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disapproved under this section." Does that include a regulation or order of appeal that was itself "repealed" automatically under subsec. (a)? Does "readopt" mean verbatim? In other words, if an agency makes a minor change in a regulation that has been disapproved under this section, may it then adopt the modified version as a new regulation under its existing statutory authority? Again, one can see that the internal relationship of this statute's provisions puts each agency in a quandary as to what it may or may not do. This would be very difficult to implement.

Subsection (j) provides a little exemption for certain agency "rules" or "general statements of policy." An exemption is a good idea, but it might be better if this exemption were to conform to the definition of "regulation" in existing AS 44.62.640(a)(3).

Subsection (k) is the definition section, to which I have referred a couple of times above. These definitions should be analyzed closely. I am not in a position to determine whether it is realistic to define a "small business" as one with annual gross sales of $2,000,000 or less. To me, that seems much too high.

Section 7:

Section 7 proposes adding a new statute, AS 44.62.515, that is a counterpart to the new subsections added by sec. 2 of the bill. Whereas that section deals with costs and attorney fees on appeal from an agency's administrative adjudication, this section deals with the costs and attorney fees incurred in connection with that adjudication itself.

Except for the last sentence of subsec. (a), all of subsecs. (d), (f), (g), and (h), and some minor wording variations, this section parallels sec. 2 of this bill. My comments, above, regarding that section also apply to this section. In addition, the one-sided unfairness of this whole arrangement is further emphasized by subsec. (h), which prohibits the court from modifying a determination of fees and costs at the agency level unless that initial determination was unsupported by substantial evidence. The state agency still is not eligible to receive any costs or attorney fees when its position is upheld by the hearing officer

and there is evidence that the opponent had no legitimate basis for his or her side of the case. (I am certainly not suggesting that, in routine cases in which an agency's position prevails and an application for some privilege or whatever is denied, the applicant should be forced to pay the agency's costs. But this bill contains no provision for an agency to be awarded costs in recognition of unusual circumstances.)

Section 8:

Section 8, a temporary law section, requires the Legislative Affairs Agency's legal services division to review all existing regulations and report back to the Administrative Regulation Review Committee. The initial deadline, subject to extension, is January 1, 1993. It is curious that, under sec. 9, the automatic repeal of existing regulations begins in 1989, with the cycle completed in 1992. Is the automatic repeal to operate independently of the Legislative Affairs Agency's review?

This section states the purposes of the review and requires certain factors to be considered in conducting a review. Having a legislative review is a good idea. That's what the Administrative Regulation Review Committee was created to provide. But if the review is only going to result in recommendations for disapprovals then the function will be largely useless and the public and the agencies ill served.

Section 9:

This section sets out a schedule for the automatic repeal of virtually all existing state administrative regulations. It is a wholesale "sunset" provision. It is not a good idea.

Incidentally, the period on line 2 of page 12 should be a colon, and one wonders why the termination date on line 4, page 12, is June 30, whereas the termination date on line 23 and the corresponding dates on the next page are July 1.

While review and analysis of regulations are worthwhile, the automatic termination of regulations is not. As mentioned earlier, administrative regulations merely constitute one of the tools an agency uses in

performing its constitutional and statutory responsibilities. The Alaska Supreme Court, in a growing line of cases, has made clear to agencies just how essential regulations are. They provide the rules of the game, and help avoid arbitrary agency action.

Under the Alaska Administrative Procedure Act, regulations are adopted through a democratic process. As mentioned above, there is saturation public notice and there is the opportunity for public comment. That includes comment by legislators. Many legislators have told me that they do not read the public notices they receive. Oddly, that is said not in the way of a confession, but as an assertion as to something that is wrong with the entire system. I cannot agree that that is a defect in the system. If there is the opportunity for heading off problems or ascertaining legislative intent during the adoption process, that's when it should be done, not at some later, arbitrary termination date.

A "sunset" date can result in unintended termination of a regulation. The effect of that can be the termination of a program. And that just might not be a program that everybody hates. It might be one that everybody loves and agrees is essential to the people or resources of the state.

Moreover, the costs of preparing for a sunset review of an agency's entire set of regulations will be substantial. Although most agencies work regularly with their regulations, because they use them in their day-to-day administration of their functions, a comprehensive review and preparation of material to avoid the termination and to persuade the legislature to extend the date requires a significant commitment of time and money. I will leave to the individual agencies the presentation of specific examples to illustrate just how undesirable such a system would be. If the extension is to be automatic, and the legislature and agencies are going to give the procedure a pro forma approach, then there is no point in having this provision. If the extension is only to be made after a thorough analysis, then the burden will be as I have mentioned.

It must be emphasized that when a program is shut down, it is not only the administrative agency that is affected, but also the members of the public who have

been relying on the affected regulations and program. Curiously, the bill does not provide for public participation when these regulations automatically terminate. Under the Alaska Administrative Procedure Act, as I have indicated, when a regulation is adopted or repealed, public notice and opportunity for making comment are required.

It must be remembered that regulations are not all "bad" or burdensome. Although many of them impose obligations on individuals, there are usually other individuals who benefit from those provisions. Many regulations govern the relationship between competing interests and between different segments of the public. And, of course, many regulations specify the procedures for getting some benefit from the state. The automatic and silent expiration of such regulations cannot be said to be for the public good.

Will regulations that have survived termination under proposed AS 44.62.295 (in sec. 6 of this bill) be immediately subject to termination again under this section?

I should also mention that, while the Department of Law has relatively few regulations of its own, it participates with all other agencies in the adoption of their regulations. This requires another huge commitment of staff time. Additional Department of Law staff would be required. There is no way around it.

Sections 10, 11, 13, and 14:

These sections contain various applicability and effective-date provisions. The effective-date sections (13 and 14) do not deal with secs. 6 and 11 (the latter of which, itself, refers to sec. 6), so the 90-day effective-date provision of art. II, sec. 18, of the Alaska Constitution will apply. Section 6, you will recall, is the one proposing the new statute on the expiration of regulations and the economic analysis of regulations.

Section 12:

Section 12 sets out the statement of changes in a court rule, as required by Rule 39(e), Uniform Rules of the Alaska State Legislature. However, contrary to the

explanation given at page 5 of one of Senator Fahrenkamp's March 8 memos to you, this section of the bill does not give "the reason" for changing the court rule. Although this approach to changing a court rule has been used many times before, it would be better to actually amend the appropriate rule (or rules) itself -- a method that has also been used many times. Legislative change of a court rule is authorized by art. IV, sec. 15, of the Alaska Constitution, with a two-thirds vote of each house of the legislature. Express amendment of the appropriate rule itself would avoid any uncertainty as to the relationship between the rule and the statute that merely has the "effect of changing" the appropriate rule.

CONCLUSION

All in all, this bill raises numerous questions and issues -- from relatively minor, technical ones to fundamental, constitutional ones. It creates substantial burdens on government agencies -- both legislative and executive -- while not providing any readily discernible public benefit. Its cost would be significant.

I would be happy to discuss each provision of the bill with you at greater length, if you wish. Despite the length of this letter, the comments above do not provide a comprehensive review of all of the issues presented by this bill.

Yours truly,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: Arthur H. Peterson
Assistant Attorney General
and Regulations Attorney

AHP:dlm:cb

cc: Hon. Bettye Fahrenkamp
Alaska State Senate

Bob Evans, Legislative Liaison
Office of the Governor

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ARLISS STURGULEWSKI, Chairman
TIM KELLY, Vice Chairman
RICK HALFORD
MIKE SZYMANSKI
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P. O. BOX V
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Senate
Community and Regional Affairs Committee

March 8, 1988

TO: Senate Community and Regional Affairs Committee Members

FROM: Senate C&RA Staff

RE: CS for SB 16[illegible] - "An Act relating to administrative regulations, adjudications,and appeals; amending Alaska [illegible]t Rule of Appellate Procedure 508; and providing for an effective date."

This bill is an extensive rewrite of the way the state handles regulations. It is not expected that this bill will pass out today. Instead, today's meeting is intended to give the committee a first look at the bill and provide comments to the sponsor.

Senator Fahrenkamp will be at the meeting to explain the bill. Art Peterson, from the Department Law, is taking the lead on this bill for the administration. He will also be at the meeting and will comment on the bill.

Enclosed in this packet is a proposed CS drafted by the sponsor and a cover memo. A sectional analysis by the sponsor will be available at the meeting.

Because the CS was delivered today, there are no formal position papers or fiscal notes prepared yet but these will be available at the next hearing on this bill.

Alaska State Legislature

SENATOR BETTYE FAHRENKAMP
CHAIRMAN, LEGISLATIVE COUNCIL
CHAIRMAN, OIL AND GAS COMMITTEE
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Senate

M E M O R A N D U M

To: Senator Arliss Sturgulewski
Chairman, Senate Community & Regional Affairs Committee

From: Senator Bettye Fahrenkamp

Date: March 8, 1988

Subject: Senate Bill 166

"An Act relating to administrative regulations, adjudications, and appeals; amending Alaska Court Rule of Appellate Procedure 508; EFD."

The committee substitute for SB 166 addresses three major areas:

1) Provides for legislative oversight and annulment of regulations, based on a law passed by the Colorado legislature;

2) Incorporates provisions of the Small Business Administration's "Equal Access to Justice" act by requiring that a party who successfully challenges a state regulation or its interpretation will receive costs and attorney's fees;

3) Sets up what the SBA refers to as "regulatory flexibility", by requiring that LAA Legal Services review all regulations for their economic impact on small businesses and make a report to the Administrative Regulation Review Committee.

Regulatory Oversight

Legislative oversight of regulations is accomplished by charging Legal Services with the review of all regulations adopted by the state during the course of a year, examining the regulations to determine whether they are within the adopting agency's regulation-making authority and whether they are authorized by law. At the same time, Legal Services will analyze the probable economic effect of the proposed action on small businesses and small municipalities. Legal Services then reports its findings to the Administrative Regulation Review Committee.

The committee then reviews the findings and reports the committee's recommendations and proposed legislation to the legislature. The bill shall indicate what portion of a regulation or order of repeal is disapproved. A significant change to current practice is that any regulation adopted during the course of the year is repealed on July 1, unless the legislature postpones its repeal by law.

Equal Access to Justice (EAJ)

The Small Business Administration has recommended adoption of an EAJ provision in order to put small businesses on an equal footing with large businesses in the matter of challenging regulations or their interpretation.

On a federal level, they have found that small businesses are unlikely to challenge the government in such matters because of limited financial resources with which to pay attorneys or to tie up management's time. Larger businesses tend to have staff attorneys or others to pursue unfair interpretations of laws or regulations. While a small business may sometimes be awarded its costs and attorney's fees should a challenge be settled by a court, the SBA found that often the federal government would wait until just before the court was due to settle a disagreement and would then correct its course of action in favor of the small business. Because the action was changed before the actual final hearing, small businesses were not being reimbursed for the costs, thus reducing the likelihood that a small business would bring a challenge in the first place.

According to the bill drafter, writing the EAJ clause to protect just small businesses "may present equal protection problems under the Alaska Constitution because it may unconstitutionally discriminate between classes of persons." Therefore, the version of the EAJ in this bill provides that any entity--be it a small business, large business, or an individual--that successfully challenges a regulation will be awarded its costs and attorney's fees, unless there is a substantiated reason not to make such an award.

Regulatory Flexibility

Again based on recommendations by the SBA, incorporated into this bill is a provision that all regulations will be reviewed for their economic impact on small businesses. If Legal Services determines that a regulation or order will have a significant economic impact on small businesses, it will elaborate on the effect and identify whether there are less costly or intrusive means of achieving the purpose of the regulation or order.

In addition, in order to allow small businesses time to respond to proposed regulations, the bill requires that each agency shall publish in the Alaska Administrative Journal a regulatory flexibility agenda which 1) describes the subject area of a regulation that the agency expects to propose that is likely to have a significant economic impact on small entities, and 2) summarizes the nature of the proposed regulation and an approximate schedule for completing action on the regulation.

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

March 7, 1988

The Honorable Arliss Sturgulewski, Chair
Senate Community and Regional Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: Proposed sponsor substitute for SB 166 (administrative regulations)

Dear Senator Sturgulewski:

McKie Campbell, of your staff, very kindly dropped off at my office this morning a copy of a January 18, 1988 memorandum from Legislative Counsel Theresa Bannister to Senator Betty Fahrenkamp covering a copy of a draft bill by Senator Fahrenkamp. McKie mentioned that it is his understanding that the draft bill is to be prepared as a sponsor substitute for Senator Fahrenkamp's SB 166. McKie also mentioned that your Community and Regional Affairs Committee would be taking up this bill tomorrow. That was the first that I had heard of this proposed substitute bill and of your committee's consideration of it.

McKie mentioned that the committee would be interested in comments from my office on the proposed 16-page substitute bill. However, with such short notice, I could not do it justice. I request that you hold the bill over, and I will attempt to give you my comments as soon as possible.

Yours truly,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: Art Peterson
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Assistant Attorney General

AHP:cb

cc: Hon. Betty Fahrenkamp
Alaska State Senate

Bob Evans, Legislative Liaison
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03-C32LH

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Community and Regional Affairs Committee

March 8, 1988

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MEMORANDUM

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In addition, in order to allow small businesses time to respond to proposed regulations, the bill requires that each agency shall publish in the Alaska Administrative Journal a regulatory flexibility agenda which 1) describes the subject area of a regulation that the agency expects to propose that is likely to have a significant economic impact on small entities, and 2) summarizes the nature of the proposed regulation and an approximate schedule for completing action on the regulation.

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Office of the Governor

IN THE SENATE

CS FOR SENATE BILL NO. 166 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to administrative regulations, adjudications, and appeals; amending Alaska Court Rule of Appellate Procedure 508; and providing for an effective date."

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

* Section 1. AS 09.60.010 is amended to read:

Sec. 09.60.010. COSTS AND ATTORNEY FEES ALLOWED PREVAILING PARTY. Except as otherwise provided by this section, the [THE] supreme court shall determine by rule or order the costs, if any, that may be allowed a prevailing party in a civil action. Unless specifically authorized by statute or by agreement between the parties, attorney fees may not be awarded to a party in a civil action for personal injury, death or property damage related to or arising out of fault, as defined in AS 09.17.900, unless the civil action is contested without trial, or fully contested as determined by the court.

* Sec. 2. AS 09.60.010 is amended by adding new subsections to read:

(b) A court that reviews an administrative adjudication shall award to the prevailing party other than the state agency the fees and other expenses incurred by the party in connection with the judicial review unless the court finds that the position of the state agency was substantially justified or that special circumstances make the award unjust. The amount of fees awarded under this subsection shall be based on the prevailing market rates for the kind and quality of the services furnished, except that

(1) an expert witness may not be compensated at a rate that exceeds the highest rate of compensation that is paid by the state agency for expert witnesses; and

(2) attorney or agent fees in excess of $75 an hour may not be awarded unless the state agency determines by regulation that an increase in the cost of living or a special factor, including the limited availability of qualified attorneys or agents for the adjudication involved, justifies a higher fee.

(c) A party seeking an award of fees and other expenses under (b) of this section shall submit an application for the fees and other expenses to the court within 30 days after the final judgment in the judicial review. The application must

(1) show that the party is a prevailing party and is eligible to receive an award under this section;

(2) state the amount sought, including an itemized statement from each attorney, agent, and expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which the fees and other expenses were computed; and

(3) allege that the position of the agency was not substantially justified.

(d) The court may reduce or deny an award authorized under (b) of this section to the extent that during the course of the judicial review the party applying for the award engaged in conduct that unduly and unreasonably protracted the final resolution of the review.

(e) The supreme court shall determine by rule or order the procedures for the submission and consideration of applications for an award of fees and other expenses under (b) of this section.

(f) In (b) - (f) of this section

(1) "administrative adjudication" means an adjudication

under AS 44.62.330 - 44.62.630;

(2) "agency" means the agency whose action or failure to act is the subject of the judicial review that is covered by (b) of this section;

(3) "fees and other expenses" includes the reasonable

(A) expenses of expert witnesses;

(B) cost of a study, analysis, engineering report, test, or project that is found by the agency to be necessary for the preparation of the party's case; and

(C) attorney or agent fees;

(4) "final judgment" means a judgment that is final and not appealable, including an order of settlement;

(5) "position of the agency" means, in addition to the position taken by the agency in the judicial review, the action or failure of the agency to act that is the basis for the administrative adjudication.

* Sec. 3. AS 24.20.460 is amended to read:

Sec. 24.20.460. POWERS. The Administrative Regulation Review Committee has the following powers:

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

(2) to hold public hearings;

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

(4) to examine all administrative regulations to determine if they properly implement legislative intent;

(5) to make recommendations for legislative annulment of administrative regulations under AS 44.62.320;

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

(7) to promote needed revision or repeal of regulations that have been adopted by state departments and agencies and, when the committee determines a regulation should be repealed or amended, to introduce a bill that would enact a statute that would supersede or nullify the regulation;

(8) to investigate findings that are transmitted to the committee by a standing committee in accordance with AS 24.05.182 and, as appropriate, to either introduce a bill annulling the regulation or exercise the committee's power to suspend the effectiveness of the regulation in accordance with AS 24.20.445;

(9) to petition the court for permission to appear as amicus curiae in an action brought under AS 44.62.300 to address the effect of the regulation on small entities.

* Sec. 4. AS 44.62.030 is amended to read:

Sec. 44.62.030. CONSISTENCY BETWEEN REGULATION AND STATUTE. If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a [NO] regulation adopted is void [VALID OR EFFECTIVE] unless consistent with the statute and reasonably necessary to carry out the purpose of the statute. A regulation may not be considered to be within the statutory authority and jurisdiction of an agency solely because the regulation is not contrary to the specific provisions of a statute.

* Sec. 5. AS 44.62 is amended by adding a new section to article 3 to read:

Sec. 44.62.177. REGULATORY AGENDA. (a) During the months of January and July of each year, each agency shall publish in the Alaska

Administrative Journal a regulatory flexibility agenda that

(1) describes briefly the subject area of a regulation that the agency expects to propose or adopt that is likely to have a significant economic effect on a substantial number of small entities;

(2) summarizes the nature of a proposed regulation under each subject area listed under (1) of this subsection, the objectives and legal basis for the proposed regulation, and an approximate schedule for completing action on each regulation for which the agency has issued a notice of proposed regulation-making; and

(3) contains the name and telephone number of an agency official knowledgeable about the items listed in (1) of this subsection.

(b) An agency may consider or act on a matter not included in a regulatory flexibility agenda. An agency may decline to consider or act on a matter listed in the agenda. The agency shall state why it is declining to act on the matter. An agency may not refuse to consider or adopt a regulation solely because the proposed regulation was not included in the agency's regulatory agenda.

(c) In this section, "small entity" has the meaning given in AS 44.62.295.

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

ARTICLE 5. LEGISLATIVE REVIEW.

Sec. 44.62.295. EXPIRATION OF REGULATIONS. (a) A regulation or order of repeal adopted between October 1 and September 30 is repealed on July 1 of the following year unless the legislature postpones its repeal by law.

(b) Within 20 days after submitting a regulation or order of repeal to the lieutenant governor under AS 44.62.040, the adopting agency shall submit the regulation or order to the legislative legal

services division in the form and manner prescribed by the Administrative Regulation Review Committee. A regulation or order that is not submitted to the division within the 20 days is void. The staff of the division shall review the regulation or order to determine whether it is within the adopting agency's regulation-making authority and whether it is authorized by law. The staff of the division shall also analyze the probable economic effect of the proposed action on small businesses and small municipalities. The staff shall report to the committee.

(c) The economic analysis required by (a) of this section must

(1) consider the types and numbers of small entities that will probably be affected by the regulation or order, including the types that will bear the costs of the regulation or order and those that will benefit from it;

(2) consider the probable economic effect of the regulation or order, both as to kind and amount, upon the affected entities;

(3) review the reasons for the regulation or order in light of the probable economic effect on small entities;

(4) identify whether there are less costly or less intrusive means of achieving the purpose of the regulation or order;

(5) identify, to the extent practicable, relevant regulations that may duplicate, overlap, or conflict with the regulation or order.

(d) If the legislative legal services division determines that a regulation or order will not have a significant economic effect on a substantial number of small entities, the division shall include in its report under (b) of this section a succinct statement explaining the reasons for the determination.

(e) An agency may consider a series of closely related

regulations or orders as one regulation or order for the purposes of the economic analysis required by (b) of this section.

(f) The Administrative Regulation Review Committee shall review the regulations, orders, and staff memorandum and shall report the committee's recommendations and proposed legislation to the legislature by the 10th day of the next legislative session. If the committee proposes legislation, that legislation shall be introduced in each house of the legislature. A bill shall indicate what portion of a regulation or order of repeal is disapproved.

(g) If a portion of a regulation or order is disapproved, the remaining portion retains its character as an administrative regulation or order of repeal. Rejection of a bill of disapproval or postponement of the repeal of a regulation or order of repeal does not constitute legislative approval of a regulation or order of repeal. Passage of a bill repealing a regulation or disapproving an order of repeal does not revive a predecessor regulation unless the bill specifically provides otherwise.

(h) Each agency shall revise its regulations to conform with the action taken by the legislature for publication in the Alaska Administrative Register.

(i) An agency may not readopt a regulation or order of repeal that was disapproved under this section unless the agency has been granted authority to adopt the regulation or order by subsequent statute, the state constitution, or by a judicial determination that the statutory authority exists. A regulation or order of repeal adopted contrary to this subsection is void.

(j) This section does not apply to rules of agency organization or general statements of policy that are not intended to be binding as regulations.

(k) In this section

(1) "small business" means a business corporation or a nonprofit corporation, a partnership, or a sole proprietorship, that is licensed in the state and transacts business in the state and

(A) employs 20 or fewer employees in the state excluding seasonal employees; or

(B) has annual gross sales, or value of services provided, of $2,000,000 or less;

(2) "small entity" means a small business or small municipality;

(3) "small municipality" means a municipality with a population of 10,000 or fewer persons.

* Sec. 7. AS 44.62 is amended by adding a new section to read:

Sec. 44.62.515. FEES AND COSTS. (a) An agency that conducts an administrative adjudication under AS 44.62.330 - 44.62.630 shall award to the prevailing party other than the agency the fees and other expenses incurred by the party in connection with the adjudication, unless the hearing officer finds that the position of the agency was substantially justified or that special circumstances make the award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record as a whole that is made in the administrative adjudication for which the fees and other expenses are sought.

(b) The amount of fees awarded under this section shall be based on the prevailing market rates for the kind and quality of the services furnished, except that

(1) an expert witness may not be compensated at a rate in excess of the highest rate of compensation that is paid by the agency involved; and

(2) attorney or agent fees in excess of $75 an hour may not be awarded unless the agency determines by regulation that an increase in the cost of living or a special factor, including the limited availability of qualified attorneys or agents for the adjudication involved, justifies a higher fee;

(c) A party seeking an award of fees and other expenses shall, within 30 days of receipt of the final decision in the administrative adjudication, submit to the agency an application that

(1) shows that the party is the prevailing party and is eligible to receive an award under this section;

(2) states the amount sought, including an itemized statement from each attorney, agent, and expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which the fees and other expenses were computed; and

(3) alleges that the position of the agency was not substantially justified.

(d) When the agency appeals under AS 44.62.560 the underlying merits of an administrative adjudication, the decision on an application for fees and other expenses in connection with the administrative adjudication may not be made under this section until a final judgment is rendered by the court on the appeal.

(e) The hearing officer may reduce or deny an award authorized under (a) of this section to the extent that during the course of the administrative adjudication, the party applying for the award engaged in conduct that unduly and unreasonably protracted the final resolution of the adjudication.

(f) The decision of the hearing officer under this section shall be made a part of the record containing the final decision of the agency and must include written findings and conclusions indicating

the basis for the award.

(g) Each agency shall establish by regulation adopted under this chapter uniform procedures for the submission and consideration of applications for an award of fees and other expenses under this section.

(h) If the determination of fees and other expenses made under (a) of this section is appealed, the court may not modify the determination of fees and other expenses unless the court finds that the failure to make an award of fees and other expenses or the calculation of the amount of the award was unsupported by substantial evidence.

(i) In this section

(1) "administrative adjudication" means an adjudication under AS 44.62.330 - 44.62.630;

(2) "fees and other expenses" includes the reasonable

(A) expenses of expert witnesses;

(B) cost of a study, analysis, engineering report, test, or project that is found by the agency to be necessary for the preparation of the party's case; and

(C) attorney or agent fees;

(3) "final judgment" means a judgment that is final and not appealable, including an order of settlement;

(4) "position of the agency" means, in addition to the position taken by the agency in the administrative adjudication, the action or failure of the agency to act that is the basis for the administrative adjudication.

* Sec. 8. REVIEW OF EXISTING REGULATIONS (a) Before January 1, 1993, the legislative legal services division shall review the regulations adopted by each agency and in effect as of July 1, 1988, and shall report the results of the review to the Administrative Regulation Review Committee.

If the division determines that completion of the review of existing regulations is not feasible by January 1, 1993, the division shall certify that fact in writing and may extend the completion date by one year.

(b) The purposes of the review required under (a) of this section are to determine whether the regulations

(1) are within the agency's regulation-making authority;

(2) are authorized by law;

(3) have or will have a significant economic effect upon a substantial number of small entities, and if so, whether the regulations should be continued without change or should be amended or repealed to minimize the significant effect.

(c) In reviewing regulations under (b)(3) of this section, the agency shall consider the

(1) continued need for the regulation;

(2) nature of complaints or comments received concerning the regulation from the public;

(3) complexity of the regulation;

(4) extent to which the regulation overlaps, duplicates, or conflicts with other state regulations, and, to the extent feasible, with federal and local governmental regulations; and

(5) length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

(d) In this section

(1) "agency" has the meaning given "state agency" in AS 44.62.-640(a);

(2) "small entity" has the meaning given in AS 44.62.295, as enacted by sec. 6 of this Act.

* Sec. 9. REPEAL OF REGULATIONS. (a) Unless extended by law, all of

the regulations of the following boards, commissions, and departments are repealed on the dates specified in this section.

(1) The regulations of the following boards, commissions, and departments are repealed on June 30, 1989:

(A) Board of Pharmacy (AS 08.80.010);

(B) Board of Veterinary Examiners (AS 08.98.010);

(C) State Physical Therapy and Occupational Therapy Board (AS 08.84.010);

(D) Board of Barbers and Hairdressers (AS 08.13.010);

(E) Board of Governors of the Alaska Bar Association (AS 08.08.040);

(F) Board of Parole (AS 33.16.020);

(G) Alaska Public Utilities Commission (AS 42.05.010);

(H) Alaska Code Revision Commission (AS 24.20.075);

(I) Older Alaskans Commission (AS 44.21.200);

(J) Council on Domestic Violence and Sexual Assault (AS 18.66.010);

(K) Special Education Service Agency (AS 14.30.600);

(L) Department of Education;

(M) Department of Community and Regional Affairs; and

(N) Department of Military Affairs.

(2) The regulations of the following boards, commissions, and departments are repealed on July 1, 1990:

(A) Board of Nursing Home Administrators (AS 08.70.010);

(B) Alcoholic Beverage Control Board (AS 04.06.010);

(C) Alaska State Fire Commission;

(D) Department of Health and Social Services;

(E) Department of Commerce and Economic Development;

(F) Department of Revenue;

(G) Department of Labor; and

(H) Office of the Governor.

(3) The regulations of the following boards, commissions, and departments are repealed on July 1, 1991:

(A) Board of Nursing (AS 08.68.010);

(B) Board of Psychologist and Psychological Associate Examiners (AS 08.86.010);

(C) State Medical Board (AS 08.64.010);

(D) Board of Marine Pilots (AS 08.62.010);

(E) Real Estate Commission (AS 08.88.011);

(F) Department of Natural Resources;

(G) Department of Fish and Game;

(H) Department of Environmental Conservation;

(I) Department of Transportation and Public Facilities; and

(J) Office of the Lieutenant Governor.

(4) The regulations of the following boards, commissions, and agencies are repealed on July 1, 1992:

(A) Board of Chiropractic Examiners (AS 08.20.010);

(B) Board of Examiners in Optometry (AS 08.72.010);

(C) Board of Dispensing Opticians (AS 08.71.010);

(D) Board of Dental Examiners (AS 08.36.010);

(E) State Board of Registration of Architects, Engineers, and Land Surveyors (AS 08.48.011);

(F) Board of Public Accountancy (AS 08.04.010);

(G) Guide Board (AS 08.54.010);

(H) Department of Administration;

(I) Department of Public Safety;

(J) Department of Corrections;

(K) Department of Law; and

(L) Office of the Ombudsman.

(b) The postponement of the repeal of a regulation under this section does not constitute legislative approval of the regulation and is not admissible in court as evidence of legislative intent.

* Sec. 10. Sections 1, 2, and 7 of this Act apply to administrative adjudications and judicial reviews that are pending or that begin on or after the effective date of secs. 1, 2, and 7 of this Act.

* Sec. 11. AS 44.62.295, enacted by sec. 6 of this Act, applies to regulations adopted after September 30, 1988.

* Sec. 12. AS 09.60.010, as amended by secs. 1 and 2 of this Act, amends Alaska Court Rule of Appellate Procedure 508 by changing the requirements for the award of costs and attorney fees to prevailing parties in appeals from administrative adjudications under AS 44.62.

* Sec. 13. Sections 1, 2, 4, 7, 9, 10, and 12 of this Act take effect immediately under AS 01.10.070(c).

* Sec. 14. Sections 3, 5, and 8 of this Act take effect July 1, 1988.

Alaska State Legislature

SENATOR BETTYE FAHRENKAMP
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Senate

M E M O R A N D U M

TO: Senator Arliss Sturgulewski, Chairman
Senate Community & Regional Affairs Committee

FROM: Senator Bettye Fahrenkamp

DATE: March 8, 1988

RE: Sectional analysis of proposed CS for SB166

Section 1. AS 09.60.010 COSTS AND ATTORNEY FEES ALLOWED PREVAILING PARTY

Amended to except sec. 2 of the bill from the present statutory provision on the award of court costs and attorney fees.

Section 2. AS 09.60.010

Sec. 09.60.010(b) directs a court reviewing an agency's administrative adjudication to award a non-state prevailing party the fees and other expenses incurred for the judicial review unless the agency's position was substantially justified or special circumstances would make the award unjust. With two exceptions, the amount of fees is based on prevailing market rates.

Sec. 09.60.010(c) establishes the procedure for a party to apply for an award of fees and other expenses under this section.

Sec. 09.60.010(d) allows a court to reduce or deny an award under this section to the extent the prevailing party unduly and unreasonably protracted the adjudication.

Sec. 09.60.010(e) directs the supreme court to establish the procedures for the award of fees and other expenses under this section.

Sec. 09.60.010(f) is the definition section.

Section 3. AS 24.20.460 POWERS

Gives the Administrative Regulation Review Committee the additional power, in an action reviewing a regulation under AS 44.62.300, to petition the court to be allowed to address the effect of the regulation on small entities.

Section 4. AS 44.62.030 CONSISTENCY BETWEEN REGULATION AND STATUTE

Declares that a regulation is not within the statutory authority and jurisdiction of an agency just because it isn't contrary to the specific provisions of a statute.

Section 5. AS 44.62 ADMINISTRATIVE PROCEDURE ACT

New Section 44.62.177 Regulatory Agenda is added. Subsection (a) requires an agency each year to publish in the Alaska Administrative Journal during the months of January and July a regulatory flexibility agenda that meets certain listed criteria.

Sec. 44.62.177(b) allows an agency to consider or act on a matter not included in a regulatory flexibility agenda, and to decline to consider or act on a matter listed in the agenda, but the agency must indicate why it declines to act on the matter. Prohibits an agency from refusing to consider or adopt a regulation just because it wasn't included in the regulatory agenda.

Sec. 44.62.177(c) defines "small entity" for the section.

Section 6. AS 44.62 ADMINISTRATIVE PROCEDURE ACT. New section--Article 5, LEGISLATIVE REVIEW--is added.

Sec. 44.62.295 EXPIRATION OF REGULATIONS. New subsection (a) establishes the repeal date for a regulation or order of repeal unless the legislature postpones the repeal by law.

Sec. 44.62.295(b) directs an adopting agency to submit the regulation or order of repeal to the legislative legal services

division within a given time and in a form and manner prescribed by the Administrative Regulation Review Committee. If not timely submitted the regulation or order is void. Directs the division to review and report on the regulation or order to determine whether it is within the adopting agency's authority and whether authorized by law. The staff shall also analyze the probable economic effect of the proposed action on small businesses and small municipalities.

Sec. 44.62.295(c) Provides criteria for the analysis.

Sec. 44.62.295(d) establishes the procedure to be followed if the legal services division determines a regulation will not have a significant economic effect on a substantial number of small entities.

Sec. 44.62.295(e) allows the division to treat a series of closely related regulations as one regulation for the purposes of this section.

Sec. 44.62.295(f) directs the Administrative Regulation Review Committee to review and report by a certain date to the Legislature on the regulations, orders, and staff memorandum. Directs the Committee to introduce its proposed legislation, if any, in each house of the legislature and directs that a bill is to indicate what portion of regulation or order of repeal is disapproved.

Sec. 44.62.295(g) indicates the effect on a regulation or order of repeal (1) of disapproval of a portion, and (2) of a rejection of a bill of disapproval or postponement of the repeal Indicates that the passage of a bill repealing a regulation or disapprovi an order of repeal does not revive a predecessor regulatic unless the bill specifies otherwise.

Sec. 44.62.295(h) directs an agency to revise its regulations to conform with the action taken by the legislature for publication in the Alaska Administrative Register.

Sec. 44.62.295(i) prohibits an agency from readopting a regulation or order of repeal disapproved under this section unless authorized by subsequent statute or the state constitution, or unless a court determines that the authority exists. Indicates that a regulation or order of repeal adopted contrary to this subsection is void.

Sec. 44.62.295(j) says that this section does not apply to rules of agency organization or general statements of policy that are not intended to be binding as regulations.

Sec. 44.62.295(k) provides the definitions for this section.

Section 7. AS 44.62 ADMINISTRATIVE PROCEDURE ACT

Sec. 44.62.515 Fees and Costs. New subsection (a) directs an agency conducting an administrative adjudication under AS 44.62.330 - 44.62.630 to award a prevailing party other than the agency the fees and other expenses incurred for the adjudication unless the agency's position was substantially justified or special circumstances would make the award unjust. Requires the determination of substantial justification to be based on the administrative record as a whole.

Sec. 44.62.515(b) establishes, with two exceptions, that the amount of the fees awarded is based on prevailing market rates.

Sec. 44.62.515(c) establishes the application procedure for a party to apply for an award of fees and other expenses under this section.

Sec. 44.62.515(d) prohibits, until a final court decision is received on the appeal, a decision on an award under this section during an agency appeal of the merits of an administrative adjudication.

Sec. 44.62.515(e) allows the court to reduce or deny an award authorized under this section to the extent the prevailing party unduly and unreasonably protracted the adjudication.

Sec. 44.62.515(f) directs the hearing officer's decision under this section to be made a part of the record containing the agency's final decision, and to include written findings and conclusions indicating the basis of the award.

Sec. 44.62.515(g) directs each agency to establish uniform procedures for the submission and consideration of applications for awards under this section.

Sec. 44.62.515(h) prohibits the court from modifying the determination of fees and expenses unless the failure to make an award or the calculation of the amount of the award was unsupported by substantial evidence.

Sec. 44.62.515(i) provides the definitions for the Section.

Section 8. REVIEW OF EXISTING REGULATIONS

Sec. 8(a) directs the legal services division to review before January 1, 1993, the regulations adopted by each agency and in effect as of July 1, 1988, and report the results of the review to the Administrative Regulation Review Committee. The review completion date may be extended by one year under certain conditions and by following certain procedures.

Section 8(b) sets out the purpose of the review, to determine whether the regulations are within the agency's rule-making authority, are authorized by law, and whether they have or will have a significant economic effect upon a substantial number of small entities.

Sec. 8(c) lists the items to be considered by legal services in making the regulation review required by this section.

Sec. 8(d) provides definitions for "agency" and "small entity" for the section.

Sec. 9 REPEAL OF REGULATIONS.

Sec. 9(a) directs that, unless extended by law, the regulations of each listed agency arerepealed on the date listed for the agency in the section.

Sec. 9(b) states that postponement of the repeal of a regulation under this section does not constitute legislative approval of the regulation, and is not admissible in court as evidence of legislative intent.

Section 10 establishes to which administrative adjudications and judicial reviews sections 1,2, and 7 apply.

Section 11 establishes to which regulations sec. 6 does not apply.

Section 12 indicates that the amendments to AS 09.60.010 in secs. 1 and 2 of this bill amend Alaska Court Rule of Appellate Procedure 508 and gives the reason.

Section 13 provides an immediate effective date for secs. 1, 2, 4, 7, 9, 10, and 12.

Section 14 provides that secs. 3, 5, and 8 take effect July 1, 1988.

SB

167

February 4, 1987

ISSUE ANALYSIS

STATE MATCHING FOR REVOLVING LOAN FUND

ISSUE: Should the Department of Environmental Conservation pursue an appropriation in the FY88 budget to match a federal capitalization grant?

INTRODUCTION

With reauthorization of the Clean Water Act, federal money will be available to Alaska for a State Revolving Loan Fund. One requirement for receiving the federal money is that it be matched with 20% State funds. The fund capitalization would be as presented in Table 1 and Figure 2 (attached).

Because the federal fiscal year (FFY) runs from October 1 through September 30, it spans two state fiscal years (SFY). FFY88 will be the first year that Alaska will request a capitalization grant; therefore, a decision needs to be made on whether to seek funding for the State match in the SFY88 budget.

SFY88 APPROPRIATION?

YES

- Easier to explain: As a bill passes through legislative committees it will be very easy to explain a fiscal note that shows capitalizing the funds in the same year the federal money is available. If there is no need for any money in SFY88, one might ask "...why should this bill pass this session."

- Interest: By capitalizing the loan fund in SFY88, the fund will accumulate interest for one year (approximately $650,000). This has the advantage of providing for administrative expenses from money already made. The administrative costs would be forward funded.

- Less Risk: If the bill and appropriation do not pass this session, there will be another opportunity to capture the $10.89 million in federal funds. However, if no attempt is made this session, there will only be one opportunity, and the $10.89 million could be lost.

- Less Needed in SFY89: If a match is requested in SFY88, $2.18 would be needed. However, if the match was delayed until SFY89, the match for two years would be needed, or $4.33.

NO

- State Financial Crisis: Because the State is having to deal with declining revenues and a deficit, there will be less funds to go around.

RECOMMENDATION

It is recommended the Department pursue funding in the FY88 budget to match the federal capitalization grant.

THE CONSTRUCTION GRANTS PROGRAM

THE CLEAN WATER ACT, PASSED IN 1977, PROVIDED FOR FEDERAL GRANTS TO COMMUNITIES FOR THE CONSTRUCTION OF WASTEWATER TREATMENT FACILITIES. TO DATE, TWENTY-FOUR ALASKAN MUNICIPALITIES AND CITIES HAVE RECEIVED A TOTAL OF $160,223,258 IN FEDERAL GRANTS FOR WASTEWATER FACILITY CONSTRUCTION. IN 1979 THE CONSTRUCTION GRANTS SECTION OF THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION ASSUMED DELEGATION OF ADMINISTRATIVE AND TECHNICAL FUNCTIONS ASSOCIATED WITH THE GRANTS PROGRAM.

REAUTHORIZATION OF THE CLEAN WATER ACT

THE CLEAN WATER ACT PROVIDED FOR FEDERAL CONSTRUCTION GRANTS FROM 1977 TO 1985. THIS YEAR CONGRESS INTRODUCED A REAUTHORIZATION OF THE ACT WHICH NOT ONLY AMENDS DATES AND FUNDING LEVELS BUT ALSO PROVIDES FOR A PHASE OUT OF THE CONSTRUCTION GRANTS PROGRAM AND A PHASE IN OF A REVOLVING LOAN PROGRAM.

FUNDING: FEDERAL GRANTS AND 20 PERCENT STATE MATCHING FUNDS WILL PROVIDE THE INITIAL REVENUE FOR THE FUND.

FEDERAL FISCAL YEAR	FEDERAL GRANT	REQUIRED STATE MATCH	TOTAL
1988	$10,895,400	$2,179,080	$13,074,480
1989	$10,763,600	$2,152,720	$13,516,320
1990	$11,263,600	$2,252,720	$13,516,320
1991	$14,527,200	$2,905,440	$17,432,640
1992	$10,895,400	$2,179,080	$13,074,480
1993	$ 7,263,600	$1,452,720	$ 8,716,320
1994	$ 3,631,800	$ 726,360	$ 4,358,160
TOTALS	$69,240,600	$13,848,120	$83,088,720

AFTER THE FIRST SEVEN YEARS OF THE FUNDS OPERATION, INPUT OF FEDERAL GRANTS WILL CEASE. THE FUND WILL, HOWEVER, CONTINUE TO REJUVENATE ITSELF. AS COMMUNITIES MAKE PAYMENTS ON BOTH THE PRINCIPAL AND INTEREST OF THEIR LOANS, NEW LOANS WILL BE MADE. IF AN INTEREST RATE OF 5% IS CHARGED, A LOANING CAPACITY OF $10.75 MILLION PER YEAR CAN BE OBTAINED BEGINNING THE THIRD YEAR THE FUND IS IN OPERATION. THIS IS WITHOUT ADDITIONAL LEGISLATIVE APPROPRIATION AFTER 1994. IN ADDITION, BY INVESTING FUNDS WHICH ARE NOT CURRENTLY BEING LOANED IN SHORT TERM ENDEAVORS (e.g. U.S. TREASURY BILLS) THE SIZE OF THE FUND WILL SLOWLY INCREASE AND ENHANCE LOANING CAPACITY.

TYPES OF ASSISTANCE: OPTIONS INCLUDE LOW INTEREST LOANS, BOND INSURANCE, INTEREST SUBSIDIES OR BOND GUARANTEES. ALL LOANS WILL BE MADE AT AN INTEREST RATE BELOW THE MARKET RATE AND MAY BE ISSUED FOR UP TO 100% OF ALL ELIGIBLE COSTS ASSOCIATED WITH PROJECT CONSTRUCTION.

IMMEDIATE LEGISLATIVE ACTION NEEDED: IT WILL TAKE SEVERAL MONTHS TO DRAFT REQUIRED REGULATIONS, DEVELOP DETAILED PLANS FOR IMPLEMENTING THE PROGRAM AND OBTAIN EPA APPROVAL FOR IMPLEMENTATION. STATE LEGISLATION AUTHORIZING THE ALASKA CLEAN WATER FUND MUST BE ENACTED THIS LEGISLATIVE SESSION OR THE STATE COULD LOSE UP TO $10.895 MILLION IN FEDERAL FUNDS FOR FFY 88.

THE ALASKA CLEAN WATER FUND

BY ESTABLISHING THE ALASKA CLEAN WATER FUND AND PROVIDING 20% MATCHING GRANTS TO THE FUND, THE STATE WILL CAPTURE APPROXIMATELY $69,240,600 IN ANNUAL FEDERAL CAPITALIZATION GRANTS. ALASKA'S SHARE OF THE FEDERAL ALLOTMENT IS AS FOLLOWS:

FED.FISCAL YR	FEDERAL	REQ. STATE MATCH	TOTAL
1988	$10,895,400	$ 2,179,080	$13,074,480
1989	10,763,600	2,152,720	12,916,320
1990	11,263,600	2,252,720	13,516,320
1991	14,527,200	2,905,440	17 432,640
1992	10,895,400	2,179,080	13 074,480
1993	7,262,600	1,452,720	8,716,320
1994	3,631,800	726,360	4,358,160
TOTALS:	$69,240,600	$13,848,120	$83,088,720

IT WILL TAKE SEVERAL MONTHS TO DRAFT REQUIRED REGULATIONS, DEVELOP DETAILED PLANS FOR IMPLEMENTING THE PROGRAM AND OBTAIN FEDERAL APPROVAL. IF ALASKA IS TO RECEIVE FFY 88 FUNDS FEDERAL APPROVAL OF THE PROGRAM MUST BE SOUGHT PRIOR TO OCTOBER 1, 1987. HB.. MUST PASS THIS LEGISLATIVE SESSION AS A SINLGE SESSION DELAY COULD COST THE STATE $10,895,400 IN FEDERAL FUNDS.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
STATE REVOLVING WASTEWATER TREATMENT FACILITIES LOAN FUND

BACKGROUND OF FEDERAL GRANTS PROGRAM

-The Federal Government is phasing out its construction grant program for wastewater treatment projects
-Since 1972 $160,223,000 for Alaskan communities
-1982 The Department received full delegation of federal program
-Program will be phased out by 1990

CLEAN WATER REVOLVING LOAN FUND

-From 1987 to 1994, $76,500,000 seed money from the Federal Government available to establish a revolving loan fund for wastewater treatment projects
-Requires 20% state match, for total of $15,300,840

-After 1994 no more federal money will be put into the fund. It should be self sustaining
-Loans will be made at rate less than or equal to the current market rate

PROGRAM ADMINISTRATION

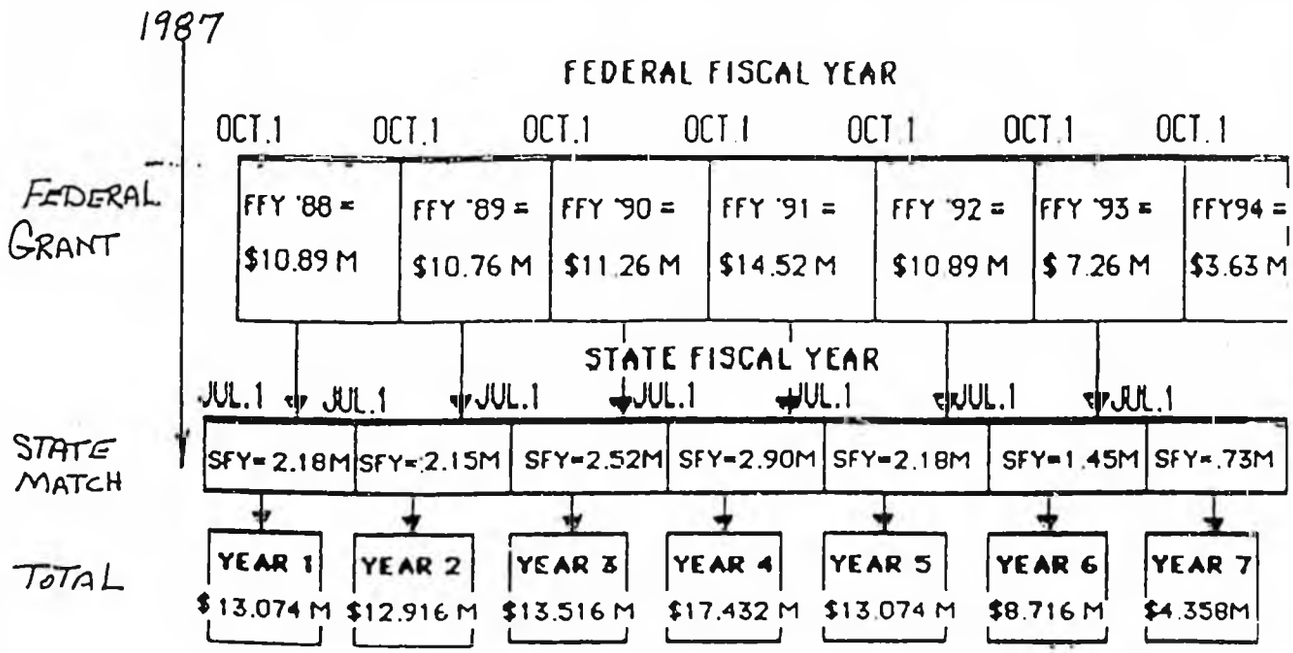
-The existing staff of The Facility Construction and Operation Division will be used for the loan program
-Administrative costs will come from loan fund
-Operation of the loan program will follow current federal construction grants procedures
-Projects selected by same process used in current federal program

TYPES OF ASSISTANCE

-Low interest rate loans
-Bond insurance
-Interest subsidies
-Bond Guarantees
-Refinancing of certain projects

CAPITALIZATION OF THE STATE REVOLVING LOAN FUND

FED F.Y.	FED SEED GRANT	STATE MATCH	TOTAL
88	$10,895,400	$2,179,080	$13,074,480
89	$10,763,600	$2,152,720	$12,916,320
90	$11,263,600	$2,252,720	$13,516,320
91	$14,527,200	$2,905,440	$17,432,640
92	$10,895,400	$2,179,080	$13,074,480
93	$7,263,600	$1,452,720	$8,716,320
94	$3,631,800	$726,360	$4,358,160
TOTALS:	$69,240,600	$13,848,120	$83,088,720



SUMMARY

1. Funds Authorized for Construction Grants and State Revolving Loan Programs

o GRANTS	$2.4 billion annually for FY 86-88	Section 211/207
	$1.2 billion annually for FY 89-90	
o LOANS	$1.2 billion annually for FY 89-90	Section 212/607
	$2.4 billion for FY 91	
	$1.8 billion for FY 92	
	$1.2 billion for FY 93	
	$ .6 billion for FY 94	

GRANTS TOTAL: $9.6 billion LOANS TOTAL: $8.4 billion (See next item)

o In FY 87, 50% of a State's grants allotment may be transferred to its revolving loan funds, 75% in FY 1988, and 100% in FY 89-90. (Sec. 212/606)

2. State Revolving Loan Programs

Federal capitalization of State revolving loan programs is authorized, with the State to provide at least 20% matching. The funds "resulting from" the capitalization grant (i.e., grant, 205m State discretionary deposit, match, and repayments) must first be used for the enforceable requirements of the Act, including the municipal compliance deadline. Of those funds, projects that receive assistance from an amount equal to the grant or 205m payment must meet enumerated Title II requirements, including limitations on eligible categories (i.e., Categories I,II,III(a), and IV(b) with 20% of the funds discretionary for other previously eligible categories and nonpoint source programs (319). Once the enforceable requirements are met, funds in excess of the Federal grants may be used for any project defined in Section 212 (Definitions), Section 319 (Nonpoint Sources) and Section 320 (National Estuary Programs). Types of assistance include loans, refinancing local debt obligations incurred after 3/7/85, guarantees or insurance for local obligations, and as a source of revenue or security for payment of principal and interest on State bonds where proceeds go to revolving funds (leveraging). Payments to States to be made quarterly within stated periods of time. Yearly audits are necessary. Annual oversight of State programs by EPA is required. (Sec 212 contains new Title VI for State revolving loan funds).

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : _____
Publish Date : _____

REQUEST: _____

Revision Date: _____
Agency Affected : Environmental Conservation
Title : Grants for water supply & sewage facilities; establishing revolving loan fund
BRU : Facility Construction & Operation
Sponsor : Governor Cowper
Components : _____
Requestor : _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING						
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	2179.0	2152.7	2252.7	2905.4	2179.0
FEDERAL FUNDS	-0-	10895.4	10763.6	11263.6	14527.2	10895.4
OTHER						
TOTAL	-0-	13074.4	12916.3	13516.3	17432.6	13074.4

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary) Passage of the revolving loan fund bill will give the state the ability to accept a total of $69,240,000 in federal dollars to capitalize the fund. Federal funds require a 20% state match. Passage of the bill does not obligate the state to accept the federal dollars or to appropriate the match. *Please see attachment.

Prepared by: Lori Telfer
Phone : 465-2610
Division : Facility Construction & Operation
Date : 3/4/87

Approved by Commissioner : _____
Date : 3/5/87
Agency : Environmental Conservation

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

Attachment 1

FISCAL NOTE ASSUMPTIONS AND ANALYSIS

1 All operating and administrative expenses will be paid by a percentage set aside from annual federal grants to the program. Operating projections have, therefore, been left blank. Additional staff will not be needed. Staff that now administer the federal grant program will administer the federal loan program.

2 Loan repayments to the fund and interest earned by the fund have not been included in this analysis.

3 Federal capitalization grants to the loan fund will be available annually for seven years (FFY 88 - FFY 94). An extension of the fiscal analysis on the front page is given below.

	FY 93	FY 94
General Fund	1,452,720	726,360
Federal Funds	7,262,600	3,631,800
Other	-0-	-0-
Total	8,716,320	4,358,160

SEVEN YEAR TOTAL:

General Fund	$ 13,848,120
Federal Funds	$ 69,240,600
	$ 83,088,720

DEPARTMENT: Environmental Conservation

DATE: 2-26-87 LAW LOG # 773-87-0027

RETURN TO GOVERNOR'S OFFICE BY: 3-6-87

Please indicate your recommendation regarding the final draft legislation affecting your department sent to you by the Department of Law. If you notice any changes you would like to make to the transmittal letter, major corrections, or issues to be addressed, list them below.

[redacted] fiscal note sign this cover sheet and return to Candise Griffin, Office of the Governor, as soon as possible. Thank you.

RECOMMENDATION: (Approve) hold, do not approve)

COMMENTS: See attached changes to transmittal letter

~~Commissioner's Signature~~

March 5, 1987
Date

SUMMARY OF REVOLVING LOAN FUND TITLE II REQUIREMENTS

I. ELIGIBILITY RELATED PROVISIONS.

1. 201(b). Must Use Best Practicable Waste Treatment Technology.
2. 201(g)(1). Must be secondary treatment or more stringent or any cost effective alternative for the following categories:
   - new interceptors
   - I/I correction
   - Other categories determined by governor
3. 201(n)(1). Can use funds for combined sewer overflows.
4. 201(0). Encouraged to file a capital financing plan that
   - projects future requirements for >= 10 years.
   - projects nature, extent, costs, timing of future
   - expansions.
   - sets forth financing plans for future expansions.
5. 211. No collectors unless
   - replacement/major rehab or existing systems necessary for total system integrity or;
   - new collectors in existing community with sufficient existing or planned capacity for treatment.

II. APPLICATION RELATED PROVISIONS.

1. 201(g)(2). Applicant must:
   - evaluate alternative waste treatment technology.
   - allow for application of later technology to provide for reclaiming/recycling of water.
2. 201(g)(3). Applicant must show that sewer collection system doesn't have excessive infiltration.
3. 201(g)(5). Applicant must study/evaluate
   - innovative/alternative technology.
   - reclamation reuse of water or elimination of discharge.
   - land treatment.
   - low energy usage systems.
4. 201(g)(6). Applicant must analyze open space and recreational opportunities.
5. 204(a)(1). Before approving grants, Administrator shall determine that treatment works are included in any applicable 208 plan.
6. 204(a)(2). Before approving grants, Administrator shall determine that treatment works are included in any applicable 303(e) plan.
7. 204(b)(2). Applicant must:
   - adopt a user charge system
   - demonstrate legal, managerial, & financial capability to construct/operate/maintain the treatment works.
8. 218. The applicant must
   - show the cost effective solution in the facility plan
   - use value engineering for high cost projects.
9. 511(c)(1). Projects are subject to NEPA.

III. CONSTRUCTION RELATED PROVISIONS.

1. 204(d)(2). Grantee must provide one year performance
   - certification.
2. 513. Project is subject to Davis-Bacon wage rates.

Preliminary — will change (16)

PRELIMINARY CONCEPT PAPER (2/3/87 DRAFT) FOR IMPLEMENTATION OF TITLES II AND VI OF THE WATER QUALITY ACT OF 1987

Only OMPC has seen this so far.

INTRODUCTION

A. Purpose of Concept Paper

This paper describes the Office of Municipal Pollution Control's (OMPC) interpretation of the recently enacted Water Quality Act of 1987, which amends the Federal Water Pollution Control Act. This interpretation is intended to provide the basis for the development of the implementing regulations. Prior to rulemaking, OMPC wishes to provide interested parties with the opportunity to review and respond to its interpretation of the amended construction grants program and the newly created capitalization grant option, whereby funds may be obligated to State Water Pollution Control Revolving Fund Programs.

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Comments should be addressed to H. William Kramer, U.S. Environmental Protection Agency, Office of Municipal Pollution Control (WH-546), 401 M Street, SW, Washington, D.C. 20460. In order to use these comments in rulemaking, OMPC must receive them by _____, 1987.

B. Contents of the Paper

Part I of this paper briefly reviews the history of the construction grants program and highlights changing trends. Part II describes the regulatory approach that OMPC is proposing to use in developing the rules necessary to implement the 1987 Amendments. Part III sets forth a tentative schedule for the promulgation of such rules. Part IV describes the concepts to be addressed in rulemaking.

C. TABLE OF CONTENTS

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Legislative History of the Construction Grants Program

In 1972, Congress enacted amendments to the Federal Water Pollution
·l Act of 1956 that provided for a strong federal role in the
·uction of publicly owned wastewater treatment works. The 1972
ıents, commonly referred to as the Clean Water Act, increased the
of federal aid and expanded the federal grant share to 75 percent in
fort to increase the pace of wastewater treatment facility
ruction and eliminate a backlog of needed facilities. Congress has
intended, however, that states and municipalities would eventually
e full responsibility for financing, building, operating,
aining, and replacing their treatment facilities.

The shift of responsibility to State and local governments began in
The 1977 amendments to the Clean Water Act authorized the
onmental Protection Agency (EPA) to delegate most of its construction
s management functions to the States. The Federal role was further
ed in the 1981 Amendments, which cut the annual Federal authorization
lf, reduced the Federal grant share, narrowed the eligible funding
ories, and reduced the eligible treatment capacity to that required
:et existing needs.

The Water Quality Act of 1987, (the 1987 Amendments), sets forth a
lule and mechanism for completing the transition to full state and
l responsibility. EPA's authority to allot funds to states for the

award of grants to municipalities to construct wastewater treatment facilities is continued through fiscal year 1990. A new authority is created that allows EPA to make grants to capitalize State Water Pollution Control Revolving Funds (SRFs), the primary purpose of which will be to provide loans and other financial assistance to municipalities for the construction of wastewater treatment facilities. Beginning in FY 1987, States may exercise an option to use a portion of their annual construction grants allotments for the capitalization of SRFs. The last year in which funds will be appropriated for direct project funding through construction grants is 1990. Separate appropriations for SRF capitalization grants are authorized from fiscal year 1989 through fiscal year 1994. After FY 1994, the Federal role will no longer include financial assistance to States or municipalities for wastewater treatment facility construction. The States and municipalities will thereafter have the sole responsibility for providing financing to meet the enforceable requirements of the Act.

II. REGULATORY APPROACH

A. Literal Interpretation

The 1987 Amendments set out the course EPA is to follow regarding the future of Federal financial assistance for wastewater treatment facility construction. The amendments to the existing construction grants program, found in Title II of the Act, as well as the SRF program requirements found in the newly created Title VI, are relatively straightforward. The legislative language is clear and detailed, and demands little additional interpretation. OMPC expects little difficulty in drafting implementing regulations that are in keeping with a strict and literal interpretion of the 1987 Amendments. However, where it is clearly in the interest of all concerned, rules will be amplified so that legislative intent can more readily be achieved.

B. Agency Rulemaking: Interim Final Rules

In order to permit States to make use of the funds authorized by the 1987 amendments as soon as possible, the Agency will publish interim final rules based on the comments received on this concept paper. This process is consistent with the Administrative Procedures Act (APA), which describes how Federal agencies are to conduct most rulemaking. The interim final rule will provide an additional opportunity for public

comment before the final rule is published. The interim final rule will also provide a basis for states and municipalities to make the necessary changes to their construction grants programs, establish SRF programs, or alter existing SRF programs, if necessary.

III. TENTATIVE SCHEDULE

The following schedule for issuing regulations assumes enactment on February ___, 1987.

Interim Final Rule

Publication: February ___, 1988.

Effective Date: ___ days following the date of publication.

Final Rule

Publication: February ___, 1990.

Effective Date: ___ days following the date of publication.

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IV. INTERPRETATION OF THE WATER QUALITY ACT OF 1987

A. Summary

The following outlines EPA's interpretation of the Water Quality Act of 1987, Public Law 100-_____, and describes the amendments EPA expects to make to its regulations at 40 CFR 35 to reflect the 1987 Amendments. The amendments to Subpart I of 40 CFR 35 will update the construction grants program. A new Subpart K will be created to delineate the rules that EPA must follow in awarding capitalization grants to State Water Pollution Control Revolving Funds (SRFs) and the rules that the States must follow to receive the capitalization grants.

B. Supplementary Information

1. Legal Authority

The rule described herein will implement the 1987 Amendments by amending the existing construction grants regulation in Subpart I, whose statutory authority is Title II of the Clean Water Act, as amended, and by adding a new Subpart K to implement Title VI of the Clean Water Act as created by the 1987 Admendments.

2. Scope of this Rule

Amendments to Subpart I of this rule apply to all projects which, after the effective date of the interim final rule, receive a Title II construction grant for a municipal wastewater treatment facility. Subpart I applies to municipal grantees and is implemented by State construction grants program managers, where delegated, and by the Regional Administrator of the EPA where the program has not been delegated to the State. Therefore, Subpart I's audiences are recipients of construction grants at the municipal level and those responsible for administering the construction grant program at the state level.

Subpart K of this rule will apply to States with revolving fund programs that receive capitalization grants. Capitalization grants are awarded at the State program level, whereas construction grants are awarded at the municipal project level. Subpart K will describe the requirements that an SRF program must satisfy in order to receive a capitalization grant.

Subpart K will not regulate project level activities. Provisions in Title VI that address project requirements will be implemented by the States using Subpart I regulations where appropriate. However, through the general program review mechanisms provided for in Title VI, and discussed in more detail later in this paper, EPA will assure that the

states do, in fact, carry out statutory mandates pertaining to facilities funded for construction under the SRF program.

C. Description of Topics in Subparts

1. Subpart I - Amendments to the construction grants regulations

a. State Set-Asides

1. Section 205(g)

The authority for the set-asides for state management assistance grants is extended through fiscal year 1994. Congress intends to assure that such management funds will be available to delegated states for any project constructed with allotted, realloted, and deobligated funds. The

2. Section 205(h)

The rural set-aside is extended through fiscal year 1990. This section requires rural states to maintain a set-aside of at least 4% of their allotment and is amended to allow any state to reserve up to 7.5% of their allotment to assist small communities in constructing alternative treatment facilities.

3. Section 205(i)

The authority for the innovative and alternative technologies .side is extended through fiscal year 1990. The 1987 Amendments provide new direction for the reallotment of the innovative and :native technology set-aside. Funds set-aside for innovative and :native technologies, but unobligated within the two year deadline l be awarded to the Small Flows Clearinghouse, which was established ie 1977 Amendments. The grant from these unobligated funds cannot ed $1 million annually. The Clearinghouse disseminates information transfers technology regarding innovative and alternative technologies provides information and advice on alternative financing and managing ngements that will offer the most affordable options to small unities. The funds from this reallotment will enable the ringhouse to increase access to existing databases, prepare new ning materials for both technological and administrative alternatives, deliver training programs tailored to the needs of individual states.

4. Section 205(j)

Section 316(d) of the 1987 Amendments amends section 205(j) of the to create a new set-aside for the Nonpoint Source Pollution Management :rams developed under the new section 319. For each state, the greater ;100,00 or one percent of the State's anuual allotment is reserved, and State is required to obligate the first $100,000 of this amount

annually for nonpoint source pollution management or forfeit the unobligated balance of that $100,000 to reallotment. Reallotted funds shall be made available to States that are able to apply such funds to implement section 319. Where the reserve for any State exceeds $100,000, that State is encouraged, although not required, to obligate the full amount for nonpoint source pollution management. However, funds in excess of the mandatory $100,000 may be used by the State for other purposes under Title II of the Act.

In addition, section 316 amends 201(g)(1) to make eligible, under the Governor's 20 percent discretionary provision, grants for the development and implementation of non-point sopurce management programs and demonstration projects (319(h)), and grants for protecting groundwater (319(i)). Regulations to implement these programs will be developed by the Office of Water Regulations and Standards and will not be discussed in futher detail in this concept paper.

The nonpoint source management set-aside supplements funds authorized to be appropriated under new section 319(j) of the Act for developing and implementing approved nonpoint source management programs (the set-aside funds may also be used to develop such programs). Again, These funds will be administered under regulations to be developed by the Office of Water Regulations and Standards and will not be discussed in further detail in this concept paper.

5. Section 205(m)

Section 607(b) creates section 205(m) to allow, at the discretion of the State, the deposit of funds from the State's Title II allotment into the SRF for use as a Title VI capitalization grant. The amount of the Title II allotment that can be depositied is limited to 50 percent of the State's fiscal year 1987 allotment and 75 percent of the State's fiscal 1988 allotment. There is no limit on the amount of the deposit for subsequent years, except that the sums reserved for 205(j) can not be deposited into the SRF.

Each of these set-asides, and the SRF option exercised pursuant to section 205(m) for FY 1987 and 1988, will be calculated as percentages of the States' entire allotments.

b. National Reserves

Two new national reserves are established by the 1987 Amendments, providing funding for projects to abate combined sewer overflows (CSO) into marine bays and estuaries and for awarding construction grants to Indian Tribes. Unlike other reserves and the governor's discretionary authority, which are percentage amounts set aside from each State's allotment, or from each State's share of the authorization, by the State or the Regional Administrator, national reserves are amounts deducted by the EPA Administrator from the total appropriation, prior to allotment.

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1. Marine CSO and Estuaries Reserve

The marine CSO and estuaries reserve is one percent of each appropriation prior to allotment in FY 87-88, and one and one half percent of each appropriation prior to allotment in FY 89-90. Two-thirds of the amount of the reserve shall be available to address water quality problems of marine bays and estuaries resulting from marine CSO discharges. The Agency intends to use existing regulations (35.2024(b)) and guidance to award funds set-aside from funds appropriated after the effective date of the 1987 Amendments. Applications for grants from these funds must be submitted to the Regional Adminitrator by _____.

The remaining one-third of the marine CSO and estuaries reserve is to be used to supplement the funds available to the National Estuary Program under Section 320 of the Act. These funds are administered under regulations to be developed by the Office of Marine and Estuarine Protection and will not be discussed in further detail in these regulations. The National Estuary Program allows EPA to convene management conferences of interstate or international parties to develop comprehensive conservation and management plans which should recommend priority actions for the control of point and nonpoint sources of pollution. Up to ten percent of the funds available under section 320 may be used for administrative expenses; the balance is available for 75 percent grants to states and interstate or regional water pollution

D.

control agencies to conduct research, monitoring, modeling, and other technical work necessary to develop conservation and management plans. Grant recipients must report to EPA eighteen months after they receive the grant and biennially thereafter. [INSERT REFERENCE TO REGS OR GUIDANCE TO BE DEVELOPED BY OMEP]

2. Grants to Indian Tribes

The second national reserve is for grants to be made to Indian tribes to build sewage treatment facilities. Within one year of enactment, EPA is required to assess the need for sewage treatment works to serve Indian tribes. Based on this needs study, EPA will develop a national priority list. Beginning in 1987(8?), prior to allotment to states, 1/2 of 1 percent of the sums appropriated under section 207 will be reserved for grants for the development of waste treatment management plans and for the construction of sewage treatment works to serve Indian tribes. To ensure consistent implementation of the Act, tribes and states may enter into cooperative agreements to jointly plan and administer funding available under the set-aside.

The Act authorizes EPA to treat tribes as states for puposes of Title II and other sections of the Act, but only where the tribe has the necessary capability and authority to carry out the functions of the Act and applicable regulations. The 1987 Amendments require the Agency to promulgate, within 18 months, regulations to specify how Indian tribes

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will be treated as States. For the purposes of the construction grants program, the existing regulations at 40 CFR, Part 35, Subpart J that govern delegation agreements will apply.

Very few Indian Tribes are expected to request delegated authority to manage the construction grants program, in view of the anticipated phase-out of the construction grants program by 1990. For this reason, it will not be worthwhile to expend the time, effort and funds for EPA or the tribes to fully develop tribal technical and managerial capabilities to administer the program as the States do now. Instead, EPA's intention is to build on the existing relationships between the IHS and the tribes, as well as the IHS' organization and experience in the water pollution control field. The IHS would administer the set-aside through an agreement transferring the funding authority from EPA to the IHS.

An umbrella memorandum of understanding was entered into by EPA and the IHS in August 1986, which will be supplemented by a detailed description of the roles, responsibilities and authorities of the two agencies for implementing the program. Under this concept, the IHS would administer the Title II funds through its existing treatment works program. IHS regulations, which do not include all EPA requirements, would apply in the interest of program consistency and administrative efficiency.

Indian tribes are not eligible to participate as States in the SRF program, which would be authorized by the new Title VI of the Act.

c. Design/Build Projects

Upon promulgation of the interim final regulations, alternative "design-build" grant management procedures will become available to communities which plan to build aerated lagoons, trickling filters, stabilization ponds, land application systems, sand filters, or subsurface disposal systems. Design-build agreements permit a grantee planning to build a small treatment system to advertise one contract for both design and construction of a treatment works, thereby avoiding several review and bidding requirements. However, all other project requirements continue to apply. The use of design-build contracts are intended to reduce both the amount of time to complete the project and the cost of the project.

In order to be considered for these alternative procedures, a project must have an approved facility plan and an estimated cost under $8 million. The agreement between the applicant and the Regional Administrator must provide for a specified Federal contribution, start and end dates for construction and effective project management procedures. It must also include a requirement that the applicant's contractor will post a bond to assure performance. The agreement and

grant award will be made after bids have been received on the basic design data and standard construction specifications.

The amount of grant funds obligated for design/build contracts cannot exceed 20 percent of a state's annual allotment.

d. Sunset Grandfathering

Phases or segments of projects which previously received a federal grant share of 75 percent, or 85 percent for innovative and alternative technologies, will no longer be eligible for that level of funding after October 1, 1990. On that date, the federal share for all projects will be no more than 55 percent, and no more than 75 percent for innovative and alternative technologies. Although there is no explicit language in the 1987 Amendments on the matter, it appears from language in the Report accompanying the Bill that the Conferees intend to eliminate funding for reserve capacity beginning in FY 1991. OMPC is seeking clarification of this issue.

e. Agreements On Eligible Costs

Secton 203(a) requires that after the 60th day following enactment of the 1987 amendments (i.e., beginning on April ___ 1987), all construction grants agreements include a written agreement on eligible costs that establishes and specifies which items of the proposed project

are eligible under the grant. The Agency may not later modify such eligibility determinations unless they are found to have been made in violation of applicable Federal statutes and regulations. Eligibility determinations shall not preclude the Agency from auditing a project or from witholding or recovering Federal funds for costs which are found to be unreasonable, unsupported by adequate documentation, or otherwise unallowable under applicable Federal cost principles, or are incurred on a project which fail to meet the design specifications or effluent limitations contained in the grant agreement and permit.

2. Subpart K - The State Revolving Fund Capitalization Grant Program

a. Purpose

This new Subpart sets out the federal requirements associated with state revolving fund capitalization grant programs, which are authorized by Title VI of the Clean Water Act, as amended. Capitalization grants are to be awarded to states for deposit in State Water Pollution Control Revolving Funds (SRFs). From these funds the states shall provide loans and other types of financial assistance, but not grants, to local communities for the construction of publicly-owned wastewater treatment facilities, and for implementation of the new nonpoint source pollution control and estuary protection programs. The intent of Title VI is for

most of the financial assistance provided by the SRFs to be in the form of loans. The loan repayment stream will then provide a continuing source of capital for states to make available to local communities for water pollution control programs.

The new SRF capitalization grants program is fundamentally different from the established construction grants program. Whereas the construction grants program is federally designed, and is operated by states only after delegation of specific activities and responsibilities, the federal role in the capitalization grants program is limited to program-level grants-making and review. EPA does not envision direct federal involvement in projects. Each SRF is to be primarily state-designed and operated, with minimal federal requirements imposed on its structure.

b. General Eligibilities

In the first years of a SRF, the 1987 Amendments condition the use of SRF funds as described in this section. Once those conditions are satisfied, then funds in an SRF may be used to provide financial assistance for (1) the construction of publicly owned treatment works (as defined in Section 212 of the Act); (2) the implementation of nonpoint

source management programs established under Section 319 of the Act, and; (3) development and implementation of estuary conservation and management plans under Section 320 of the Act.

1. All Funds - Timely Commitment

The most general of the conditions is that the State must agree to commit all of the funds in its SRF in a timely and expeditious manner, and that projects be consistent with plans, if any, developed under sections 205(j), 208, 303(e), 319, and 320. The Agency does not intend to specify in regulation what constitutes "timely and expeditious."

2. Funds as a Result of Capitalization Grants -- First Use for Enforceable Requirements

The second general condition requires that funds resulting from capitalization grants -- which include the federal contribution, the state match, and any proceeds from the investment or other use of these funds -- first be used to assure that treatment works maintain progress towards compliance with the enforceable goals of the Act.

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3. Funds Directly Made Available From Capitalization Grants -- Title II Limitations

The third general condition imposes additional limits on the use of a portion of the funds "as a result of" a capitalization grant. These additionally conditioned funds are those "directly made available" by capitalization grants or 205(m) deposits, by which is meant an amount equivalent to the grant or deposit. Projects funded in whole or in part by these "equivalency" funds must satisfy certian project requirements found in title II of the Act; these requirements are described in detail in the Capitalization Grant section. The Title II provisions that define eligibilities are:

> section 201(g)(1) which limits assistance to projects for secondary treatment, advanced treatment, or any cost-effective alternative, new interceptors and appurtenances, and infiltration/inflow correction (this section also retains the 20 percent Governor's discretionary set-aside, which can be used to fund other projects within the definition of treatment works in section 212, and for certain non-point source control and groundwater protection purposes;
>
> section 201(n)(1) which provides that funds under section 205 may be used to address water quality problems due to discharges of combined sewer overflows, which are not otherwise eligible,

if such discharges are a major priority in the state,

section 211 which provides that collectors are not eligible under the Governor's 20 percent discretionary provision unless the collector is needed to assure the total integrity of the treatment works or to assure that adequate capacity exists at the facility.

4. Set-Asides from Title VI Allotments

There are two set-asides from Title VI allotments, one for administering the grant supported SRF and one for planning. Up to 4 percent of a capitalization grant from funds alloted under title VI can be used to administer the SRF -- this is described in more detail in the section on State Administration. In addition, section 604(b) creates a reservation of funds for planning under 205(j) and 303(e) of 1 percent of the State's annual allotment or $100,000 whichever is greater.

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c. Types of Assistance

1. The SRF may not award grants.

2. Loans

The primary type of financial assistance an SRF shall provide is loans. Properly conditioned loans, as compared with the other types of financial assistance available from SRFs, establish repayment streams to fuel future SRF assistance.- The conditions placed on loans made by an SRF are intended to maintain the Fund's financial integrity without hampering the state's flexibility to use the Fund to address the diverse needs of its communities. As part of its fund management strategy, a State should strive to ensure that money will be continually available to meet present and future wastewater treatment needs. Note, however, that loans may not be made to support the non-federal share of a project receiving grant assistance under the construction grants program.

a. Interest Rate

Loans must be made at or below market interest rates, and may include zero interest loans. A State may exercise flexibility in setting interest rates in order to accommodate the fiscal circumstances of individual communities. The market interest rate is the rate the State ascertains to be prevailing in the State, and the rate applied may

represent an average rate over a period of time or the rate on the date the loan is made.

b. Repayment Period

The SRF must establish loan terms that do not exceed twenty years (which has been calculated to be the average design life of a municipal wastewater treatment facility). This requirement guarantees that a revenue stream to support repayments will exist throughout the term of the loan because the funded project should be operating and collecting user charges for at least the length of its design life.

c. Repayment Schedule

Principal and interest payments must be made annually beginning not later than one year after the date of completion of construction, and the loan must be amortized within twenty years of completion. Each State has complete flexibility in setting the yearly amount of the principal repayment and the interest payment. States may set standard State-wide amortization schedules or address each loan on a case-by-case basis.

d. Dedicated Repayment Source

Each loan recipient must establish a dedicated source of revenue for repayment of the loan. Communities constructing treatment works with loan funds "directly made available by capitalization grants under Title VI and section 205(m)" of the Act must establish user charge systems as required under sections 602(b)(6) and 204(b)(1) of the Act. User charge systems must satisfy the requirements of 40 C.F.R. Subpart I. However, the municipality's debt can be serviced by systems other than user charges. For projects whose financial assistance is supported by funds other than Federal capitalization grants, the state must also assure that the recipient has a system that requires adequate revenue to provide for debt service and sufficient operation and maintenance of the project. Dedicated sources of revenue could be a user charge system, a special assessment, a general tax pledge (full faith and credit of the municipality), revenue bonds, or other sources.

e. Repayment to the SRF

All repayments of principal and interest must be deposited into the dedicated Fund. This requirement is intended to preserve the "revolving" nature of the SRF.

f. Prevention of Double Benefit

Because the portion of a loan that covers planning and design expenses previously covered by an allowance as part of a construction grant must be immediately returned, a State should generally not make such expenses eligible for loans.

3. Uses Other Than as Loans

In addition to loans, State Revolving Funds may provide any of the following types of financial assistance:

a. Refinancing

An SRF may buy or refinance a local debt obligation at or below market rate where such debt was incurred after March 7, 1985. For example, a municipality that, for NPDES compliance reasons, cannot wait for SRF funding to become available before commencing construction of its wastewater treatment facility may obtain interim financing from a source other than the SRF, and seek refinancing through the SRF at a later date when SRF funds are available.

b. Guarantees and Insurance

An SRF may guarantee or buy insurance for local debt obligations where such action would improve credit market access or reduce interest rates. Because these types of assistance may involve the expenditure of funds without a return stream, the purchasing power of the SRF may not be maintained. Therefore, fund activity in these areas should be limited to the extent that the purchasing power of the SRF is maintained to accommodate future project needs.

c. Leveraging

Resources in the SRF may also be "leveraged," i.e., used as a source of revenue or security for the payment of principal and interest on revenue or general obligation bonds issued by the State if the proceeds of the sale of such bonds will be deposited in the SRF. Resources include all assets of an SRF, including the existing balance in the SRF at any point in time and future revenues from loan repayments. The state may be able to borrow against the repayment stream from outstanding loans made from an initial set of capitalization grants or part of the capitalization grant or state match, thus making available significant amounts of money much sooner that would otherwise be possible. Each state must comply with all of its securities laws and regulations, as well as with those of the Federal government. The bonds may be issued by an instrumentality of the state, the state agency responsible for administering the SRF, or an

interstate agency to which two or more states have delegated such responsibility.

Note, however, that the intent of the State match requirement is to show the State's willingness to invest in the SRF and to provide an absolute increase in the resources available to the SRF. Further, a capitalization grant is not available for use by a State until the State has shown that each match payment will be made and has made at least the first quarter's payment into the SRF. For these reasons, the State match can not come from future proceeds of a leveraging action that is dependant on a reserve account funded from the capitalization grant.

d. Sub-state Revolving Funds

Although the 1987 Amendments state that an SRF can provide loan guarantees to similar revolving funds established by municipal or intermunicipal agencies, EPA does not expect to authorize that use under the interim final regulations. Such authority will be provided when EPA has had sufficient experience with State-level revolving funds to provide a basis for sound regulations and guidance for the award of loans to substate revolving funds.

e. Administrative Expenses

As previously noted, SRF monies may be used by the state to cover the reasonable costs of administering the Fund, provided that no more than four percent of the amounts provided to the fund by federal capitalization grants are used for this purpose.

f. Earn Interest

In addition, an SRF may earn interest on fund accounts, subject to federal and state arbitrage limits.

g. Financial Constraints

The types of financial assistance described in this section (i.e., other than loans) may only be provided to a project receiving a construction grant if the Governor determines that the municipality faces severe financial constraints and the assistance is necessary to allow the project to proceed. The Agency does not intend to specify in regulations what constitutes "severe financial constraints."

d. Notice of Intent to Use Allotment for SRF Programs

In order for a state to to use a portion of its construction grant allotment under Section 205 of the Act as a capitalization grant, the Governor must file with the Regional Administrator a notice of the state's intent. For FY 1987, the Notice of Intent must be received no later than _____ [90 DAYS AFTER ENACTMENT]. For each year therafter, the notice must be filed no later than 90 days before the first day of the fiscal year for which it applies. In FY 1987, up to 50 percent of the state's allotment may be deposited in its SRF, and up to 75 percent may be deposited for FY 1988. There are no limits on the amount of the allotment which may be deposited in subsequent fiscal years, except that funds set-aside under section 205(j) cannot be deposited into the SRF. On October 1, 1990, federal funds will be available for capitalization grants only.

The notice of intent requirement is not intended to bind the State to a declared course of action. Instead, it will enable EPA to adminster the SRF program more efficiently, particularly in its early years. Because the deadline for filing a notice of intent for fiscal year 1987 will pass prior to the promulgation of the interim final rules, and because a State's legal and budget circumstances may remain unclear until after the 90 day deadline, the Agency is advising States to submit the notice as specified above with the assurance that the notice may be amended or withdrawn.

e. Capitalization Grant Application and Agreement

A State may apply for a capitalization grant by submitting to the gional Administrator the standard application form SF 5700-32 and a ift agreement and intended use plan. The application must be received later than ____ days before the fiscal year for which funds are being quested.

For each fiscal year, a Capitalization Grant Agreement must be tered into between the Administrator and the State before funds can be rded under the permanent Title VI program and under the section 205(m) tion. Section 602 of the Act clearly sets forth ten specific conditions it must be included in this agreement. Additional provisions may be cluded if they are deemed necessary by the Administrator. The quirements are as follows:

1. SRF - An Instrumentality of the State

A certification that the State has established an SRF as an trumentality of the State that is able to comply with the requirements objectives of the Act.

documents, recognized by state law, that define terms and timing for transferring SRF assets to a loan recipient.

Anticipated commitments must be contained as specific proposals in the intended use plan, which is described in the next section and must be documented in the actual use report. The intended use plan, as its name implies, does not bind the State. Substitutes and modifications to provisions in the original plan must, however, be explained in the actual use plan, and total commitments on the amount, timing and type of assistance must be met.

5. All Funds - Timely Commitment

The state must agree to commit all of the funds in its SRF in a timely and expeditious manner. This requirement applies to the capitalization grant payments, deposits made under Section 205(m), the state match and any other state contributions, the proceeds of leveraging, and ultimately, loan repayments. This agreement must be supported by project information contained in the intended use plan.

6. Funds as a Result of Capitalization Grants --
First Use for Enforceable Requirements

Funds in the SRF not as a result of capitalization grants are not subject to this requirement. These monies may be used at any time for the construction of any treatment works on the state's priority list, for the implementation of management programs established under section 319, or for development and implementation of conservation and management plans under section 320. The use of the funds for section 319 and 320 programs need not be on the priority list but must be described in the intended use plan. The Governor retains the discretion to use up to 20 percent of the State's allotment to fund previously eligible projects as provided in 40 CFR Part 35, 2015.

7. Funds Directly Made Available from Capitalization Grants -- Title II Requirements

The State must certify to the Regional Administrator that all projects financed, in whole or in part before FY 1995, with funds "directly made available" by capitalization grants under Title VI and Section 205(m) of the Act will meet the requirements listed below in the same manner as projects receiving grants under Title II. These requirements do not apply to projects funded wholly from the state match nor to monies repaid to the fund, but do apply to the portion of the proceeds of leveraging equivalent to the capitalization grant when that grant is used for leveraging purposes. The projects not subject to the specified Title II requirements must be noted in the intended use plan. The content of the intended use plan is described in more detail in the following section.

The applicable requirements are:

Section 201(b) which requires that projects apply best practicable waste treatment technology,

Section 201(g)(1) which limits assistance to projects for secondary treatment, advanced treatment, or any cost-effective

alternative, new interceptors and appurtenances, and infiltration-inflow correction (this section retains the 20 percent Governor's discretionary set-aside, which can be used to fund other projects within the definition of treatment works in section 212(2), and for certain non-point source control and groundwater protection purposes,

Section 201(g)(2) which requires that alternative technologies be considered in project design,

Section 201(g)(3) which requires the applicant to show that the related sewer collection system is not subject to excessive infiltration,

Section 201(g)(5) which requires that applicants study innovative and alternative treatment technologies and take into account opportunities to make more efficient uses of energy and resources,

Section 201(g)(6) which requires that the applicant analyze the potential recreation and open space opportunities in the planning of the proposed facility,

Section 201(n)(1) which provides that funds under section 205 may be used to address water quality problems due to discharges

of combined sewer overflows, which are not otherwise eligible, if such discharges are a major priority in a State.

Section 201(o) which calls on the Administrator to encourage and assist communities in the development of capital financing plans,

Section 204(a)(1) and (2) which require that treatment works projects be included in plans developed under sections 208 and 303(e),

Section 204(b)(1) which requires communities to develop user charge systems and to have the legal, institutional, managerial, and financial capability to construct, operate, and maintain the treatment works,

Section 204(d)(2) which requires that, one year after the date of construction, the owner/operator of the treatment works must certify that the facility meets design specifications and effluent limitations included in its permit,

Section 211 which provides that collectors are not eligible unless the collector is needed to assure the total integrity of the treatment works or that adequate capacity exists at the facility,

Section 218 which assures that treatments systems are cost-effective and requires that projects of over $10 million