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the litigation which results will be in the nature of a trial proceeding rather than an appeal on the record. Because litigation will thus be at once more frequent and more lengthy, the legislation may have a fiscal impact on the Department of Law;

3. Finally, if our fears over the impact of this legislation are justified, the legislation will have a fiscal impact on the court system. Courts will essentially be playing the role currently exercised by the commissioner's offices of the various agencies, and, under the legislation, their performance of that role "has preference on the calendar of civil actions before the court." p. 4, ls. 13-14. Certainly, the judicial branch should be consulted in this regard.

Finally there is little question that this bill would have a drastic impact on public participation in state natural resource decision making. Before the public's rights are constricted to the degree envisioned in this bill, we would suggest that the committee seriously consider a teleconferenced hearing on the proposed legislation.

Sincerely,

WILSON L. CONDON
ATTORNEY GENERAL

By: Jonathan K. Tillinghast
Assistant Attorney General

JKT/kh

cc: Members of the House Judiciary Committee
The Honorable Jack Fuller

DEPARTMENT OF LAW ANALYSIS OF CSSB 84

I. Introduction

We have reviewed CSSB 84 (Resources). The legislation, drafted by the Alaska Oil and Gas Association, curtails local government and public involvement in natural resource permit decisions by establishing inflexible permit deadlines. The administration's Uniform Procedural Regulations (22 AAC 10), which have recently been adopted by the departments of Environmental Conservation, Natural Resources and Fish and Game, also establish permit deadlines, but do so in a manner which protects the rights of Alaskans and their local representatives.

CSSB 84 is biased legislation. Moreover, the bill is more a "protest statement" on bureaucratic sloth rather than a remedy for acknowledged problems in permit processing. As a result, this "quick fix" to the complex problems in Alaska administrative law has the following fundamental shortcomings:

1. A central provision of the bill, in our opinion, is probably unconstitutional. The provision--proposed AS 44.62.636(b)--arbitrarily varies the burden of proof in judicial review proceedings between the applicant on the one hand, and other equally interested parties on the other;

2. The bill is primarily designed to deny local governments and the public any involvement in most state permit decisions. Under the AOGA bill, public notice on permit applications will almost never be given, and public hearings become impossible;

3. The bill discards existing rules governing permit appeal procedures universally employed by all 50 states, and at the federal level. These universally accepted rules are replaced with a bizarre and cumbersome relationship between the courts and administrative agencies which threatens far more frequent litigation, and has a far greater potential for project delay, than existing law; and

4. The deadline provisions of the bill will at once:

a. effectively coerce state agencies into denying a permit rather than let a deadline

run;

b. afford administrative agencies the ability to insulate an unlawful permit decision from judicial review;

c. prevent an agency from reaching a legally defensible decision in complex cases; and

d. ironically, prohibit the establishment of a "lead agency" for coastal management purposes.

The succeeding sections of this analysis will discuss these difficulties in turn.

II. The relationship of CSSB 84 to the administration's Uniform Procedural Regulations

During the last legislative session, the administration and the oil, timber and mining industries developed a consensus permit reform bill which would mandate the expeditious processing of state permits, while at the same time avoide the severe problems present in CSSB 84. The legislation (CSSB 548) died in House Rules upon adjournment. Thereafter, Governor Hammond committed the administration to implementing the major provisions of CSSB 548 administratively. To this end, the administration commenced a year-long, full-time process to

develop and adopt uniform procedural regulations. These regulations were intended to achieve the following goals:

1. Replace the current mishmash of state procedures with one uniform set of permit rules. Currently, permit procedures vary inexplicably between and within agencies, and an applicant seeking to understand his rights and privileges must consult a vast array of regulations, administrative orders, internal memoranda, memoranda of understanding, and must as well be privy to a series of unwritten ground rules known only to those most intimate with state government. A chief goal of the administration was to place in one location the full array of procedural ground rules applicable to a permit proceeding. While recognizing that, viewed in isolation, the resultant product would look somewhat lengthy and complicated, when compared to the morass which it was replacing, the benefits of the effort should be apparent;

2. Establish deadlines on permit issuance which achieved the maximum possible degree of certainty <u>consistent with sound public policy and the rights of other interested parties</u>;

3. Solve a festering coastal management consistency determination problem. Under existing practice, each state agency with permit jurisdiction over a project is required to determine whether that project is consistent with the state's coastal management standards found in 6 AAC 80.

Additionally, the Division of Policy Development and Planning is required to inform federal permitting agencies if the activity is "consistent" with the state standards. The result is that a project needing several permits will need multiple consistency determinations. It was felt by the administration that the "consistency" question should be addressed once for all federal and state law purposes by a "lead agency."

Working sessions on the regulations were held with industrial representatives--including AOGA--in September. A working draft of the regulations was released on December 3, and separate working sessions with industry and environmental/ public interest groups were held later in December. A public notice draft was released in January, which was transmitted to the legislature with a personal appeal from Governor Hammond to become actively involved in their development.

Three public hearings were held on the regulations, and the public comment period was extended until April 1. Throughout that period, numerous informal sessions with both industry and environmental groups were held, and the regulations were on the Coastal Policy Council's agenda on three occasions. Additionally, that council held a separate workshop in Juneau on the regulations.

Recently, the regulations were adopted by the departments of Fish and Game, Environmental Conservation and Natural

Resources. However, the filing of these regulations with the Lieutenant Governor's Office has been deferred pending a comprehensive review of their terms by the Administrative Regulations Review Committee. See Attachment 1.

It is beyond the scope of this analysis to explain the regulations in detail. The specific controversies which have emerged between AOGA on the one hand, and environmental groups on the other, are both numerous and complex. As noted previously, the administration's proposed resolution of these several controversies is currently undergoing detailed review by the Administrative Regulations Review Committee. As Attachment 1 indicates, that committee will shortly be serving detailed questions with respect to the regulations on the administration, and we will thereafter be filing our responses. Those documents, of course, will be provided to this committee.

Suffice it to say at this point that the regulations are acceptable to neither the oil industry nor environmental groups. 1/ Essentially, AOGA believes that the regulations provide unwarranted recognition of the rights of local governments, the public in general, and the departments of Environmental Conservation and Fish and Game in state natural

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1/ However, industry opposition to the regulations has largely been confined to the oil industry. The Alaska Loggers' Association, and Sealaska Regional Corporation, for example, support the regulations.

resource decision making. Decisions on oil and gas permitting matters could be made faster, and with more certainty of result, if these interests were denied meaningful involvement in the permit process. SB 84 was introduced and pursued primarily to accomplish this goal.

Thus, in many respects, an informed decision on CSSB 84 necessarily involves a rather detailed comparison of the path taken in that legislation and the choices made in the Uniform Procedural Regulations. That in turn, of course, would necessitate close coordination between the House Judiciary Committee, and the Administrative Regulations Review Committee.

Above all, it must be recognized that the disagreements over the regulations are as specific as the differences between interest groups are fundamental. To date, hearing testimony on the regulations has contained more rhetoric than substance. 2/ Criticism that the regulations are "complicated," and are "a lawyer's dream," are not only unfair and inaccurate (see above), but have absolutely nothing to do with the heart of the controversy. As an introduction, we have appended as Attachment 2 the Executive

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2/ For example, in Senate Resource Committee hearings, AOGA representatives testified at length that the Uniform Procedural Regulations did not go far enough in establishing a "lead agency." They therefore argued that CSSB 84 was necessary. CSSB 84, of course, does not address this topic at all. However, (Footnote continued)

Summary on the proposed Uniform Procedural Regulations, which details the major disagreements between the oil industry and environmental organizations. The summary gives a flavor of the difficult issues which any permit reform measure--be it administrative or legislative--needs to address.

III. Constitutional Problems

Under existing law, a person challenging an agency decision in court has the burden of proving--at least as to issues of disputed fact--that the agency decision was in error. See AS 44.62.570(c); State Department of Labor v. Boucher, 581 P.2d 660 (Ak 1978); Interior Paint Company v. Rodgers, 522 P.2d 164 (Ak 1974). Proposed AS 44.62.636(b) (p. 4, ls. 10-12) would reverse that burden of proof, so that the agency would be required to justify its decision. The burden of proof is switched, however, only for the applicant. Unfortunately, the applicant may not be the only person seriously affected by the decision. Thus, although the impact of the permit decision may severely affect other people (or local governments), the applicant is assigned a favorable burden of proof, while other injured parties must proceed under the traditional standard.

(Footnote 2 continued from p. 7) in operation, the bill would prevent any lead agency designation for any purpose. See Section VI, infra.

In sum, the bill would make an appeal of an agency decision far more difficult for some persons than for others. In our view, this discrimination probably violates the equal protection rights (Alaska Const. Article 1, sec. 1) of the non-applicant injured party. Even under federal constitutional law--which affords states more flexibility in making legislative classifications than does Alaska's equal protection provision (see below)--changing appellate ground rules for only some individuals has been declared unconstitutional. Lindsey v. Normet, 405 U.S. 56, 74 (1972). See also Stanley v. Illinois, 405 U.S. 645 (1972). Irrespective of the constitutionality of the discrimination under federal law, Alaska equal protection analysis is more demanding--requiring that the state show a "fair and substantial relationship" between the discrimination and a proper legislative purpose. Isackson v. Rickey, 550 P.2d 359 (Ak 1976). The purpose of this discrimination seems plain enough--to give an inherent and significant advantage to one party in an appellate proceeding, regardless of the relative injuries involved. Certainly, the purpose of a judicial appeal--to determine whether the agency has met applicable statutory standards--is hardly served by a provision which parcels out the burden of proof depending upon sympathies for the various litigants.

IV. The legislation invites litigation and project delay

Under existing administrative law--as it exists in all 50 states, and at the federal level--the initial permit decision

is made by the agency's staff. A person disagreeing with the staff decision must appeal that decision to the head of the agency. That appeal involves varying levels of formality, depending upon the interest involved. Only when the appeal to the commissioner has been decided is the person allowed to take his case to court. Put in legal terms, the person is required to "exhaust his administrative remedies." CSSB 84 abolishes this requirement. AS 44.62.636(a); p. 4, ls. 6-8.

There are two reasons for the "exhaustion" requirement. First, agency staff occasionally makes mistakes. Judicial review proceedings are time consuming and usually expensive. The courts, and the parties, should not be subjected to this delay and expense unless the agency has had a chance to correct its own errors.

Second, in assessing whether the agency made a correct decision, the court will require a fully developed "record" on which to base its decision. This record normally needs to be developed in an "adversarial" process where each party's evidence can be contested by the other. This process does not and cannot occur at the staff level. The entire purpose of the administrative appeal is to provide this adversarial setting. The court will then use the record so developed to reach its decision. It will not be required to hold a trial to develop evidence, but will conduct a "review" of the adversarial record developed by the agency. If, however, that record has not been developed at the agency

level, the court will hold a "de novo hearing"--in other words, a trial. Alaska courts have made it very clear that where a sufficient adversarial process has not occurred at the administrative level, a "de novo hearing" is necessary. State v. Lundgren Pacific Construction Company, 603 P.2d 889 (Alaska 1979). A "de novo hearing" is very much a trial proceeding, and the trial may not conclude for months, and in many cases years, after the complaint has been filed.

In sum, there is no "free lunch" with respect to the appellate process. If the time is not taken to conduct an administrative appeal, far more time will be taken by the court when a judicial appeal is initiated. 3/

The "exhaustion" requirement thus serves the dual purpose of avoiding unnecessary and premature litigation, and shortening the length of judicial proceedings by limiting the court's role to review of the fully-developed administrative

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3/ The relative "delay" caused by an administrative appeal vs. a judicial trial becomes far more dramatic under the Uniform Procedural Regulations. Under the Class A appeal procedures (22 AAC 10.700 et seq.) which will govern oil and gas permitting matters--the commissioner may decide the appeal on its merits in some cases immediately upon filing of the appeal (22 AAC 10.640(c)), and, in most remaining cases, within 15 days of granting an appeal. Compare 22 AAC 10.700 and 710(a). Even in complex cases, when further briefing is ered, the commissioner can render his decision within 30 day of granting of an appeal. 22 AAC 10.710 and 10.730. No administrative appeal procedure--either state or federal--has been shown to the administration which even approaches the brevity of the Class A appeal procedure.

record. Allowing a person to proceed directly from the staff decision to court may save days in the short run, but will cost months or years in the long run. Despite all this, CSSB 84, by ignoring literally hundreds of years of administrative law in its abolition of the "exhaustion" requirement, would set Alaska apart, in a very embarrassing way, from the body of administrative law in our nation.

Finally, the legislation aggravates its own shortcomings with the "burden of proof" concept discussed in the previous section. If the reversal of the burden of proof is retained in the legislation, it is our view that the burden must be reversed for all injured parties. Thus, it will be easy for an environmental group to stop a project. When an environmental group takes a staff decision to court 4/, it will at the outset argue that it is entitled to a full trial. For the reasons stated above, it will probably prevail in that argument. The question then becomes whether to stop the project pending the trial. Under Alaska law, it is not necessary, in order to obtain an injunction pending trial, for a party to show that it is likely to win. Rather, under some circumstances it will be entitled to an injunction if it raises "serious and substantial issues." Alaska Public Utilities Commission v. Greater Anchorage Area Borough, 534 P.2d 549 (Ak 1975). Since, under the burden of proof language in the bill, the court must presume that the environmental

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4/ A decision which, again, the commissioner's office has had no opportunity to review.

group is correct in its allegations, it will be very difficult for the agency to defeat that showing. As a result, the court more often than not will order that the project be halted.

V. The legislation prohibits informed review of complex projects, and shuts out the public and local governments from state decision making.

Under both CSSB 84, and the Uniform Procedural Regulations, all state permits are required to be classified as either a "Class I" or "Class II" permit. Under both, Class I permits must be issued in 30 days. For Class II permits, the bill provides 60 days, and the regulations 65. Compare proposed AS 44.62.632(a) and 22 AAC 10.060.

There are no extensions from the deadlines allowable under CSSB 84--regardless of how complex or controversial the project may be. The Uniform Procedural Regulations, on the other hand, permit an extension when the commissioner's office certifies that the project is too complex for review within the time period applicable (22 AAC 10.020(a)(1)). Additionally, the agency can extend a deadline by a maximum of 20 days in the event that a public hearing is determined to be desirable under strict criteria. 22 AAC 10.020(a)(2); 22 AAC 10.030.

At the outset, the immutable deadlines in CSSB 84 are unrealistic. In the vast bulk of cases, these deadlines can

be met. However, it is silly to think, for example, that the public interest would have been protected if the Department of Environmental Conservation had been given only 65 days to set pollution limits for the Valdez Terminal of the Trans-Alaska pipeline. The occasional ability to undertake more intensive review of complex projects is absolutely indispensable if Alaska's natural resource laws are to remain anything but a facade. 5/

5/ Under CSSB 84, for example, Alyeska Pipeline Service Co. could have sat upon its environmental, engineering and technical data with respect to waste discharges until literally the last minute, dumping a veritable library of data on the Department of Environmental Conservation. DEC would then have a mere 65 days to make the kind of detailed technical decisions necessary to ensure that state water quality standards will be met from the facility.

The absence of a "complex project" deadline override aside, CSSB 84 ensures that local governments and the public will have little or no input on state natural resource decisions, regardless of their significance. To understand the full impact of CSSB 84 on the public, it must be understood at the outset that an inflexible 30 day deadline precludes review of the application by local governments or the public. There simply will not be the time to involve these parties.

To give but one example, an absolute 30 day permit deadline obviously precludes the holding of a public hearing. Under both CSSB 84 and the Uniform Procedural Regulations, it is envisioned that a majority of state permits will be designated as "Class I" permits, with a 30 day deadline. However, under the Uniform Procedural Regulations, the 30 day Class I deadline can be extended for a maximum of 20 days if the agency determines that public concern for the project warrants a public hearing.

Since CSSB 84 provides no such extension, neither public notice nor a public hearing is possible unless the agency is allowed to designate a particular class of permits as "Class II" permits--in which a 60 (CSSB 84) or 65 (22 AAC 10) day review period is provided. However, under the bill, an agency can provide for a 60 day review period only if "a public notice, public hearing, or comment period is specifically required by state law in connection with the permit application." AS 44.62.632(a)(2); p. 2, ls. 7-10. Almost no state permits

have such a statutory requirement. Rather, state permit laws generally leave the decision as to whether to issue public notice, or hold a public hearing, to the discretion of the permitting agency. Thus, under the bill, almost all state permits will have a 30 day deadline, with a resultant preclusion of public notice and public hearings.

While there is a difference of opinion over the value of public hearings, on occasion a hearing is warranted even when there is no statutory requirement. 6/ For example, permits for activities within state parks are issued under AS 38.05.330. As with most state permit laws, there is no statutory requirement for public notice or hearing. However, on occasion, activities are proposed in heavily utilized portions of state parks which generate significant public controversy. Attachment 3--a memorandum from state parks Director Chip Dennerlein--gives two recent examples in Chugach State Park and the Chena Recreation area. In both cases, public hearings were both necessary and beneficial. Under the Uniform Procedural Regulations, the Division of Parks would propose to classify the types of applications described in Attachment 3 as Class II permit applications--so that public notice, and if necessary a public hearing--would be provided. Under CSSB 84, however, all permit applications in state parks would be required to be issued in 30 days. As a result, the public would have no knowledge of, and certainly would have no ability to comment upon, any proposed

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6/ Indeed, agencies occasionally are strongly encouraged by legislators to hold a hearing.

use of a state park, no matter how significant, incompatible or controversial.

CSSB 84 represents a decision that the public should neither be informed of nor involved in state natural resource decision making. 7/ The statement is true in spades with respect to local governments. The same time constraints that preclude public involvement also preclude consultation with municipalities, Native organizations and other interested parties. This denial of local government involvement becomes particularly disturbing in the context of the Alaska Coastal Management Act (AS 46.40). Under that act, the legislature has encouraged local governments to develop coastal management plans. Once those plans have been developed and approved by the Alaska Coastal Policy Council, the legislature has committed itself to allowing local governments a greater role in state decision making. AS 46.40.100; AS 46.40.200. Unfortunately, under CSSB 84, local governments will never learn of state decisions prejudicing their approved coastal management plans--much less have any meaningful ability to shape the outcome of that decision. 8/

7/ Environmental organizations believe that the Uniform Procedural Regulations are guilty of the same sin, since, in their opinion, an insufficient number of state permits are being placed in the "Class II" category. Be that as it may, the Uniform Procedural Regulations do place substantially more permits in the Class II category than would be permissible under CSSB 84. Moreover, as noted previously, even with Class I (30 day) permits, the regulations provide that the deadline can be extended for 20 days in order to accomodate a public hearing.

8/ 22 AAC 10.130 requires state agencies to defer at the outset to local governments on the question of whether a particular activity is consistent with a state-approved (Footnote continued)

All of which, of course, brings us to the heart of AOGA's preference for CSSB 84 over the Uniform Procedural Regulations. While the Uniform Procedural Regulations attempt to safeguard the rights of local governments and the public (see 22 AAC 10.130), AOGA strongly believes that decisions on their proposed activities--even when they prejudice approved coastal management plans--should be made without meaningful involvement of local governments or the public. This is what CSSB 84 is all about, and the administration is unwilling to accept it.

VI. CSSB 84 would prevent use of the "lead agency" concept.

As noted in Sec. II of this analysis, a primary goal of the Uniform Procedural Regulations is to assign the responsibility for making a single coastal management consistency determination to a "lead agency." Under the "lead agency" approach, one agency would make a consistency determination which would bind all state agencies on coastal management issues for both state and federal law purposes.

The choice of the "lead agency" was the most difficult decision facing the administration and the Coastal Policy Council. For almost all oil and gas activities, the administration agreed with AOGA that the Department of Natural Resources should be the "lead agency." Where the administration and

8/ (Footnote continued from p. 17) local coastal plan. No such provision is possible under CSSB 84, since local governments normally won't even know the activity is being proposed until the bulldozers arrive.

AOGA parted company, however, was with respect to the obligations which DNR would assume in return for its ability to bind not only its sister state agencies, but as well local governments with approved district programs, on coastal management issues. In return for transferring their current coastal management authority to DNR, the departments of Fish and Game and Environmental Conservation, in conjunction with local governments asked to ensure that their views would receive a fair hearing through formal interagency and local government review. The rights of local governments and other state agencies were protected in the regulations in 22 AAC 10.130.

The procedural protections provided local governments and state agencies in sec. 130 have been vigorously opposed by AOGA. Currently, oil and gas operations are reviewed by DNR in an informal manner. There is nothing wrong with that approach, as long as local governments and other agencies will get their own "shot" at those operations, as far as coastal management issues are involved, in other forums. Under the regulations, however, those other forums are removed, and thus the integrity of DNR's decision-making process in reviewing oil and gas operations becomes vital.

Additionally, under sec. 307(c)(3) of the federal Coastal Zone Management Act (16 U.S.C. § 1456(c)(3)), any federal permitting agency must obtain from the state a certification that the activity is "consistent" with the

state coastal management standards. Under the Uniform Procedural Regulations, DNR will conduct that determination as well. 9/ Under 15 C.F.R. 930.61, that consistency determination cannot be made until public notice on the issue has been given. Therefore, as a matter of federal law, if DNR--as AOGA desires--is to be the coastal management "lead agency" for oil and gas matters, DNR must provide public notice for its review of oil and gas operations in the coastal zone.

However, under CSSB 84, DNR would be required to approve oil and gas operations plans in 30 days. Thus, as a matter of federal law, and as well because of the need to protect the rights of local governments and sister agencies on coastal management issues, DNR could not, under CSSB 84, be the "lead agency" for coastal management matters. Rather, that responsibility could only be given to an agency which issues permits for oil and gas operations for which a notice, hearing or comment period is "specifically required by state law." AS 44.62.632(a)(2). In certain cases DEC may be able to perform that role. AS 46.03.100. Generally, however, there will be no such agency, with the result that the whole concept of a "lead agency" goes out the window.

Thus, while AOGA clearly wants the Department of Natural Resources to serve as the coastal management "lead agency,"

9/ Currently, this is done by the Division of Policy Development and Planning.

it has drafted legislation which would necessarily require that the status quo be maintained. This difficulty is but one example of the dangers inherent in attempting to cure complicated problems with hasty legislation.

VII. Other problems

In addition to the fundamental difficulties with the legislation, there are innumerable technical problems with the bill, each of which holds within it the potential for necessary litigation. For example, under proposed AS 44.62.-632(b)(1) (p. 2, ls. 14-17), even the most rudimentary of permits could not be issued until the agency prepares formal findings and conclusions. In the January 9 proposed Uniform Procedural Regulations, the administration had proposed that findings and conclusions be prepared only for Class II--or more significant--permits. Even this limited requirement of "findings and conclusions" was opposed by the Natural Resources Section of the Alaska Bar Association. While the Alaska Supreme Court has ruled that, at least for significant administrative decisions, the agency must explain its reasons (Moore v. State, 553 P.2d 8 (Ak 1976), it has never ruled that agencies are obligated to prepare formal "findings and conclusions" in the judicial sense. Therefore, the Alaska Bar Association, and several oil companies, recommended that we go no further than the rule in Moore v. State, supra, and that we merely require, in Class II proceedings, that a

"statement of reasons" be provided. The administration accepted the Bar Association's request. See 22 AAC 10.160(1). CSSB 84, ironically, requires "conclusions" for all permits--ranging from swimming pool plan approval to firewood permits.

Additionally, proposed AS 44.62.632(c) (p. 2, ls. 20-22) requires that permit decisions "must bear a fair and substantial relation to the object of the law." This particular legal term, to our knowledge, is limited to constitutional equal protection analysis. In terms of reviewing an administrative decision, the term to our knowledge has never been used, and we haven't the foggiest idea what this curious standard of review means. This phrase alone will require the development of a body of case law to define it. Again, we find a bill ostensibly designed to limit litigation in fact encouraging it.

Finally, the "automatic issuance" provision of the bill is contrary to sound public policy. Proposed AS 44.62.632(e) provides:

> A permit application which has not been approved or rejected by the responsible state agency within the time period specified in (a) of the section is approved as submitted.

Particularly in light of the fact that no extension, no matter how justifiable, is permissible under CSSB 84, this provision literally puts administrative agencies against the wall in terms of processing difficult permit applications. Using the prior example of major permits for the trans-Alaska pipeline, it is more likely than not the agency could not meet the applicable deadline. Taking its statutory responsibilities seriously, the agency obviously would not allow the application to be approved "as submitted." It will, quite simply, deny the permit when the deadline runs.

Of course, that decision is appealable to the courts, and under the bill the agency must bear the burden of proof. In appealing the denial, however, the applicant--for the reasons stated in Section IV--has bought himself a lengthy lawsuit, during the pendency of which it is unlikely that he would be allowed to proceed with the project. Either the court will conduct a lengthy trial, or will remand the matter to the agency to reach a meaningful decision. In either event, the entire exercise would seem a silly waste of time.

This, then, is the risk to the applicant of an "automatic approval/no extension" bill. There is also a serious risk to the public , and indeed to the integrity of the legislative process. In permit legislation, the legislature has set down the criteria for the approval of various activities. If an administrative agency does not believe that a proposed activity can meet those critieria, yet, for whatever

reason, would nonetheless like to grant the permit to the applicant, it can insulate that otherwise unlawful decision from judicial review by simply letting the deadline run. Since, under CSSB 84, it would be a statutorily sufficient reason to grant a permit that a certain arbitrary deadline has been missed, the potential for collusion and abuse in this regard is monstrous.

Respectfully submitted,

Attachment 1

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

May 29, 1981

The Honorable Jack Fuller
Chairman, Administrative
Regulations Review Committee
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: Uniform Procedural Regulations
and CSSB 84

Dear Representative Fuller:

The purpose of this letter is to confirm discussions which have been held between Assistant Attorney General Jon Tillinghast and Allen Blume of your office concerning your committee's review of the Uniform Procedural Regulations (22 AAC 10) which have recently been adopted by the departments of Environmental Conservation, Natural Resources and Fish and Game and the Alaska Coastal Policy Council.

As you are aware, the Uniform Procedural Regulations have generated a great deal of controversy within and outside state government. In particular, environmental groups on the one hand, and the Alaska Oil and Gas Association on the other hand, have been and remain opposed to the course taken in the regulations.

Unfortunately, in legislative hearings held to date, the specific issues surrounding the regulations have been lost amidst the frustration and polarization attendant the entire topic of permit reform. As a result, the only concrete progress ever made by state government on the issue of regulatory reform is in jeopardy. I cannot convey too strongly my belief that ending this year-long, full-time effort in failure would be a disaster--particularly so in light of the fact that there does not appear on the horizon any legislative or administrative initiative which would begin to address, much less resolve the multitude of difficult and controversial issues addressed in the regulations we have proposed.

Thanks largely to the efforts of your staff, and Mr. Blume in particular, it appears as though the regulations will now receive the kind of deliberate analysis which we had hoped for at the outset. Mr. Blume has been provided with a complete copy of the public comments received on the regulations, as well as a lengthy position paper which Mr. Tillinghast prepared for the Governor's consideration. From this, and the materials provided the Legislature in January, Mr. Blume, in consultation with you and the committee, will prepare a list of specific written questions on the regulations. These questions will deal with specific issues addressed in the regulations of concern for the committee, and will solicit the administration's justification for choosing the particular course taken. The questions, and the answers, would then form a focus for committee hearings.

This approach has the singular advantage of focusing the analysis on the heart of the controversy, minimizing the risk that the real issues at stake will be obscured. It will also, of course, save the committee from lengthy dissertations by the administration on matters of no concern to any of its members.

This process, as I understand it, will be accomplished in short order so that the committee can commence full hearings on the regulations at an early date. It is my understanding that the committee's questions will be given to our department on or about June 3, and we can certainly have detailed responses back in the committee's hands by June 8.

Although the regulations have been adopted, they will not be filed with the Lieutenant Governor's Office in the near future. Deferring the filing of these regulations will enable the administrative agencies involved to propose and adopt their own regulations classifying individual permits as "Class I" or "Class II" for the purposes of the Uniform Procedures regulations. It will also enable the administration to make any necessary changes in the regulations following the conclusion of your committee's hearings. For the reasons articulated in Governor Hammond's letter to you, we felt that it was necessary to bring this unusually prolonged and difficult rule-making process to a close. Nonetheless, particularly in light of the kind of deliberate review which these regulations will apparently undergo in your committee, everyone's interest would seem better served by deferring the filing of these regulations until that review can be completed.

Hopefully, any remaining disagreements after your committee's review has been completed can be accommodated amicably. There may, however, be additional permit reform measures which are of particular importance to the legislature, and which are compatible with the regulations themselves. One particular area of interest to some legislators has been the expansion of the "lead agency concept" in the regulations to include the preparation of a single state position on related federal permit applications. Such an approach could be established by supplemental legislation drafted by the committee. While we certainly cannot pre-commit the Governor on this issue, we can observe that lead agency legislation would not significantly affect the regulations themselves.

Any legislation, however, should be carefully considered for the impact which it may have on the balance which these regulations attempt to strike. As you turn to the specific provisions of these regulations, it should become evident that, at every turn, we faced an accommodation between the competing interests involved. The balance struck is held together by interrelated provisions. Legislation which pushes a particular issue towards one extreme may require significant changes in other provisions of the regulations. CSSB 84 provides an excellent example of this problem. Shortly, we will be forwarding to the House Judiciary Committee a detailed analysis of that bill. Suffice it to say at this point that, if enacted in its present form, that AOGA-drafted legislation would have the unintended effect of precluding implementation of many of the provisions of the regulations which the oil industry has strongly supported.*

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* As one example, CSSB 84 would require that the Department of Natural Resources reach a decision on oil and gas plans of operations within 30 days. Within that time period, the Department of Natural Resources could not make a coastal management consistency determination on those operations in conformity with federal law. As a result, the regulations would have to provide that either the Department of Environmental Conservation, or the Division of Policy Development and Planning, would determine whether the oil and gas activities are consistent with the state's coastal management standards. As the forthcoming detailed analysis of the legislation will demonstrate, this is but one example of the dangers of a hasty "quick fix" which CSSB 84 represents.

No one to our knowledge has ever argued that there is nothing in the regulations worth saving. Indeed, many--such as the Alaska Loggers' Association and Sealaska Regional Corporation--strongly believe that the regulations should be adopted and implemented as written.

I frankly doubt that there exists any irreconcilable differences between the legislature and the executive on the specific issues involved in these regulations. I cannot be more pleased with the relationship developing between us on this matter, and I look forward to working with you in the days ahead.

Sincerely yours,

Wilson L. Condon
Attorney General

WLC/blc

cc: Representative Fred Brown

Jerry Reinwand
Executive Assistant
to the Governor

PHIL. R. HOLDSWORTH, P.E.
CONSULTING ENGINEER & LEGISLATIVE COUNSEL
MINING – GEOLOGY – LANDS

PHONE 907-586-1383

326 FOURTH STREET No. 1009
JUNEAU, ALASKA 99801

June 2, 1981

Rep. Fred Brown, Chairman
House Judiciary Committee
Pouch "V" - State Capitol
Juneau, Alaska 99811

Dear Representative Brown:

The following statement is submitted on behalf of the Alaska Miners Association in support of CSSB 84(Res) which will be subject to hearings before your committee tomorrow. The undersigned must be in Anchorage for a meeting of the Alaska Growth Policy Council and will be unable to present it in person.

CSSB 84(Res) is similar to CSSB 548 of the Eleventh Legislature - Second Session. That bill passed the Senate and reached House Rules where it was held through the closing days of the session. During the interim period between sessions Governor Hammond, by memorandum, directed the state agencies involved in permitting processes to meet with industry representatives and develop permitting regulations responsive to the 1980 proposed legislation.

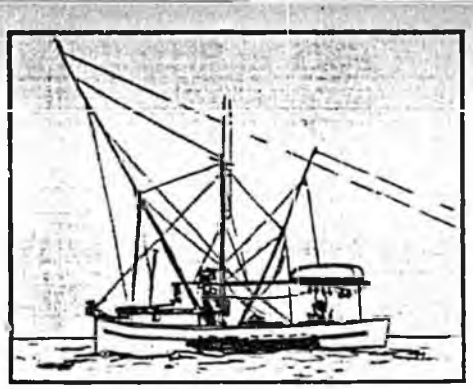
The draft regulations resulting from these efforts are so unsatisfactory, and would be so restrictive in their application, that the general consensus of those who would be affected is that the legislative approach is necessary; and that proper guide line should be statutorily identified.

The Alaska Miners Association strongly supports the bill before your committee - CSSB 84(Res) - and urges its approval.

Respectfully submitted,

Phil R. Holdsworth

Phil R. Holdsworth
Lobbyist
Alaska Miners Assoc.



Alaska Trollers Association

REPRESENTING ALASKA POWER TROLLERS

205 North Franklin Street
Juneau, Alaska 99801
(907) 586-9400

June 1, 1981

Representative Fred Brown
Alaska Legislature
Pouch V
Juneau, AK 99811

RE: CSSB 84 (Res)

Dear Representative Brown:

We would like to ask your help in defeating this bill--which is now in House Judiciary committee.

Commercial fishermen are vitally concerned with all aspects of the state permit process. The reason for this is that we are the people who will pay the immediate and personal price of any land-use error which takes place near salmon habitat.

We feel that this bill will have the following negative effects:

1) All permits must issue within 30-days. This will effectively exclude public notice and participation.

2) In an action for judicial review of the permits, the burden of proof will be on the plaintiff citizen (unless the plaintiff is the applicant).

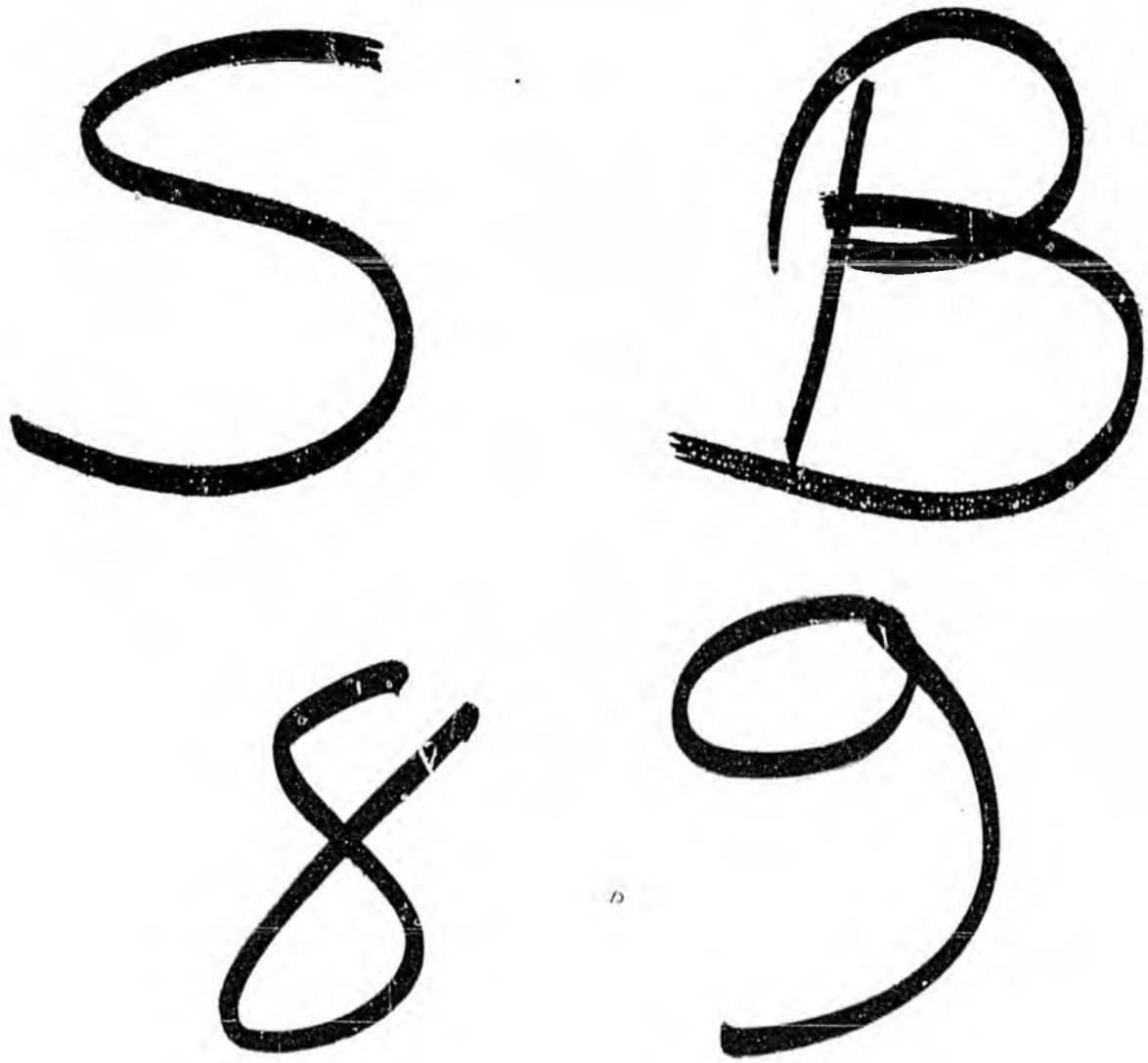
3) There is no fiscal note--and at the present level of resource commitment to permit review this will mean that all permits will issue by default.

4) The concept of "exhaustion of administrative remedies" is abandoned. This might be desirable from our immediate interests, but it will mean that litigation will replace administrative review. With the bill's provision that actions under it will take precedence over other civil cases, this will result in confusion in the courts.

Thank you for your assistance.

Sincerely,

Lewis Schnaper



March 19, 1982

ANALYSIS BY BILL SECTION
OF PROPOSED
HOUSE CS FOR SB 89

Sec. No.	Page; Line	Analysis of Section
1	1; 10	Deletes the requirement of necessity for immediate medical attention to take emergency custody, and emphasizes protection of child as determinative factor.
2	1; 15	Outlines legislative purpose behind AS 47.10: protection of children, preservation of family life when possible, encourage cooperation between agencies with child protection functions involving abuse or neglect, preserve and protect the public safety and order.
3	2; 1	Delineates the professional persons who are required to report child abuse or neglect to proper authorities. An immediate report can be made either to the Department of Health & Social Services or to a law enforcement agency. Requires a written follow-up report of the harm to the department within 72 hours. Expands the catagories of persons required to report.
4	3; 9	Sets out the required interplay of agencies having child protection functions. The law enforcement agency must immediately notify DHSS when it receives a report of abuse or neglect of a child. DHSS is required to immediately notify Law of a report of abuse of a child and must provide a written follow-up to Law within 72 hours.

Sec. No.	Page; Line	Analysis of Section
4	4; 16	Requires Law to review reports of abuse and then to assist DHSS in taking legal action, if appropriate.
5	4; 22	Requires DHSS to maintain a central registry of reports required to be filed by AS 47.17. Provides that reports of abuse and neglect are confidential except that they may be disclosed to governmental agencies having child protection functions for their limited use in investigations of judicial proceedings involving a crime against a child, child abuse, neglect, or custody. Provides a criminal penalty for knowing improper disclosure of these confidential reports.
6	5; 8	Grants authority to DHSS or a person required to report child abuse or neglect to photograph or X-ray areas of trauma visible on an apparent child victim, without parental consent. Provides further that DHSS or a health practitioner, if medically appropriate, may have a radiological examination performed on the child.
6	5; 16	Provides that the penalty for a person required to report child abuse or neglect who knowingly fails or refuses to do so is a violation.
7	5; 21	Provides definitions of significant words or phrases.
8	6; 25	Provides that all information and social records pertaining to a minor which are prepared by an employee of a court or an employee of a federal, state or city agency are privileged and may not be disclosed without the court's permission, except that information or social records of an apparent child victim of abuse is to be disclosed to Law upon request.

POSITION PAPER/Department of Health & Social Services

POSITION PAPER

CS FOR SENATE BILL NO. 89 (RULES) am

"An Act amending the child protection laws; and providing for an effective date."

The Department of Health and Social Services is in support of CS for Senate Bill No. 89 amending the child protection laws. Significant elements of the Bill include the addition of sexual abuse as one of the conditions under which the Department may assume emergency custody. Under current statute it is unclear whether the Department has the authority to assume emergency custody, and in cases of sexual abuse, children are often in danger of being pressured and of continuing to be abused unless they are removed from the home. Therefore, this amendment provides stronger protection to children who are being sexually abused or exploited.

This Bill also amends the child protection reporting statute to require school administrators and individuals involved in day care and foster care to report child abuse or neglect if they become aware of it in the performance of their duties. In addition, it permits the taking of photographs of the injuries to the child and, if medically indicated, of X-rays. It also provides a penalty for failure to report, which considerably strengthens the present law.

The Department wishes to point out a minor problem in this Bill. Section 1 was amended by the Rules Committee to eliminate mental harm from the previous wording. This has resulted in Subparagraph F (Lines 11-13, Page 1) being substantially the same as Subsection C in existing statute. The Department thus recommends that Section 1 be deleted from this Bill.

In summary, the Department believes this Bill, if passed, will provide greater protection to Alaskan children; and, therefore, the Department supports its passage.

RECOMMENDED BY: John R. Pugh

John R. Pugh, Director
Division of Family and
Youth Services

DATE: 2/16/82

APPROVED BY: Helen D. Beirne

Helen D. Beirne
Commissioner

DATE: 2-17-82

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. CS for Senate Bill No. 89 (Rules) am
Title "An Act amending the child protection laws; & providing for an eff. date."
Requested by The Rules Committee Date

II. FISCAL DETAIL
Agency Affected Department of Health and Social Services
Program Category Affected
BRU, Program, Or Subprogram(s) Affected
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER (Specify Source)	-0-	-0-	-0-	-0-	-0-	-0-
	-0-	-0-	-0-	-0-	-0-	-0-
	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS

FULL TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-
	-0-	-0-	-0-	-0-	-0-	-0-

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

CS for Senate Bill No. 89 (Rules) am has no fiscal impact on the Department of Health and Social Services.

IV. DATE 2/16/82 PREPARED BY John R. Pugh, Director
AGENCY Division of Family & Youth Services
PHONE 465-3170

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/81)

SB

100

alaska
state
hospital
association

319 Seward St., Juneau, Alaska 99801 (907) 586-1790
REPRESENTING ACUTE, LONG TERM AND OUTPATIENT FACILITIES

President
Sister Barbara Haase
Ketchikan General Hospital
Ketchikan

President-Elect
Tom Mingen
Fairbanks Memorial Hospital
Fairbanks

Secretary/Treasurer
Ron Pavelles
Alaska Hospital & Medical Center
Anchorage

Immediate Past President
Al Carrosso
Providence Hospital
Anchorage

Executive Director
Dennis L. DeWitt
Juneau

May 12, 1981

The Honorable Charles Parr
Alaska State Senate
Pouch V, State Capitol Building
Juneau, Alaska 99811

Dear Senator Parr:

The Alaska State Hospital Association has reviewed the most recent proposed amendments to SB 100 and wishes to inform you of our support.

Senate Bill 100 is a valuable step forward in protecting a mental patient's right while at the same time providing the ability to provide sometimes necessary involuntary treatment. In addition, this measure provides a means for nonstate hospitals to become designated to provide involuntary mental treatment so that these services can be offered at facilities other than the Alaska Psychiatric Institute in Anchorage.

I would also like to take this opportunity to express my appreciation of your willingness to work with us to resolve the initial problems we had with this bill.

Sincerely,

Dennis L. DeWitt
Executive Director

DLD/b

cc: Senate Judiciary Committee
Tom Mingen, Fairbanks Memorial Hospital
Sharon White, Careage North Health Care Center

STATE OF ALASKA
JAY S. HAMMOND, GOVERNOR
DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
POUCH K – STATE CAPITOL
JUNEAU 99811

March 7, 1977

The Honorable Francis S. L. Williamson
Commissioner
Department of Health & Social Services

ATTN: Dr. Gerald Schrader, Director
Division of Mental Health &
Developmental Disabilities

Re: Constitutionality of certain provisions of AS 47.30.010-.340

Dear Commissioner Williamson:

The Division of Mental Health has requested our opinion on the constitutionality of certain provisions of AS 47.30.010-.340, which govern commitments of mentally ill persons to designated hospitals, in view of recent federal court decisions and decisions in other state jurisdictions. The Division has also requested advice as to how it should proceed under the current statute.

Unless the issue is free from all doubt, the constitutionality or unconstitutionality of a statute is for the courts alone to decide. Where the issue has not been ruled on by the Alaska Supreme Court, the United States District Court for the District of Alaska, the Ninth Circuit Court of Appeals, or the United States Supreme Court, we can only attempt to predict whether any parts of AS 47.30.010-.340, if challenged, would be found unconstitutional. With this understanding as to the un-

certain nature of the predictions, this opinion will point out several areas of possible unconstitutionality in Alaska's civil commitment procedures for mentally ill persons, based on recent judicial trends throughout the United States at the federal court level. An analysis of judicial decisions in other jurisdictions in relation to the Alaska statutes will be followed by advice to the Division of Mental Health on how best to proceed under the current statute -- recognizing, however, that the Division cannot control all aspects of the commitment process, which frequently involves police officers, private physicians, relatives and other interested private parties.

We are not aware of specific abuses in civil commitments under AS 47.30.010-.340. In fact, it is our understanding that, at least where the state is involved, the rights of persons being committed are generally provided protections which are not required by the statutes. Our concern is that Alaska's mental commitment statutes, if followed to the letter, permit practices which other courts have found to be unconstitutional, such as a standard for commitment not based on harm to self or others, an absence of an automatic hearing after an involuntary emergency commitment, a long potential delay before a hearing and absence of a notice and hearing mechanism when convalescent leave from a mental institution is revoked. Our general recommendation is for legislative revision of Alaska's current civil commitment statutes.

INTRODUCTION

Advocacy on behalf of mentally ill persons has increased dramatically in recent years throughout the United States and has resulted in federal court decisions striking down parts of several states' civil commitment statutes on constitutional grounds. 1/ Some courts have also interpreted state statutes or state and federal constitutions as providing certain rights to involuntarily committed persons, such as a right to treatment while institutionalized 2/ and a right to be placed in the least restrictive setting consistent with

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1/ For example, the following state's statutes have been found to be unconstitutional in part: Alabama - Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Georgia - J. L. v. Parham, 412 F. Supp. 112, motion denied at 412 F. Supp. 141 (M.D. Ga. 1976); Hawaii - Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Ha. 1976); Kentucky - Kendall v. True, 391 F. Supp. 413 (W.D. Ky. 1975); Nebraska - Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975); Michigan - Bell v. Wayne County General Hospital at Eloise, 384 F. Supp. 1085 (E.D. Mich. 1974); Pennsylvania - Goldy v. Beal, No. 75-791 (N.D. Pa., July 8, 1976); Meisel v. Kremens, 405 F. Supp. 1039 (E.D. Pa. 1975); Dixon v. Attorney General of Com. of Pa., 325 F. Supp. 966 (M.D. Pa. 1971); Wisconsin - Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated on procedural grounds 414 U.S. 473 (1974), on remand 379 F. Supp. 1376 (E.D. Wis. 1974), vacated on procedural grounds 421 U.S. 957 (1975), on remand 413 F. Supp. 1318 (E.D. Wis. 1976); West Virginia - State ex rel. Hawks v. Lazaro, 202 S.E.2d 109 (W. Va. 1974).

2/ E.g., Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Nason v. Superintendent of Bridgewater State Hospital, 233 N.E.2d 908 (Masa 1968); Wyatt v. Stickney, 325 F.Supp. 781 (M.D. Ala. 1971), 344 F.Supp. 373, 344 F.Supp. 387 (M.D. Ala. 1972), affirmed sub. nom.; Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Welsch v. Likins, 373 F.Supp. 487 (D. Minn. 1974) dealing with mentally retarded persons; Davis v. Watkins, 384 F.Supp. 1196 (N.D. Ohio 1974); Stachulak v. Coughlin, 364 F.Supp. 686 (N.D. Ill. 1973).

the treatment of the patient and the protection of the patient and others from harm. 3/ The clear trend in judicial decisions in other jurisdictions is toward more specific rights for mental patients and tighter procedural safeguards surrounding the serious deprivation of personal liberty involved in an involuntary commitment.

Civil commitment procedures in other jurisdictions have been challenged for their lack of procedural safeguards and consequent violation of the due process clause of the 14th Amendment of the federal constitution. 4/ The United States Supreme Court has adopted a two-step approach to due process analysis: (1) Is the private interest affected a "liberty" or "property" interest within the meaning of the due process clause? 5/ (2) If so, do the individual

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3/ E.g., Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966); Lessard v. Schmidt, supra; Lynch v. Baxley, supra; Dixon v. Weinberger, 405 F. Supp. 974 (D.D.C. 1975); J. L. v. Parham, supra.

4/ Section 1 of the 14th Amendment to the United States Constitution provides in part:

> . . . nor shall any state deprive any person of life, liberty or property without due process of law . . . .

See also, Constitution of the State of Alaska, Article I, Section 7.

5/ See, e.g., Perry v. Sindermann, 408 U.S. 593, 599-603 (1972); Board of Regents v. Roth, 408 U.S. 564, 569-72 (1972).

interests and the importance of the procedure in protecting them outweigh the state's objectives? 6/

In the context of a civil commitment, the individual's interest is physical liberty. The state's interest is confinement of those individuals who pose a significant danger to the community (the police power of the state) and care and treatment of individuals who may do harm to themselves (the parens patriae authority of the state). The deprivation of liberty in a commitment must be balanced against the state's interest in protecting the public and the individual.

The United States Supreme Court has not yet had occasion to address the issue of procedural safeguards in a civil commitment proceeding. In O'Connor v. Donaldson, 422 U.S. 563 (1975), the Supreme Court's most recent decision in the area of civil commitments, the Court did not find it necessary to reach the constitutional questions of standards for civil commitment and procedural safeguards. The Court's holding was a narrow one:

> In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends. Since the jury found, upon ample evidence, that O'Connor, as an agent of the State, knowingly did so confine Donaldson, it properly concluded that

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6/ See, e.g., Morrisey v. Brewer, 408 U.S. 471, 481-90 (1972); Bell v. Burson, 402 U.S. 535, 539-42; Richardson v. Perales, 402 U.S. 401-07 (1971); Goldberg v. Kelly, 397 U.S. 254, 263-71 (1970).

O'Connor violated Donaldson's constitutional right to freedom. 422 U.S. at 576.

COMMITMENTS UNDER AS 47.30

AS 47.30 provides for three methods of commitment for persons alleged to be mentally ill: (1) voluntary commitments under section 20; (2) emergency commitments under section 30; and (3) judicial commitments under section 70.

(1) Voluntary Commitments. 7/ Under sec. 20(1) a person may be admitted on his own application, but a minor needs parental consent. Sec. 20(2) does not appear to present independent grounds for admission to a mental hospital, but merely sets out the circumstances under which the head of a designated hospital may receive an individual who is not a voluntary committee. (These grounds are covered by sections 30 and 70).

7/ Sec. 47.30.020. AUTHORITY TO RECEIVE PATIENTS. The head of a hospital designated by the department under § 10 of this chapter may receive for observation, diagnosis, care, and treatment of an individual (1) upon application by the individual, including a minor with the consent of a parent or guardian; (2) upon application by an interested party, by a peace officer, by the department, or by the head of an institution in which the individual may be, subject to the approval of the head of the hospital if the application is accompanied by a certificate of a licensed physician stating that on a basis of an examination held not more than 15 days before the individual's admission, the individual is in the physician's opinion mentally ill, or has symptoms of mental illness, and because of his illness is (A) likely to injure himself or others if allowed to remain at liberty, or (B) in need of care or treatment in a hospital.

(2) Emergency Commitments. 8/ Sec. 30(a) provides that a person may be admitted if: (1) a licensed physician signs a certificate that the individual is likely to harm himself or others if allowed to remain at liberty or is in need of immediate

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8/ Sec. 47.30.030. EMERGENCY HOSPITALIZATION. (a) If the certificate by a licensed physician under § 20 of this chapter states a belief that the individual is likely to injure himself or others if allowed to remain at liberty, or is in need of immediate hospitalization, an interested party or peace officer may, upon endorsement of the certificate for this purpose by the department or by a superior court, take the individual into custody, apply to a designated hospital for his admission, and transport him to the hospital.

(b) An interested party or peace officer who has good and valid reason to believe that an individual is mentally ill, and because of his illness is likely to injure himself or others if not immediately restrained, may, pending examination or certification by a licensed physician, or pending endorsement of the certification as provided in (a) of this section, take the individual into custody, and transport him to the most accessible medical facility and obtain a certificate for endorsement under (a) of this section, or take the steps which are necessary to arrange for a judicial commitment under § 70 of this chapter. Transportation shall be allowed as is set out in § 110 of this chapter. The application for admission shall state the circumstances under which the individual was taken into custody and the reason for the belief.

(c) Sections 10 - 340 of this chapter do not limit the availability and utilization of designated hospitals or designated parts of them for other appropriate purposes, except that the use of the designated hospitals or parts of them shall be primarily for the care and treatment of the mentally ill.

hospitalization; (2) the certificate is endorsed by the Department of Health and Social Services or by a superior court; and (3) an interested party or peace officer who has this endorsed certificate takes the individual into custody, applies to a hospital for admission and transports the person there.

Sec. 30(b) provides that an interested party or a peace officer may take an individual into custody and transport him to a hospital before obtaining an endorsed medical certificate if he has "good and valid" reason to believe that because of mental illness a person is likely to injure himself or others if not immediately restrain After transporting the person to a hospital the interested party or peace officer must either obtain an endorsed medical certificate as in 30(a) or initiate judicial commitment proceedings.

(3) Judicial Commitment Proceedings. 9/ Sec. 70 pro-

9/ Sec. 47.30.070. HOSPITALIZATION UPON COURT ORDER. (a) An interested party, a licensed physician, a peace officer or the head of an institution in which an individual is hospitalized, or the department may, by filing an application with the superior court, start proceedings for the hospitalization of an individual by judicial commitment.

(b) On reciept of an application, the superior court shall give notice of the commencement of proceedings to the proposed patient, to his legal guardian, and to other interested parties.

(c) As soon as practicable after notice of the commencement of proceedings is given, the superior court shall appoint one or more designated examiners to examine the proposed patient and report within 48 hours to the court their findings as to the mental condition of the patient and his need for care or treatment in a hospital. The court may consider the choice

9/ continued:

of the patient in appointing an examiner. If the designated examiner reports that the proposed patient refuses to submit to an examination, the court shall give notice to the proposed patient and order him to submit to the examination. The order may direct that he be taken into custody and detained pending a hearing.

(d) The examination shall be held at a hospital or other medical facility, at the home of the proposed patient, or at another suitable place, inside or outside this state, not likely to have a harmful effect on his health.

(e) If the report of the designated examiner states that the proposed patient is not mentally ill, the court shall terminate the proceedings and dismiss the application. Otherwise, the court shall immediately fix a date for a hearing and give notice of the hearing. The hearing shall be held not more than 15 days from receipt of the report of the designated examiner.

(f) The proposed patient, the applicant, the legal guardian and other interested parties, as determined by the superior court, shall be given notice of the hearing and an opportunity to appear at the hearing, to testify, and to present and cross-examine witnesses. The court may, in its discretion, receive the testimony of any other person. The proposed patient shall not be required to be present, and the court may exclude all persons not necessary for the conduct of the proceedings.

(g) The hearing shall be conducted as informally as is consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the proposed patient. The entire proceedings may be recorded stenographically or with the use of mechanical recording devices which the superior court approves. The court shall prepare and maintain a summary record of all relevant and material evidence which is offered concerning the mental condition and the residence of the proposed patient and may relax the rules of evidence to the extent of receiving affidavits, certificates of licensed physicians and other writings of similar apparent authenticity and reliability.

9/ continued:

(h) An opportunity to be represented by counsel or advisor shall be given to the proposed patient, and if neither he nor others provide counsel or advisor, the superior court shall appoint a counsel or advisor. If, not less than two days before the date fixed for the hearing, the proposed patient or his counsel or advisor files a written request with the superior court, the court shall summon and impanel a jury of six adult residents of the judicial district in which the court officiates, preferably from the court's jury list or the last voters' list, if available, to hear and consider the evidence concerning the mental condition and residence of the proposed patient.

(i) The superior court shall terminate the proceedings and dismiss the application upon completion of the hearing and consideration of the record, except that the court shall order the hospitalization of the proposed patient for an indeterminate period if the court or the jury find the proposed patient is mentally ill and (1) because of his illness is likely to injure himself or others if allowed to remain at liberty; or (2) is in need of immediate care or treatment in a hospital, and because of his illness, lacks sufficient insight or capacity to make responsible decisions concerning hospitalization.

(j) If the superior court orders the hospitalization of the proposed patient, a finding shall be made as to the residence of the patient. A copy of the finding and the summary of proceeding shall accompany the patient to the hospital. The order of hospitalization shall be directed to the department. The department shall assure the order's execution.

(k) Notwithstanding any other provision of §§ 10--340 of this chapter, except § 170 of this chapter, commitment proceedings under this section shall not be commenced with respect to a patient admitted under § 20 of this chapter unless release of the patient is first requested in accordance with § 50 of this chapter.

(l) An order for hospitalization under this section is not a judicial determination of legal incompetency, except to the extent provided in § 130(b) of this chapter. Proceedings for a determination of legal incompetency and the appointment of a guardian for a patient who has been ordered hospitalized may be started before, during or after proceedings under this section, if the circumstances of the case require and the condition of the patient permits.

vides for hospitalization upon a court order after a full judicial hearing initiated by a petition from an interested party, physician, peace officer, the Department of Health and Social Services or the head of an institution in which an individual is hospitalized. The proposed patient has an opportunity to be represented by an attorney or an advisor and may request a jury of six. The court orders the person hospitalized for an indeterminate period if the court (or the jury, if requested) finds that the proposed patient is "mentally ill and because of his illness is likely to injure himself or others if allowed to remain at liberty" or is "in need of immediate care or treatment in a hospital, and because of his illness, lacks sufficient insight or capacity to make responsible decisions concerning hospitalization."

DUE PROCESS CONSIDERATIONS

Areas of AS 47.30 which might be challenged on due process grounds because of an absence of adequate procedural safeguards include the following:

A. Standards for Commitment

(1) Analysis: There are two standards for commitment in AS 47.30: Mental illness which results in (1) likelihood of injury to self or others and (2) need for immediate care or

treatment in a hospital, i.e., that the individual, because of his mental illness, lacks sufficient insight or capacity to make responsible decisions concerning his need for hospitalization. These standards are found at section 20(2), 10/ section 30(a) and (b), 11/ section 40(b), 12/ section 70(i) 13/.

The first standard -- likelihood of harm to self or others -- appears to be constitutionally adequate. A few courts have required that the standard of future dangerousness must include a showing that the person has actually been dangerous in the recent past and that such danger was manifested by an overt act, attempt or threat to do substantial harm to himself or to

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10/ See footnote 7.

11/ See footnote 8.

12/ AS 47.30.040. NEWLY ADMITTED PATIENTS.

> . . . (b) At the end of the 48 hours, a patient admitted under § 20 or 30 of this chapter, shall be discharged without application if a preliminary examination has not been held or if, upon examination, the designated examiner refuses or fails to certify to the head of the designated hospital that in his opinion the patient is mentally ill and is either likely to injure himself or others if allowed at liberty, or in need of care or treatment in a hospital and because of his illness lacks sufficient insight or capacity to make responsible decisions concerning it. All other patients shall be discharged when, in the opinion of the head of the designated hospital, there is no further need for their hospitalization. Notice of discharge shall be given to the department and the court or person responsible for the order of hospitalization, who shall have an additional 48 hours within which to make other arrangements under § 70 of this chapter or otherwise.

13/ See footnote 9.

another. Lynch v. Baxley, 386 F. Supp. at 391; Lessard v. Schmidt, 349 F. Supp. at 1093; Cross v. Harris, 418 F.2d 1095, 1102 (D.C. Cir. 1969); Doremus v. Farrell, 407 F. Supp. at 515.

The second standard -- need for care and treatment -- appears to be open to serious question on due process grounds. In Jackson v. Indiana, 406 U.S. 715 (1972), and Humphrey v. Cady, 405 U.S. 504 (1971) the United States Supreme Court addressed issues relative to involuntary commitment of criminally insane persons. In reaching its decision in these cases, the Court interpreted Indiana's civil commitment standard ("in the interest of the welfare of such persons or others") and Wisconsin's standard ("is mentally ill and a proper subject for custody and treatment") to require an independent showing of dangerousness. The Supreme Court applied the balancing test and found that the state's interest in the welfare of a person was insufficient to justify such a "massive curtailment of liberty", Humphrey v. Cady, 405 U.S. at 509, unless there was an implicit requirement in the statute that the person was dangerous to himself or others.

The following cases have held that the standard of "need for care and treatment" as a basis for involuntary commitment because of mental illness violates due process: Suzuki v. Quisenberry, 411 F. Supp. 1121-25; Kendall v. True, 391 F. Supp. at 417-19; Lessard v. Schmidt, 349 F. Supp. at 1093-94; Lynch v. Baxley, 386 F. Supp. at 389-92; Doremus v. Farrell,

407 F. Supp. at 513-15; Bell v. Wayne County General Hospital at Eloise, 384 F. Supp. at 1096. All of these cases have held that dangerousness -- harm to oneself or others -- is a constitutional requirement for involuntary commitment. In other words, without a showing of dangerousness, the State may not constitutionally deprive an individual of his liberty without his consent, even though it could show that it would be to the individual's benefit to provide him with certain care and treatment.

One court has held that the "in need of care or treatment" standard where no evidence of dangerousness is required is impermissibly vague because the standard is susceptible to several interpretations and may be enforced arbitrarily. The court in Goldy v. Beal, ___ F. Supp. ___ (N.D. Pa., July 18, 1976) stated:

> Such lack of specificity in a statute that authorizes an interference with a constitutionally protected right of physical liberty places insufficient limits on the discretion of officials who are responsible for its implementation, with the result that there is nothing in the statute to prevent it from being enforced arbitrarily. Such a result amounts to vagueness that violates due process. (Reported in Mental Disability Law Reporter, Vol. 1, No. 2, p. 137, Sept-Oct, 1976)

It would seem difficult for a court to save the "in need of care and treatment" standard in AS 47.30 by reading in an implicit requirement of harm to self and others. The statute

specifically sets out two alternative grounds -- either harm to self or others or need of care and treatment in a hospital.

(2) Advice: In order for the Division of Mental Health to operate on safe constitutional grounds it is our advice that it should apply only the first standard -- harm to self or others -- in cases where it is in control of the petitioning process, i.e., where the department or the head of a state institution initiates the commitment. Harm to self can include a proven inability to meet one's fundamental needs, such as food, clothing, shelter, or essential medical care, because of mental illness. See, e.g., Doremus v. Farrell; In re Mostella, 215 S.E.2d 790 (N.C. App. 1975). It might also be well to prove the likelihood of future harm by a recent overt act, threat or attempt to inflict harm on self or others.

B. Time Before Hearing

(1) Analysis: While a prior hearing is normally a prerequisite to the state's interference with a person's liberty, it may be delayed until some time after the deprivation has taken place where there is a compelling state interest to warrant postponement. See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970). The authorities which approve emergency commitments to mental institutions without prior hearing where there is an immediate threat of harm to self or others are uniform in requiring that a

hearing be held after the commitment to determine if the person should be released or continued under hospitalization.

Some courts have required a preliminary hearing, i.e., an abreviated informal hearing where the state must convince the court that it will probably be able to show that person meets the legal criteria for commitment at a full, formal hearing later. See, e.g., Bell v. Wayne County General Hospital, 384 F. Supp. at 1098 (within 5 days); Lessard v. Schmidt, 349 F. Supp. at 1103 (within 48 hours); Lynch v. Baxley, 386 F. Supp. at 388 (within 7 days); Doremus v. Farrell, 407 F. Supp. at 388 (within 5 days); Kendall v. True, 391 F. Supp. at 419 (requires a preliminary hearing but no specific time limit set); Mignone v. Vincent, 411 F. Supp. 1386, 1389 (S.D.N.Y. 1976) ("quickly after the commitment").

Doremus v. Farrell, 407 F. Supp. at 515 requires a full and formal hearing, i.e., a hearing where each side presents all the evidence it has marshalled in support of its position and where rules of evidence apply, on the necessity for commitment within 14 days after the preliminary inquiry; Lessard v. Schmidt, 349 F. Supp. at 1092, requires a full hearing within 10 to 14 days after detention; Lynch v. Baxley, 386 F. Supp. at 388, sets an outside limit of 30 days from date of the initial detention for the holding of a full hearing; Kendall v. True, 391 F. Supp. at 419, requires a full hearing within 21 days of confinement.

Other courts have not required a preliminary hearing and have approved longer time periods of commitment prior to a full hearing. In Coll v. Hyland, 411 F. Supp. 905 (D. N.J. 1976), the court ruled that confinement of up to 20 days without a preliminary hearing and before a full hearing was constitutionally permissible. In Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972) aff'd sub nom. Briggs v. Arafeh, 411 U.S. 911 (1973), the United States Supreme Court summarily affirmed a three-judge federal court ruling upholding a Connecticut statute allowing confinement of up to 45 days without a hearing. Some courts have openly disagreed with the length of time before hearing permitted in Logan. See, e.g., Kendall v. True, 391 F. Supp. at 419.

In Alaska, no hearing is automatically provided by statute after an emergency commitment. The main mechanism for triggering a hearing for a patient who has been committed on an emergency basis is a request for discharge, after which the head of the hospital must either issue a release or oppose the discharge by instituting judicial commitment proceedings under AS 47.30.070. Interested parties are notified of the patient's request for discharge and may oppose it by initiating judicial commitment proceedings if the head of the hospital does not.

When a request for discharge is opposed, it is possible under AS 47.30 that a hearing on the need for continued hos-

pitalization will not occur for 32 or more days (15 days limit for initiating the proceeding under section 50(a)(3); 14/ unknown amount of time for notice and appointing examiners; 2 days limit for examination and report; 15 days limit for a hearing after examiner's report under section 70(b), (c), and (e). 15/

14/ Sec. 47.30.050. APPLICATION FOR DISCHARGE AND EMERGENCY DETENTION. (a) An individual, 30 days after admission to a designated hospital under § 20 of this chapter or an individual admitted to a designated hospital under § 30 of this chapter, shall be immediately discharged upon his request or upon the request in writing of an interested party or peace officer, except that

(1) if admitted upon his own application, his discharge may be conditioned upon his agreement;

(2) if under 18 years of age and admitted under § 20 of this chapter, his discharge before becoming 18 years of age may be conditioned upon the consent of his parent or guardian; and

(3) if the head of a designated hospital, within 48 hours after receiving the request, files with the superior court a certification that in his opinion the discharge of the patient would be unsafe to the patient or others, the discharge may be postponed for not more than five days to begin commitment proceedings under § 70 of this chapter; if the court finds that because of justifiable circumstances, proceedings for judicial hospitalization cannot reasonably be instituted in that time, the discharge may be postponed for not more than 15 days.

(b) The head of the designated hospital shall provide reasonable means and arrangements for informing patients of their right to discharge, as provided in §§ 10--340 of this chapter, and for assisting the patients in making requests for discharge under this section.

15/ See footnote 9.

There is always a possibility, too, that a committed person will not understand his right to ask for discharge, and therefore, will not trigger the hearing mechanism for some time.

A longer delay before hearing is possible for a voluntarily committed person who becomes, in essence, an involuntary committee when the person no longer desires to remain voluntarily and is kept against his or her will. Section 50(a) 16/ provides that immediate discharge for a voluntarily committed patient is not required before 30 days after admission, at which time the head of the hospital may file a petition for a judicial commitment if he believes that discharge would be unsafe to the patient or others. If a voluntary patient requests discharge after 5 days of hospitalization, for example, the head of the hospital would not be obliged to grant the discharge, and the patient could be kept for 25 more days before the request for discharge would trigger either a discharge or a judicial commitment proceeding. Thus a voluntary patient who is not discharged on request during the 30 day period after admission might not receive a hearing for the number of days between the first request and the end of the 30 day period plus the 32 or more days discussed above which can elapse under the statute before a hearing.

It is true that section 60 provides that the patient or an interested party may petition the superior court for a judicial

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16/ See footnote 14.

determination of the need for continued hospitalization under section 70. 17/ It is also true that section 100 provides that an individual detained under AS 47.30 as an involuntary committee is entitled to a writ of habeas corpus. 18/ Both of these procedures must be initiated by the patient or an interested person, and the statute does not provide that the patient must be informed of the availability of these procedures. The court in Fahgen v. Miller, 306 F.Supp. 634 (S.D.N.Y. 1969) discussed the habeas corpus remedy in these words:

> It is true that habeas corpus is always available to test the lawfulness of detention [under New York's Mental Hygiene Law]. But this assumes a patient has knowledge or has been advised of his right to so proceed. In any event, not only is the presumption that the confined person knows the law ### highly unrealistic, but if the statute is constitutionally defective, it will not be

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17/ Sec. 47.30.060. Petition for judicial determination. A patient who is hospitalized under § 20, 30 or 70 of this chapter may have the need for his continued hospitalization determined or redetermined on his own petition or that of an interested party or a peace officer, to the superior court. On receipt of the petition, the superior court shall conduct proceedings in accordance with § 70 of this chapter except that the proceedings need not be conducted if the petition is filed sooner than (1) six months after the issuance of an order of hospitalization under § 70 of this chapter; (2) one year after the filing of a previous petition under this section; or (3) 30 days after the voluntary application and admission of a patient.

18/ Sec. 47.30.100. Writ of habeas corpus. An individual who is detained under §§ 10-340 of this chapter is entitled to a writ of habeas corpus upon proper petition by himself or an interested party to a court authorized to issue writs of habeas corpus in the jurisdiction in which he is detained.

> saved by the Great Writ. Nor is it saved by express recognition in the state's Mental Hygiene Law of a patient's right to the writ. 306 F.Supp. at 638. (footnotes omitted.)

In view of cases from other jurisdictions it would seem that AS 47.30.020 - 47.30.070 is subject to attack on due process grounds for failure to provide for an automatic hearing to determine the legality of all emergency commitments which last more than a very short period of time and for providing procedures under which a long period of time may lapse before a hearing occurs in such cases 19/ and also in the case of persons voluntarily committed who no longer wish to remain committed.

(2) Advice: It is our advice that the Division of Mental Health or its designees should initiate a hearing under AS 47.30.070 for persons committed under section 30 and attempt to have the hearing occur within 7 to 10 days of commitment. For voluntary

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19/ In the New Jersey case of Coll v. Hyland, 411 F. Supp. 905 (D. N.J. 1976), and in the Connecticut case of Logan v. Arafeh, where 20 days and 45 days respectively without a hearing were held constitutionally acceptable, the patients involved had been determined by at least one physician (two under the New Jersey statute) to be dangerous to themselves or others as a result of mental illness. Because the Alaska statute allows for a standard of "in need of care or treatment in a hospital" which can probably not be interpreted to include an element of dangerousness to self or others, a person could be institutionalized under AS 47.30.030 without a hearing for a lengthy period of time on the basis of a physician's determination that the person is in need of hospitalization.

patients who desire discharge sooner than 30 days after commitment, it is our advice that the Division either release them or treat them as involuntary patients and promptly initiate a judicial commitment proceeding.

C. Rights of the Subject of a Judicial Commitment Hearing.

(1). Adequate Prior Notice.

(a). Analysis: Several courts have held that adequate prior notice to the subject of a final, i.e., non-preliminary hearing should include: the date, time and place of the hearing; a clear statement of the purpose of the proceedings and the possible consequences to the subject of the proceedings; the alleged factual basis for the proposed commitment; a statement of the legal standard upon which commitment is authorized; the names of examining physicians and other persons who may testify in support of the petition to commit and a summary of proposed testimony (some courts hold that this information does not have to be in the notice but must be made available to counsel in advance of the proceeding); a statement of the right to counsel and the right to jury trial (if the latter right is provided by statute --some courts have found that it is not constitutionally required; AS 47.30.070(h) provides for a jury of six on written request). Some courts have held that notice before a preliminary hearing should include the time and place of the hearing; the

grounds, reasons and necessity for emergency detention; and the right of the person being committed to counsel. See, e.g., Lessard v. Schmidt, 349 F.Supp. at 1092; Lynch v. Baxley, 386 F.Supp. at 388; State ex rel. Hawks v. Lazaro, 202 S.E.2d at 124; Suzuki v. Quisenberry, 411 F.Supp. at 1127; Doremus v. Farrell, 407 F.Supp. at 515; Bartley v. Kremens, 402 F.Supp. at 1050; cf. Commonwealth v. Roop, 339 A.2d 764 (Pa. Super. 1975).

The court in Coll v. Hyland, 411 F.Supp. at 911, held that there was no constitutional necessity that notice to the patient include (1) a factual basis upon which commitment is sought, (2) names of examining physicians, (3) the names of any other individuals who might testify in support of commitment or (4) a summary of proposed testimony, because under New Jersey's scheme there was an absolute requirement of representation by counsel with most relevant information being readily available to the patient's counsel. Under AS 47.30 there is not an absolute requirement of representation by counsel. (See discussion in section (2) below.)

AS 47.30.070(b) and (e) 20/ do not specify the information which the notice to the proposed patient should contain, but this specificity could be added by judicial interpretation.

20/ See footnote 9.

(b). Advice: When the Division of Mental Health initiates a commitment proceeding, it should include the provisions mentioned in the first paragraph of this section in its notice. The notice could omit the summary of proposed testimony if such a summary is made available to counsel for the patient before the hearing.

(2). Representation by Counsel.

(a). Analysis: During a judicial commitment proceeding a patient is given the opportunity to be represented by "counsel or advisor", including an appointed counsel or advisor if he cannot provide one. AS 47.30.070(h). 21/

Almost all the courts which have examined the due process aspects of state civil commitment statutes have held that the subject of an involuntary commitment proceeding has a right to counsel at all stages of the proceeding; a right to be informed of the right to counsel and to appointment of counsel if indigent; a right to have counsel made available far enough in advance of the final commitment hearing to assure adequate opportunity for preparation; and a right to representation by a legally trained and qualified counsel instead of any person. See, e.g., Bell v. Wayne County General Hospital, 384 F.Supp. at 1093-94;

21/ See footnote 9.

Lessard v. Schmidt, 349 F.Supp. at 1097-98; Heryford v. Parker, 396 F.2d 395, 396 (10th Cir. 1968); Suzuki v. Quisenberry, 411 F.Supp. at 1129; Lynch v. Baxley, 386 F.Supp. at 38; Bartley v. Kremens, 402 F.Supp. at 1050-51; Doremus v. Farrell, 407 F.Supp. at 516; Dixon v. Attorney General of Comm. of Pa., 325 F.Supp. at 974.

The Alaska statute allows the proposed patient to choose representation by an advisor, who would presumably be a lay person. There is question as to whether this choice should be offered by the statute. The cases cited above hold that in view of the serious deprivation of liberty involved in a civil commitment, the need for representation by an attorney is similar to the need in a criminal case. In a criminal case the accused may waive the right to counsel only if the court determines that the waiver is voluntary and knowing. See, e.g., Boyd v. Dutton, 405 U.S. 1 (1972); Johnson v. Zerbst, 304 U.S. 458 (1938); Gregory v. State, 550 P.2d 374 (Alaska 1976).

It would almost certainly, therefore, be argued that the proposed patient should not be able to choose an advisor instead of an attorney unless the court determines that his waiver of the right to counsel is voluntary and knowing. Representation by an attorney and an advisor might be a possibility instead of an attorney or an advisor.

(b). Advice: When the Division or its designees initiate commitment proceedings, they should encourage the patient to choose an attorney and encourage the court to appoint an attorney instead of an advisor -- or in addition to an advisor.

(3). Presence of the Proposed Patient at the Judicial Hearing.

(a) Analysis: Section 70(f) of AS 47.30 22/ provides that the proposed patient shall not be required to be present at a hearing under section 70. Some courts have required the presence of the patient at such a hearing unless it is judicially determined that the patient has knowingly and voluntarily waived his right to be present or that presence at the hearing would be harmful to the patient.

In Bell v. Wayne County General Hospital, 384 F.Supp. at 1094, the court found that due process standards were not met where the patient was not present at the hearing unless his presence would be so disruptive that the proceeding could not continue in any reasonable manner, as in the case of a criminal defendant. The Bell court held that the court could not make such a decision in advance of the hearing and solely on the certificate of physicians that the respondent should not be allowed to appear. Where the removal of the defendant to the

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22/ See footnote 9.

court house would be "improper and unsafe", the court in Bell required that some method alternative to total exclusion be attempted first, such as holding the proceedings at the mental health facility. See also, Suzuki v. Quisenberry, 411 F.Supp. at 1129; Lynch v. Baxley, 386 F.Supp. at 388-89; State ex rel Hawks v. Lazaro, 202 S.E.2d at 125.

(b) Advice: Where the Division of Mental Health is involved in a judicial commitment proceeding it should encourage the presence of the patient at the hearing unless the court has made a judicial determination that the patient has effectively waived his right to be present or that presence would be medically harmful to the patient or seriously disruptive of the proceeding.

(4). Standard of Proof.

(a) Analysis: Section 70 23/ of AS 47.30 provides no standard of proof for judicial commitment of an allegedly mentally ill individual. There are essentially three standards of proof which might be required to prove that a person is committable: (1) by a preponderance of evidence, (2) by clear and convincing evidence, or (3) beyond a reasonable doubt. Courts which have considered the issue have concluded that, in view of the deprива-

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23/ See footnote 9.

tion of liberty involved in a commitment, proof must be either by clear and convincing evidence or beyond a reasonable doubt.

Proof by preponderance of the evidence (the standard used in most civil actions) has been rejected in commitment proceedings by at least two courts. Lessard v. Schmidt, 349 F.Supp. at 1094-95; In re Ballay, 482 F.2d 648, 653-5 (D.C. Cir. 1973). As far as we have been able to determine, proof by a preponderance of the evidence has not been approved by any court.

Proof by clear and convincing evidence has been approved by the majority of courts which have considered the issue. Lynch v. Baxley, 386 F.Supp. at 392-94; State ex rel. Hawks v. Lazaro, 202 S.E.2d at 126-7; Castillo v. U.S., 406 F.Supp. 585, 595 (D.N.M. 1975); Doremus v. Farrell, 407 F.Supp. at 517; Bartley v. Kremens, 402 F.Supp. at 1051-53; Dixon v. Attorney General of Pennsylvania, 325 F.Supp. at 974.

Proof beyond a reasonable doubt has been required by some courts. Lessard v. Schmidt, 349 F.Supp. at 1094-95; In re Ballay, 482 F.2d at 653-5; United States ex rel. Stachulak v. Coughlin, 364 F.Supp. 686 (N.D. Ill. 1973), affirmed 520 F.2d 931, 935-37 (7th Cir. 1975); Suzuki v. Quisenberry, 411 F.Supp. at 1132. Cf. In re Winship, 397 U.S. 358 (1970), where the

United States Supreme Court held that the standard of proof in juvenile proceedings which involve a loss of liberty must be beyond a reasonable doubt, even though a juvenile proceeding is not technically a criminal proceeding.

Section 70 of AS 47.30 might be found to be violative of due process in not specifically setting out a higher standard of proof than the preponderance of the evidence standard which is applied in most civil cases. This defect can be cured by judicial interpretation, and, apparently most Alaska courts do apply a higher standard of proof in commitment proceedings.

(b) Advice: When the Division of Mental Health is involved in a judicial commitment proceeding it should be prepared to meet, and if there is any doubt that the court will not do so on its own initiative, should encourage the court to apply a standard of proof higher than in a normal civil case.

(5). Formality of the Proceeding and Rules of Evidence.

(a) Analysis: Subsection (g) of section 70 of AS 47.30 24/ provides that the hearing shall be conducted as informally as is consistent with orderly procedure and that the court may relax rules of evidence to the extent of receiving affidavits,

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24/ See footnote 9.

certificates of licensed physicians and other writings of similar apparent authenticity and reliability.

Several courts have held that there should be no relaxation of the rules of evidence, specifically those governing hearsay (use of out-of-court statements at a judicial proceeding made by someone who is not a witness at the proceeding). See State ex rel. Hawks v. Lazaro, 202 S.E.2d at 125; Lessard v. Schmidt, 349 F.Supp. at 1102-03; Lynch v. Baxley, 386 F.Supp. 394; Suzuki v. Quisenberry, 411 F.Supp. at 1130; Doremus v. Farrell, 407 F.Supp. at 517. These courts hold that the seriousness of the deprivation of liberty and the consequences which follow an adjudication of mental illness make imperative strict adherence to the rules of evidence generally applicable to other proceedings in which an individual's liberty is in jeopardy. Cf. In re Gault, 387 U.S. 1, 11, n. 7 (1967), where the U.S. Supreme Court considered the use of hearsay evidence in an informal non-criminal juvenile proceeding:

> [T]o the extent that the rules of evidence are not merely technical or historical, but like the hearsay rule have a sound basis in human experience, they should not be rejected in any judicial inquiry.

To the extent that a hearing under section 70 may be conducted with relaxed rules of evidence, it appears to be in conflict with the decisions cited above.

(b) Advice: To the extent that the Division of Mental Health has any control of witnesses in favor of commitment, it should have them testify in person rather than by affidavit or certificate.

(6). Other Rights at Hearing.

(a) Analysis: A few courts have found an additional due process requirement that the patient be informed of his or her right to invoke the privilege against self-incrimination before a psychiatric examination on which a finding of mental illness is to be based. Lessard v. Schmidt, 349 F.Supp. at 1100-02; Suzuki v. Quisenberry, 411 F.Supp. at 1130-32. The necessity for this requirement has been questioned in a balancing test of state vs. individual interest. See "Civil Commitment of the Mentally Ill", 1974 Harv. L.Rev. 1191 at 1306-13.

(b) Advice: It is our opinion that recognition of the individual's right to remain silent would seriously impair the state's ability to achieve the valid objectives of civil commitment. The state's interest in protecting the public from a mentally ill person who is likely to cause harm to others and in protecting a mentally ill person from causing harm to himself must outweigh the right of a proposed patient to remain silent during a court-ordered psychiatric examination. The purpose of

the examination is neither accusation nor inquisition but rather to gather current medical information about the patient's mental condition which can be obtained in no other manner. Without this essential information, the state would be unable to proceed with its case, and a person dangerous to himself or others could not be hospitalized.

D. Recommitment After Release on Convalescent Statute.

(1). Analysis: Section 200 of AS 47.30 provides for release on convalescent status when the head of the hospital believes that it is in the best interest of the patient. Section 210 provides in part:

> If there is reason to believe that it is to the best interest of the patient to be re-hospitalized, the department or head of the designated hospital may issue an order for the immediate re-hospitalization of the patient.

The court in Meisel v. Kremens, 405 F.Supp. 1253 (E.D. Pa. 1975) held that a Pennsylvania statute which provides for summary revocation of leaves of absence from state mental health facilities at the discretion of the directors of those facilities is unconstitutional as violative of due process. The Meisel court relied on two decisions from New York: Shaban v. Essen, 386 F.Supp. 1042 (E.D.N.Y. 1974), aff'd 516 F.2d 897 (2d Cir. 1974), and Ball v. Jones, 351 N.Y.S.2d 199 (1974). In these

cases the federal and state courts held that a provision of the New York mental hygiene law providing for revocation of out-patient status of a person adjudged to be a drug dependent person without written notice of violation or opportunity to be heard violated due process.

The courts in Meisel, Shaban and Ball found that the principles of due process enunciated by the United States Supreme Court in Morrisey v. Brewer, 408 U.S. 471 (1972), requiring notice and a hearing with regard to revocation of parole for criminals should apply to revocation of leave for mental patients or drug-addicted patients. The "conditional liberty" of the mental out-patient was not seen to differ in any significant respect from the "conditional liberty" of the paroled criminal.

Section 210 might, therefore, be subject to constitutional attack for failure to provide notice and a hearing when release on convalescent status is revoked and the patient is recommitted. It might also be argued that the same standards should apply for recommitment as for the original commitment.

(2). Advice: The Division or its designee should not recommit a person released on convalescent status without notice and hearing. If there is no emergency, a hearing under AS 47.30.070 should be initiated by the Division or its designee. If emergency

commitment is necessary, the person should have the same safeguards as attend an original emergency commitment.

E. Indeterminate Commitment and Provisions for Periodic Judicial Review.

(1). Analysis: Commitment in Alaska is for an indeterminate period (sec. 70(i); sec. 40(b)) and discharge occurs when, in the opinion of the head of a designated hospital, there is no further need for hospitalization (sec. 220; sec. 40(b)). The United States Supreme Court in O'Connor v. Donaldson, 422 U.S. at 574-5 held that even if the commitment was initially founded on a constitutionally adequate basis, it could not constitutionally continue after that basis no longer existed. This seems to put the burden on the state to re-establish from time to time the basis for continued confinement.

The issue then is whether AS 47.30.060 violates due process because the periodic judicial determinations (where the burden is on the state to re-establish the basis for continued confinement) must be initiated by the patient or an interested party rather than the state and cannot be initiated more than once within a time period of 6 months initially and after that only once a year. One of the only courts which has considered the issue held that a similar provision in the Hawaii statutes

was not violative of a patient's due process rights in Suzuki v. Quisenberry, 411 F.Supp. at 1134. The court nevertheless stated that limitation of the period of confinement to 90 days without another commitment hearing would be "in line with current mental health doctrine" and clearly protective of due process rights.

(2). Advice: Even if the current provisions are not violative of due process, the Division of Mental Health would assure greater protection for patients if it initiated an annual judicial review for all involuntarily committed patients who did not initiate such a review themselves.

F. Minors.

(1) Analysis: Minors are treated specially under AS 47.30 in two ways: (1) a minor needs the consent of a parent or guardian for voluntary admission to a hospital under AS 47.30.-020(1), 25/ and (2) a minor admitted under the voluntary commitment section and discharged while still a minor may have his discharge conditioned upon the consent of his parent or guardian under AS 47.30.050(a)(2). 26/

25/ See fo note 7.

26/ See footnote 14.

We have found no cases addressing the first situation where a minor wishes to be hospitalized and a parent or guardian refuses. The second situation where a voluntarily committed minor's discharge is blocked by a parent or guardian has been addressed by at least one court. In In the Matter of Williams, 336 A.2d 468 (Essex Co., N.J. 1976), the court ruled that a minor voluntarily committed to a mental hospital for treatment with his parent's signature has the right to sign himself out on 72 hours' notice without parental consent. Hospital authorities could invoke involuntary commitment procedures in response to the minor's request for discharge if they believed discharge would be unsafe. The court stated:

> To require parental consent to leave the hospital would, in effect, convert John Williams' status from that of a voluntary patient to that of an involuntary patient. This court will not be party to such a situation. 336 A.2d at 471.

It should be noted that in Williams, the New Jersey statutes did not contain a special provision for minors but stated that any voluntary patient is to be discharged on request within 72 hours.

The state must be able to show a fair and substantial relation between the special restrictions on minors under AS 47.30.020(1) and 47.30.050(a)(2) and the state's interest. We

question whether the state could do so in a situation where a voluntarily committed minor desires discharge, the head of the hospital does not oppose the discharge on grounds of harm to self or others, but the parents of the minor block the discharge.

(2). Advice: The language of AS 47.30.050(a)(2) is discretionary: "discharge may be conditioned upon the consent of his parent or guardian". The heads of designated hospitals under the control of the Division are advised to discharge voluntarily committed minors on the minor's request when the head of the hospital does not believe that discharge of the minor would be harmful to the minor or others, even if the parent or guardian is opposed to the discharge. If the parent or guardian believes that the minor should remain hospitalized, the parent or guardian should initiate judicial commitment proceedings.

G. Substantive Rights of Committed Persons.

(1). Consent to Treatment.

(a) Analysis: Section 130(b) 27/ of AS 47.30 requires consent to surgery and psychiatric therapies which the department

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27/ AS 47.30.130(b) provides:

> (b) Consent to surgery, the psychiatric therapies which the department determines, and autopsies must be obtained for a patient before the undertaking of the surgery,

determines are necessary. This is an area of recent litigation, particularly as concerns those forms of treatment which are considered to be most intrusive, such as electro-shock therapy (ECT), psycho-surgery, lobotomy, and aversion behavior control therapy. 28/

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27/ continued:

chiatric therapies or autopsies from one of the following persons: spouse, guardian, either parent, or oldest adult child. If none of these persons is found in this state within a reasonable time, or in the case of an emergency, the commissioner of health and social services or his designee, upon being notified of the pertinent medical facts, may give the consent. However, when the head of the hospital is of the opinion that the patient has insight or capacity to make a responsible decision, the patient's consent shall be obtained before the surgery or psychiatric therapies; his consent shall be obtained before the surgery or psychiatric therapies; his consent shall be determinative, and no other consent is necessary. However, in the case of a minor, consent shall also be obtained from the parent or guardian. The person giving the consent, or a person who acts after the consent is given and is authorized to perform the act undertaken by him is not liable civilly or criminally if the act is done by him in his official capacity or in the capacity set out in secs. 10 - 340 of this chapter.

28/ See, e.g., Doe v. Younger, California Court of Appeals, April 23, 1976, (reported in Mental Disability Law Rptr., Vol. 1, No. 2, Sept-Oct., p. 119-120), Price v. Sheppard, 239 N.W.2d 905 (Minn. 1976); Scott v. Plante, 532 F.2d 939 (3rd Cir. 1976); Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973); Mackey v. Procunier, 477 F.2d 65 (2d Cir. 1971), cert. den. 404 U.S. 985 (1971). The most significant decision in this area was Kaimowitz v. Mich. Dept. of Mental Health, Civil No. 73-19434-AW (Cir. Ct., Wayne Co., Mich., July 10, 1973), (an involuntary patient cannot effectively consent to experimental psychosurgery.)

Some of these therapies have significant, permanent and painful side effects (aversion therapy); some are irreversible, highly intrusive and often debilitating (psychosurgery and lobotomy). 29/ A fundamental interest in bodily privacy has long been recognized at common law, and several judicial opinions have sketched the outline of a constitutional right to protection of bodily integrity from unwanted state intrusion. 30/

(b) Advice: The provisions for consent in section 130(b) should be strictly construed, and for intrusive forms of treatment, every effort should be made to see that the patient's informed consent, or the substitute informed consent of a spouse, guardian, parent or oldest adult child, is obtained. Consent is not informed if the person consenting does not understand the dangers and possible negative consequences of the treatment. If informed consent or substitute informed consent cannot be obtained under AS 47.30.130(b) the commissioner or his designee might be wise to obtain a court order before allowing the most intrusive treatments such as psychosurgery or lobotomy (cf. Price v. Sheppard, 239 N.W.2d 905 (Minn. 1976)), even though he has statutory authority to consent under sec. 130(b).

29/ "Civil Commitment of the Mentally Ill", 1974 Harv.L.Rev. 1190, 1345, n. 122.

30/ Id. at 1194-97, n. 11 and 12.

(2). Consideration of less restrictive alternatives.

(a) Analysis: Some courts have held that the burden is on the state to show that the goal of treatment and protection from harm for the mentally ill cannot be more narrowly achieved than by institutionalization, i.e., the state must show that institutionalization is the least restrictive alternative possible.

In Lessard v. Schmidt, 394 F.Supp. at 1096, the United States District Court for the Eastern District of Wisconsin set out the requirement that less drastic means than commitment be investigated. The court said:

> We believe that the person recommending full-time involuntary hospitalization must bear the burden of proving (1) what alternatives are available; (2) what alternatives were investigated; and (3) why the investigated alternatives were not deemed suitable. These alternatives include voluntary or court-ordered out-patient treatment, day treatment in a hospital, placement in the custody of a friend or relative, placement in a nursing home, referral to a community mental health clinic, and home health aid services.

The same requirement was stated in Lynch v. Baxley, 386 F.Supp. at 392, in these words:

> In addition to the findings which are required to be made by the fact-finder, the state . . . shall have the burden of demonstrating the proposed commitment is the least restrictive environment consistent with the needs of the person to be committed.

The principle has been applied in other cases such as Welsch v. Likins, 373 F.Supp. at 502; Suzuki v. Quisenberry, 411 F.Supp. at 1132-33.

In Dixon v. Weinberger, 405 F.Supp. 974 (D. D.C. 1975) the court interpreted a District of Columbia statute to require placement of committed patients in less restrictive appropriate facilities than a hospital and held that the responsible authorities were obliged to create such facilities if they did not currently exist. See also, Covington v. Harris, 419 F.Supp. 617 (D.C. Cir. 1969); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966). The statute for the District of Columbia contains language referring to hospitalization or "alternative treatment".

In the Alaska statutes governing civil comitments, section 20(a)(B), section 30(a), and section 70(i) all set out the standard of "care or treatment in a hospital" or "immediate hospitalization". A court should read these statutory words to require that alternatives short of hospitalization have been considered and are not appropriate.

(b) Advice: The Division of Mental Health is advised to utilize institutionalization only after it has determined that the danger to the subject himself or to others cannot be avoided by out-patient treatment, day treatment in a hospital, night

treatment in a hospital or treatment at a community mental health clinic. When the Division or its designee is involved in a judicial commitment hearing, it should show the court that other alternatives short of institutionalization have been considered. The Division or its designee should attempt to move committed patients to less restrictive treatment settings inside or outside an institution as soon as their mental condition improves, even when a restrictive setting is initially appropriate.

CONCLUSION

A number of areas of AS 47.30 which may be vulnerable to attack on due process grounds have been set out. The most serious defects appear to be the "in need of care or treatment" standard for commitments; the absence of a mandatory hearing to test all involuntary emergency commitments which last more than a short period of time; the long delay which is possible before a judicial determination occurs after an emergency commitment or after a voluntary commitment becomes involuntary; the absence of due process protections when conditional leave is revoked.

This opinion has pointed out other areas of potential legal problems with the statute in view of developing case law in other jurisdictions and has advised the Division of the safest

way to proceed under the present statute. It is obvious, however, that the Division of Mental Health does not control the entire process of civil commitment, which includes the court system, private physicians, police officers, relatives, and other interested parties.

A more definite way to proceed would be to revise Alaska's current civil commitment statutes. We recommend that any new or amended civil commitment statute include the following due process safeguards:

(1) A standard for commitment based on dangerousness to self or others;

(2) A hearing initiated by the state to test the legal basis for all involuntary emergency commitments within a short period of time after the commitment (a preliminary hearing plus a full hearing later or only a full hearing);

(3) Procedural due process at a commitment hearing, which should include:

(a) adequate prior notice;

(b) a neutral judicial officer;

(c) right to effective assistance of counsel;

(d) right to be present at the hearing except in exceptional circumstances;

(e) right to cross-examine witnesses and to offer evidence;

(f) adherence to the rules of evidence;

(g) proof by clear and convincing evidence (or beyond a reasonable doubt, although the clear and convincing standard is recommended as a better balance between individual and state interests, given the lack of consensus among mental health professionals about what constitutes mental illness and whether future harm can be predicted);

(h) consideration of less restrictive alternatives to commitment;

(i) record of the proceedings and written findings of fact;

(j) appellate review;

(k) periodic judicial redetermination of the basis for confinement;

(4) Notice and hearing when conditional leave is revoked, with the same safeguards as in (3)(a) - (k);

(5) Informed consent or informed substitute consent to intrusive or irreversible treatment;

(6) Explanation to the patient of his rights while hospitalized and assistance in exercising these rights.

We are available to assist in amending the current civil commitment statutes by working with the Division of Mental Health, legislators or legislative committees who address the problem, or other interested groups.

Very truly yours,

AVRUM M. GROSS
ATTORNEY GENERAL

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Elizabeth R. Arnold
Assistant Attorney General

ERA:md

persons/groups who have commented on SB 100 (HB 472 - HB 2):

Dept. Health & Social Services

Dept Law

Alaska Court System

Public Defender

Alaska Legal Services

Alaska Mental Health Association

Governor's Mental Health Advisory Council

Alaska State Hospital Association

Public Hearings were held in Fairbanks, Anchorage, Kodiak, Ketchikan, Juneau & Soldotna

Other Person's Action Groups

Mauneluk Association

Central Peninsula Mental Health Association

Bristol Bay Area Health Corp.

Dept. Public Safety

Barrow Mental Health Clinic

Tanana Valley Bar Association

Alaska Association of Social Workers

Alaska Psychiatric Association

Citizen Commission on Human Rights
(Washington State)

as of 5-26-81