HB 205 will return the Constitutional authority of lawmaking back to the legislature. It will not stop the writing of regulations but will require that the legislature through the Administrative Regulation Review Committee, review and not prevent their approval before taking effect.

The language further requires an accounting of the costs associated with regulations before they are implemented. The estimates include the department, and probably most importantly the public. Costs include living expenses, market competition, effects on employment, and must included short and long-term benefits or damages.

HB 205 is a major step towards bringing Alaska's Regulation system back under control of elected officials.

**Representative Jay Ramras**  
Co-Chair, House Resources  
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**Tourism & Trade**

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# Alaska State Legislature



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## House of Representatives

### Sectional

HB 205

**“An Act relating to review of proposed regulatory actions and regulations, fiscal effect of proposed regulatory actions, and suspension of regulations.”**

#### Section 1

The additional language assures that the Department will provide a copy of proposed regulations by electronic means to a standing committee that oversees the subject of the regulations.

#### Section 2

Incorporates new language into AS 24.20.445(a) and represents the action language of the bill. Once the copies are provided to the Administrative Regulations Review Committee, the Committee may hold public hearings on the proposed regulation. If the Committee disapproves of the regulation it may by a majority vote, suspend the implementation of the regulation until after the end of the Legislative Session. The Committee must submit a bill annulling or invalidating the regulation. Failure by the body to pass that bill by the end of the session will allow the regulation to take effect.

#### Section 3

Provides language that requires the Committee to file a suspension resolution with the Lieutenant Governor's office in order for the suspension to take effect.

#### Section 4

This paragraph gives the Committee the opportunity to disapprove a proposed regulation within 35 days of receipt of the new proposals. Failure by the Committee to act is interpreted to mean approval by the Committee. A disapproval, may be returned to the Department with recommendations that may allow the regulation to be reviewed again and approved. The

**HB 205 Sectional, Section 4 (Cont.)**

Committee may review the proposed regulations on several different issues listed in Paragraph (1)- (5).

Paragraph 6 adds language that authorizes the Committee to review regulatory language . introduce legislation that will suspend, nullify or amend regulations

**Section 5**

Paragraph 8 will require a review of regulations submitted by the Lieutenant Governor to the Committee to determine if they should be suspended.

Section 6 assures that the Administrative Regulation Review Committee receives copies of all regulations, suspensions or revisions regardless on the distribution format.

**Section 6**

Requires the agency to provide an actual and accurate fiscal impact note, and how it will be funded, with the proposed regulation. It further requires the agency to submit the need for the regulation to include costs and benefits and why this is the most fiscally responsible way of accomplishing a goal. The fiscal information must take into account both the costs to the state and to the private sector including the cost of doing business and or the cost of living and employment effect by specific geographical region that may be affected by the regulation(s).

In addition to costs, the agency must determine its effect on competition, the environment and public health.

# ALASKA STATE LEGISLATURE

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Sen. Lyda Green  
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## Administrative Regulation Review Committee

### Memo

**TO:** Committee Members

**FM:**

**Cc:**

**Date:** May 1, 2002

**RE:** Response to 3/19/02 Department of Law memo

This memo is in response to G. Ken Truitt's, Esq. Memorandum 663-01-0113 of March 19, 2002. Mr. Truitt addressed various aspects of the regulatory process in relationship to the review process. In every aspect he discussed and referenced the Administrative Procedures Act<sup>1</sup>. I can appreciate his complete explanation of how regulations are supposed to be reviewed prior to being sent to the Lieutenant Governor for her *ministerial role of filing the regulations*.<sup>2</sup> Unfortunately, the members of this Committee are well aware that the review process, is sometime motivated by a political agenda, resulting in regulations that violate statute.<sup>3</sup> It is nice to know, assuming that Mr. Truitt will be the one reviewing the regulations, that there is a willingness to consider cites during that review. Based in part on that statement, this memo includes additional cites to be considered when reviewing the 04 AAC 33.

One of the most controversial sections of 04 AAC 33.421(d) & (3) allegedly is not under review. However, by virtue of publishing this section as part of the proposed regulations, it certainly is available for change. This section deals directly with the Establishment Clause of the United States Constitution. I agree that *Allen*<sup>4</sup> is an older case that has more than likely been eclipsed in some earlier rulings. However, in *Mitchell*<sup>5</sup>, *Allen* is returned as an acceptable precedent. The Court further affirmed *Witters*<sup>6</sup> in *Mitchell*. *Mitchell* offers an interesting observation on the current makeup of the Court and how they rule regarding the Establishment

<sup>1</sup> AS 44.62.010-.300

<sup>2</sup> AG Opinion 663-92-0325

<sup>3</sup> 12 AAC 21.990(7) & 12 AAC 39.992(b) v. AS 08.18.171(D); AS 08.40.240(3) & AS 08.40.90(A)

<sup>4</sup> Board of Education v. Allen, 392 U.S. 236 (1968)

<sup>5</sup> Mitchell et al. v. Helms et al., 530 U.S. 793 (2000)

<sup>6</sup> Witters v. Wash. Dept. of Services for Blind, 474 U.S. 481 (1986)

Clause. 04 AAC 33.421(d) & (3) essentially bars districts from providing funding for material that might be considered to "advocate partisan, sectarian, or denominational doctrine.

In an unnumbered Department of Education and Early Development (DEED) Memorandum from Dr. Ed McLain to Representative Fred Dyson, dated March 8, 2002, these three words are defined using Merriam Webster's 3d. Unabridged Dictionary. While the U.S. Supreme Court has, on several occasions used this source for definitions, it is interesting to note that DEED's memo uses them as a sole source for definitions in a legal sense. A more common source, one that is considered citable to define legal terms is Black's Law Dictionary. It is important to point out the definitions are similar. Black's defines the terms this way:

**Partisan:** An adherent to a particular party or cause as opposed to the public interest at large.

**Sectarian:** Denominational; devoted to, peculiar to, pertaining to, or promotive of, the interest of a sect, or sects. In a broader sense, used to describe the activities of the followers of one faith as related to those of adherents of another. The term is most comprehensive in scope.

**Denominational:** Of, or pertaining to, a denomination; sectarian

With that background we again return the question of not paying for materials used by parents in correspondence education. The issue falls under three aspects of the Constitution: The Establishment Clause, Discrimination and Free Speech.

The U.S. Constitution States:

Amendment I - Freedom of Religion, Press, Expression. Ratified 12/15/1791.  
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IX - Construction of Constitution. Ratified 12/15/1791.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV - Citizenship rights. Ratified 7/9/1868. Note History

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Likewise, Alaska's Constitution has similar language.

#### Section 1.1 - Inherent Rights.

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

#### Section 1.3 - Civil Rights.

No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin. The legislature shall implement this section. [Amendment effective October 14, 1972]

#### Section 1.4 - Freedom of Religion.

No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.

#### Section 1.5 - Freedom of Speech.

Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

In *Good News Club*<sup>7</sup> The U.S. Supreme Court dealt with the use of a public school by a religious organization. The Court stated the two primary issues:

This case presents two questions. The first question is whether Milford Central School violated the free speech rights of the Good News Club when it excluded the Club from meeting after hours at the school. The second question is whether any such violation is justified by Milford's concern that permitting the Club's activities would violate the Establishment Clause. **We conclude that Milford's restriction violates the Club's free speech rights and that no Establishment Clause concern justifies that violation.** (emphasis added)

The Court cited two other cases in the issue of free speech:

...we first address whether the exclusion constituted viewpoint discrimination. We are guided in our analysis by two of our prior opinions, *Lamb's Chapel*<sup>8</sup> and *Rosenberger*<sup>9</sup>. In *Lamb's Chapel*, we held

<sup>7</sup> *Good News Club et al. v. Milford Central School et al.*, 531 U.S. 923 (2000)

<sup>8</sup> *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 401 (1993)

<sup>9</sup> *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995)

that a school district violated the Free Speech Clause of the First Amendment when it excluded a private group from presenting films at the school based solely on the films discussions of family values from a religious perspective. Likewise, in *Rosenberger*, we held that a university's refusal to fund a student publication because the publication addressed issues from a religious perspective violated the Free Speech Clause. Concluding that Milford's exclusion of the Good News Club based on its religious nature is indistinguishable from the exclusions in these cases, we hold that the exclusion constitutes viewpoint discrimination.

In *Rosenberger*, a student organization at the University of Virginia was denied funding for printing expenses because its publication, *Wide Awake*, offered a Christian viewpoint. Just as the Club emphasizes the role of Christianity in students morals and character, *Wide Awake* challenge[d] Christians to live, in word and deed, according to the faith they proclaim and encourage[d] students to consider what a personal relationship with Jesus Christ means. 515 U.S., at 826. Because the university select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints, we held that the denial of funding was unconstitutional. *Id.*, at 831.

In what is known as the *Lemon*<sup>10</sup> Test The Supreme Court asks whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion.

*Lemon* can be applied to both the State and Federal Constitutions. It is also applicable to 04 AAC 33.421(d) which reads: *Certified Staff shall not advocate partisan, sectarian, or denominational doctrine as part of their instruction or duties as certified staff in the correspondence program.* This by itself is not a problem since the certified staff is only there to review what lessons are being learned in the required basics. However, the paragraph continues: *Nothing in this section prevents a parent from providing instruction to their child using materials of their choice, provided such material was not purchased with program funds.* This sentence meets the first and the third questions in the *Lemon* test by preventing a secular purpose and excessive entanglement. On the other hand, it fails the second part of the test because it essentially inhibits religion. This same point could also be an issue under Section 1.4 - Freedom of Religion, Alaska State Constitution and the First Amendment of the U.S. Constitution. Both use the same language "...prohibiting the free exercise thereof..." (emphasis added) Paragraph (3) also fails the same test.

One of the issues presented to the Committee by the Department on March 1, was that distant school districts were receiving funds and then not using the full amount for the correspondent student, therefore diverting that money somewhere else within the local district. While the DEED considers this a problem, they freely allow it to happen by restricting that money discriminately to parents who chose to teach moral values and character. *Good News Club*,

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<sup>10</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971); 411 U.S. 192 (1973)

"([W]hen the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters)...."

In *Mitchell* the court states:

"In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and a religious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, see *Allen*, 392 U. S., at 245-247 (discussing dual secular and religious purposes of religious schools), then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. The government, in crafting such an aid program, has had to conclude that a given level of aid is necessary to further that purpose among secular recipients and has provided no more than that same level to religious recipients."

It should be pointed out that *Allen*, is the same case referenced in the first Committee memo and referenced by Mr. Truitt. Essentially, Section 4 AAC 431(d) & (3) restricts one group from receiving funds, to pay for a curriculum that in addition to teaching the Basics, enhances the child's growing and learning experience by teaching moral values and character.

Justice Scalia in *Good News Club* adds:

I have previously written that [r]eligious expression cannot violate the Establishment Clause where it (1) is purely private.

In *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), we struck down a similar viewpoint restriction. There, a private student newspaper sought funding from a student-activity fund on the same basis as its secular counterparts. And though the paper printed such directly religious material as exhortations to belief, see *id.*, at 826 (quoting the paper's self-described mission to encourage students to consider what a personal relationship with Jesus Christ means); *id.*, at 865 (Souter, J., dissenting) (The only way to salvation through Him is by confessing and repenting of sin. It is the Christians duty to make sinners aware of their need for salvation

(quoting the paper)); see also *id.*, at 865867 (quoting other examples), we held that refusing to provide the funds discriminated on the basis of viewpoint, because the religious speech had been used to provid[e] a specific premise from which a variety of subjects may be discussed and considered, *id.*, at 831 (opinion of the Court). The right to present a viewpoint based on a religion premise carried with it the right to defend the premise.

### **In Conclusion:**

The cases cited in this memo are only the tip of the iceberg. In February, The U.S. Supreme Court heard and is reviewing *Zelman et al. v. Simmons-Harris*, No. 00-1751, 1777, 1779. This will present a new review of the Establishment Clause. While I have not had time to completely read the 71 pages, the makeup of this Court has not changed since any of the cases cited here. Barring any surprise decision from the Court it appears that the cases referenced in this memo establish grounds to require the Department of Education to pass funding on to individual correspondence parents, to purchase educational material, even if those materials have some religious overtones. This is not to say that the State should be purchasing the Koran or Bible for these students. However, more than one parent in the correspondence program has pointed out that there are a lot of excellent curriculums from religious sources. I continue to feel that 04 AAC 421(d) and 04 AAC 421(3) makes it difficult if not impossible for some parents involved in the program to have the ability to chose an education tool that meets the needs of the family by virtue of the fact that the regulations as written forbid it.

If the Department resists, then the question must be asked about funding for the curriculum that is being used. Does it present a partisan position? We have all heard about schoolbooks with an agenda. To allow the State to pay for a partisan curriculum is just as bad, but that does not appear to be a problem.

The Department and the Board both need to review their policy and ask these questions:

Does it discriminate?

Currently it does, based on inhibiting religion and therefore discriminating against it.

Does it prevent Free Speech?

Currently it does, because a parent has made a choice to teach their children in a manner that includes family values, morals and character. This is as basic a right under free speech as any.

Does violate the Establishment Clause?

Yes. It violates the Clause by specifically restricting religious activities and education.

Based on these and other points to numerous to list in a memo I believe changes need to be made to the regulations:

04 AAC 33.405 (2) should read: students enrolled in such programs are public school students; **but because of the unique nature of their educational environment AS 14.03.090 may not apply.**

I also believe that paragraph ( c ),(d) and (3) need to be amended:

Paragraph c should read: The program must use curriculum materials, including textbooks and other instructional aids that have been reviewed [and selected] by the district school board,... And are in compliance with [AS 14.03.090 and] AS 14.18.060.

Sentence 2 of (d) should read: Nothing in this section prevents a parent from providing instruction to their child using materials of their choice. [provided such material was not purchased with program funds.]

Paragraph 3 should be deleted.

# ALASKA STATE LEGISLATURE

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Rep. Jeannette James  
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## Administrative Regulation Review Committee

### Memo

**To:**

**From:**

**Date:** January 25, 2002

**Re:** Background, Mechanical Code

Since statehood the fire Marshall has traditionally used the Uniform Mechanical Code (U) (AS 18.70.080):

The legislative process began on December 15, 1999, with the submission of the Governor's proposed budget with the Public Safety line item. That line item made it through the 2000 Legislative session and was signed in June or 2000.

Using those funds the Department of Public Safety moved forward to adopt the International Mechanical Codes (I). This involved coordination with local fire marshals so that the effort was generally organized.

Ross Fosberg was hired as a consultant in July, 2000

Public notices and public comments were sent out in November, 2000 with the comment period ending on January 31, 2001. Because of concerns from the Mechanical Contractors of Alaska, the Department reopened public comment from May 5 through June 8, 2001. As a result of comments some changes were made and the regulations took effect on September 15, 2001. All actions by the Department of Public Safety met and exceeded the requirements of statute.

The mechanical contractors filed suite against Commissioner Godfrey (PS) and Sedwick (DCED) on September 6, 2001. On November 23, 2001, The Contractors filed an application seeking a preliminary injunction to prevent the regulations from being implemented until the case was resolved.

The parties met before Judge Elaine Andrews, Superior Court on December 17, 2001, and the injunction motion was denied.

In late December the State moved for Summary Judgment seeking Dismissal. In mid January, the Contractors responded opposing and cross-moved for Summary Judgment challenging the Department's authority to adopt regulations. That is where the case stands today as the State is still within its timeline for response to the court.

Even with the court proceedings underway, in October, the Department of Commerce and Economic Development gave public notice that it intended to adopt the "I" code for the purposes of testing. This is where the department interpreted "Uniform Mechanical Code" to mean any code adopted by the Department of Public Safety. DCED cited AS 08.10.171, AS 08.40.230, .240, .270, .4012, as the source of the decision.

Following the proper procedures the Department went through the public process (no public hearing) with written comments submitted by November 23, 2001.

The regulations were adopted on November 27, 2001 with an effective date of January 19, 2002.

Ballentines Legal Dictionary defines **Uniform** as an adjective meaning: consistent in pattern; unchanging; without variation, conforming to a standard. It goes on to include: compatible, habitual, homogeneous, equal, even, identical, constant, undeviating, conventional.

While this definition certainly gives the Department the ability to interpret the individual word generically, their decision does not take into account that the statute does not take Uniform as an individual word. Both the "Uniform Mechanical Code and the "International Mechanical Code" are propriety documents. I do not have copies in front of me, I am sure they are both copyrighted and suspect the names are registered.

My Conclusion and opinion: (I realize this may sound a little dramatic)

First I should point out, I do not believe this was the intent of the Department of Public Safety.\*\*\*\*

The Administration, through DCED is making a stand against the Legislature using Separation of Powers. This vehicle is its best choice, because, the majority of the Department's decisions are made by boards, not under our control. A victory in this arena will ultimately mean that any word or group of words in statute means nothing more than what an attorney in a department says it means. Additionally, if we attack it using the appropriations process, the Knowles media will accuse the legislature of being anti-economic development. This puts the Legislature in a position of having to pass a repeal bill. It has never been successful before, but this may actually have the most potential, since it the most blatant case of interpretation I have seen.

As for the court case, based on the earlier decision in Anchorage, I do not think the contractors will prevail. The case is against both Departments and Public Safety is legal. I also believe the State can argue that the codes are similar enough that the Judge will rule in favor of the state. I do not believe she will rule on the Statute v. Regulation interpretation of Uniform as that is traditionally left to the Supremes. The Contractors will more than likely, not appeal.

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**Regulations Hamper Private Schooling Efforts in California**

Author: Kate McGreevy

Published: The Heartland Institute 03/01/2005

California school choice advocates should consider shifting some of their resources away from the voucher movement to contest cumbersome regulations that affect the supply of private schooling in the Golden State, according to a recent report from the Reason Foundation. Even if demand-side reforms occurred and voucher programs were made operational, the low supply of private schools "would prevent those reforms from succeeding," the report concludes.

While demand for better schools—private, charter, and public—has been increasing, the supply has not kept up because of state-level regulatory barriers. The report posits current regulations "shift back the supply curve, keeping potential entrepreneurs out of the market, reducing the amount of new school capacity, and raising its price."

The December 2004 report, "Addition and Subtraction: State and Local Regulatory Obstacles to Opening a New Private School," provides an analysis of California's main regulatory hurdles and recommendations for improvement. The report was written by Bahaa Seireg, a George Mason University Ph.D. candidate.

**Excessive Regulation Noted**

The report provides compelling, if anecdotal, evidence in the form of three case studies.

In one example, Michael Leahy, founder of the Alsion Montessori Middle/High School, estimated the cost of his building should have been \$400,000, but the total came to nearly \$1.2 million because of several state regulations, "like the one requiring that he install a red tile roof."

"Children and parents want and need real educational choices," said Lisa Snell, the study's project director and director of education at the Reason Foundation. "But we aren't seeing more private schools because the government buries anyone interested in building a school under a mountain of needless regulations. The resulting lack of competition among private schools is fueling increases in private school tuition."

Reason's report identifies four main sources of regulation faced by those trying to open new schools:

- the State Environmental Quality Act (SEQA), which imposes barriers to land acquisition and modifications of structures on schools' land;
- city zoning requirements, which impose restrictions on where schools can be located;
- city parking requirements; and,
- state and local building codes, which impose restrictions on design and construction of school buildings.

### **Time, Money Wasted**

According to Seireg, each regulation is potentially time-consuming, expensive, process-intensive, and "predicated on the city planner's belief that there is one best answer to all decisions about building."

SEQA, for example, requires a particularly lengthy process involving several land studies, all shouldered financially by the landowner, and an eventual public notice posting of a detailed Environmental Impact Report. Zoning regulations and enforcement processes are often prolonged, as well.

"The basic purpose of zoning regulations is to protect neighboring properties and owners from potentially adverse impacts of certain uses," says Geoffrey Goodfellow, planning director for Santa Clara, California. He adds the local public school district makes available closed school sites to private schools, and Santa Clara does not require a city review for the private use of these public buildings.

Even after years of working through the process, however, a permit application can be rejected because of the influence of a few local voices of opposition on decision-makers at a lead agency. This, says Seireg, makes the purchase of land for a private school "very risky."

### **Improvements Proposed**

Seireg maintains that a performance planning approach to building regulation would improve the situation for private schooling. That approach, he said, gives landowners more flexibility to "use the land as they see fit," while remaining accountable for damages to the property.

"A performance planning approach focuses on end results rather than prescriptive policies," Seireg writes. He notes performance-based planning approaches have succeeded elsewhere.

"Performance standards that deal directly with actual and measurable impacts on the specific area would result in fewer regulations, less paperwork, a much simpler approval process, and ultimately, more schools," Snell stated.

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*Kate McGreevy ([mcgreevy@gmail.com](mailto:mcgreevy@gmail.com)) is a freelance education writer from Indiana. She formerly worked with the Cesar Chavez Public Charter High School for Public Policy in Washington, DC.*

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### **For more information ...**

The December 2004 report, "Addition and Subtraction: State and Local Regulatory Obstacles to Opening a New Private School," is available online at <http://www.rppi.org/ps329.pdf>.

# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: HB 205  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: \_\_\_\_\_  
 Title Review and Suspension of Regulations BRU Alaska Court System  
 Component Trial Courts  
 Sponsor Representative Ramras  
 Requester \_\_\_\_\_ Component No. 768

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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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--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2005) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

The court system does not anticipate any fiscal impact from the passage of HB 205.

Prepared by: Douglas Wooliver, Administrative Attorney Phone 463-4750  
 Division Alaska Court System Date/Time 4/1/05 9:01 AM  
 Approved by: Doug Wooliver for Stephanie Cole, Administrative Director Date 4/1/2005  
 Agency Alaska Court System