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ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE
Division of Legislative Audit

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October 11, 1991

Summary of: A Report on the Department of Commerce and Economic Development, and the Department of Public Safety, Big Game Commercial Services Board, Consistency of Disciplinary Penalties, October 1, 1991.

PURPOSE OF THE REPORT

In accordance with Title 24 of the Alaska Statutes, and a special request of the Legislative Budget and Audit Committee, we conducted an audit of the Big Game Commercial Services Board (BGCSB). Our audit had two objectives:

1. Determine if the board has been consistent in applying sanctions such as license suspensions and revocations for similar violations of professional standards as set out in statute and regulations.

2. Review the role and impact that the Division of Fish and Wildlife Protection within the Department of Public Safety has had on the license disciplinary process, and assess if that agency has acted consistently and objectively.

REPORT CONCLUSIONS

Penalties involving an individual's guide license may be imposed by the courts prior to any sanction imposed by BGCSB. When this happens, the board's disciplinary action essentially ratifies the decision of the courts. Because of differing circumstances involved with each case, the penalties imposed by the courts for similar offenses may vary. Such differences, while within the latitude granted the courts in imposing sentences, often makes BGCSB appear inconsistent in the actions it takes against licensees. Aside from these apparent differing sanctions, we found that, with one minor exception, BGCSB has been consistent in the penalties and sanctions it has imposed on various license holders.

FINDINGS AND RECOMMENDATIONS

1. The Division of Fish and Wildlife Protection (FWP) should emphasize and strictly enforce its policies prohibiting participation in the guiding industry.

In December 1984, then Department of Public Safety Commissioner Sundberg first issued a policy prohibiting outside employment as guides for all departmental personnel. Since that time, the department's policy has not always been effectively enforced. In the past, supervisory management did not believe that guiding was necessarily a conflict with enforcement despite the policy set by upper management. Accordingly, there appears to have been little effort to enforce the policy, and it has been reported that supervisors actually encouraged officers to work in the guiding industry.

By failing to be sure that the policy was effectively enforced, the department allowed its investigatory methods and approaches to be called into question. Recently, the department redoubled its efforts to enforce the policy, and has clarified the policy to be consistent with the requirements of the Executive Branch Ethics Act.

2. DPS should conduct an internal review regarding the basis and procedures involved in developing undercover law enforcement actions on guiding and game violations.

According to the director of FWP, most game law violations are detected and prosecuted through the use of undercover police operations. The director acknowledged that there is a great deal of discretion allowed over who to "target" for an undercover operation. The officer most prominently involved working as an assistant guide was in the position to influence and use his discretion over who would and would not be subject to an undercover operation.

At a minimum, these circumstances give the appearance that this individual could have suppressed information regarding the activities of licensed guides with which he was associated, while at the same time making decisions to target others who were competitors of his guide associates. We believe it is important that FWP satisfy the guiding public that undercover operations are appropriately directed and are carried out on the basis of sufficient and reliable criteria.

AUDITOR'S COMMENTS

In our view, BGCSB should be made aware of the situation involving FWP officers and their guiding activities in violation of departmental policy. In one particular case, an officer testified in court that he had acted as an unpaid assistant guide. Since a key part of the statutory definition of guiding involves compensation, BGCSB should carefully scrutinize any assistant guiding experience claimed by this individual if, and when, he applies to be licensed as a guide.

not have been acting unreasonably in asserting that he had not received "compensation," while at the same time seeking to rely on that experience as an assistant guide in attempting to become qualified as a registered guide . . .

The primary purpose of raising the point in the audit report was to more fully substantiate our audit evidence that the Fish and Wildlife Protection officer was on record as serving as an assistant guide. The issue of compensation and the apparent contradiction with court testimony was a secondary issue that had been raised by the investigator at the Division of Occupational Licensing at the time of the original internal investigation. In our review of the records and documents related to that investigation, we found no evidence that this particular issue had been satisfactorily resolved or analyzed. In view of DOLaw's response this issue has now been formally addressed.

The central point of our discussion remains unaffected. To restate, the Big Game Commercial Services Board (BGCSB) has a vital interest in maintaining the integrity and independence of the investigations involved in the licensing disciplinary process. The board should do all it can within its statutory powers to strengthen and improve that process. Accordingly, BGCSB should carefully consider granting guide licenses to individuals who gained necessary, qualifying experience when they were employed in positions involving either real or apparent conflicts of interest.

Randy S. Welker, CPA
Legislative Auditor

ALASKA STATE LEGISLATURE

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Division of Legislative Audit

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October 8, 1991

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DEPARTMENT OF PUBLIC SAFETY
BIG GAME COMMERCIAL SERVICES BOARD
CONSISTENCY OF DISCIPLINARY PENALTIES

October 1, 1991

08-4402-91

This report reviews the disciplinary actions taken by the Big Game Commercial Services Board since its first meeting in December 1989. The board was created as part of a comprehensive 1989 revision of the statutes related to the licensing of professional hunting guides. The board's primary disciplinary sanction is the authority to suspend or revocate a guide's license.

The audit was conducted in accordance with generally accepted government auditing standards. In this report we discuss our analysis and review of the board's consistency in assessing licensing sanctions. We also discuss the large role that the Division of Fish and Wildlife Protection within the Department of Public Safety plays in the investigations and hearings involved in the disciplinary process.

Randy S. Welker, CPA
Legislative Auditor

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OBJECTIVES, SCOPE, AND METHODOLOGY

Objectives

In accordance with Title 24 of the Alaska Statutes, and a special request of the Legislative Budget and Audit Committee, we conducted an audit of the Big Game Commercial Services Board (BGCSB). Our audit had two objectives:

1. Determine if the board has been consistent in applying sanctions such as license suspensions and revocations for similar violations of professional standards as set out in statute and regulations.

2. Review the role and impact that the Division of Fish and Wildlife Protection within the Department of Public Safety has had on the license disciplinary process, and assess if that agency has acted consistently and objectively.

Scope and Methodology

The period covered by our audit review involves disciplinary actions taken by BGCSB since its inception in December 1989. Many of the licensing sanctions taken by the board involved cases and allegations that happened as long ago as 1988.

In order to evaluate the consistency of the board's licensing sanctions, we reviewed and considered the following documents:

1. Minutes of all BGCSB meetings, with particular emphasis on the discussion and voting involving proposed hearing officer decisions regarding sanctions against licensees.

2. All hearing officer rulings and proposed decisions submitted to BGCSB.

3. Investigative files at the Division of Occupation Licensing related to the cases that resulted in license sanctions.

4. Transcripts of court testimony of selected disciplinary cases that were adjudicated prior to being considered by BGCSB.

5. Documents provided by individuals disciplined by BGCSB related to their cases.

6. Ombudsman investigation reports and correspondence with the Department of Public Safety and the Department of Commerce and Economic Development.

7. Guide licensing files and files of applicants for guide licenses maintained by the Division of Occupational Licensing.

We also interviewed individuals involved in the disciplinary process including the following:

1. Individual guides or assistant guides that had their licenses suspended or revoked.

2. Division of Occupational Licensing officials and personnel responsible for assisting BGCSB in administering its responsibilities.

3. The director of the Division of Fish and Wildlife Protection, in addition to other officials in the Department of Public Safety.

ORGANIZATION AND FUNCTION

In 1989 the Legislature extensively revised the statutes (Chapter 37, SLA 1989) related to the licensing and regulation of guiding, outfitting, transportation, and other commercial services provided to big game hunters. These extensive revisions were brought on by conflict and confusion within the guiding industry. Guides complained that individuals, calling themselves either "outfitters" or "transporters" were providing unregulated guiding services. Outfitters and transporters claimed that they were not guiding, that their activities were legal, and that the guides were acting to protect their exclusivity and control rather than out of concern for providing better regulation of the industry.

The legislature acted to restore stability and provide comprehensive regulation of all of the professions. The legislature broadened the scope of the pertinent statutes to provide regulatory oversight of both outfitters and transporters in addition to guides. Part of this extensive restructuring was the establishment of the Big Game Commercial Services Board (BGCSB), which replaced its forerunner, the Guide Licensing and Control Board and its more circumscribed regulatory scope.

Big Game Commercial Services Board

The new nine member BGCSB is made up of two licensed guide-outfitters (the new, broader classification for guides and outfitters set out under the revised statutes), two licensed transporters, a commercial use permit holder, a representative from the Board of Game, a representative of Native landholders, and two members from the general public.

The board is responsible for:

1. Administering the licensing examinations for the various licenses it issues.

2. Establishing qualifications necessary for the various licenses it issues.

3. Establishing performance standards for providers of big game commercial services, and regulating the activities of those providers.

4. Compiling and publishing an annual register of service providers in good standing.

5. Prohibiting big game commercial service activities that are "unsportsmanlike, unethical, unsafe, against principles of game conservation, degrading to a profession [regulated by the board], or that adversely affect natural resources."

6. Revoking, suspending, or denying renewal of various licenses or permits it issues, following the requirements of due process.

7. Issuing transporter licenses.

8. Issuing commercial use permits.

9. Registering base camps and facilities used by individuals regulated by the board.

The statutes require BGCSB to meet at least twice annually, specifying that one of the meetings must be in Anchorage and the other "in another municipality."

Division of Occupational Licensing

The Division of Occupational Licensing within the Department of Commerce and Economic Development (DCED) provides administrative assistance and coordination to 21 boards and commissions. These boards and commissions are responsible for establishing qualifications for entry into various professions, proposing legislative amendments, adopting regulations, developing examinations, and disciplining licensed professionals for incompetent, unethical, or illegal behavior.

The division also has a staff of investigators who are responsible for investigating complaints and allegations of license holders violating the standards, ethics, or prohibitions established for the various professions licensed by the State.

DCED employs hearing officers who are responsible for conducting the formal hearings required by the Administrative Procedures Act. These hearings, necessary to the provision of due process, are a central aspect of the license sanctioning process.

Fish and Wildlife Protection

The Division of Fish and Wildlife Protection (FWP) is within the Department of Public Safety. The division is responsible for enforcing various statutes and regulations adopted to protect fish and game resources. FWP officers patrol the State by road, air, and waterway. They have the authority to issue citations, make arrests, seize fish and game taken illegally, and seize equipment used to commit violations.

BACKGROUND INFORMATION

This section discusses three aspects of guiding and licensing which relate to the issues discussed in other sections of this report. The three aspects discussed are: (1) the statutory requirements to be licensed as a guide, (2) the role that the Fish and Wildlife Protection (FWP) Division plays in investigating and disciplining guides, and (3) the investigation and hearing process followed by the Big Game Commercial Services Board (BGCSB) in disciplining guides.

GUIDE LICENSING REQUIREMENTS

To be a guide, an individual must work as an assistant

Under AS 08.54.350(a) an individual must meet 12 statutory requirements in order to receive a guide license. In addition to passing the qualification examinations prepared and administered by the board, two other key requirements are that:

1. the individual has been licensed and active as an assistant guide in three separate years; and

2. the individual has obtained written recommendations from six big game hunters, two for each year of the three most recent years that the individual was active as an assistant guide.

To be an assistant guide, the requirements are less numerous and demanding. Essentially, an applicant must be at least 18 years old, pass a required examination, have been a hunter two of the last five years, be in sound physical condition, and demonstrate a practical knowledge of first aid.

LAW ENFORCEMENT AND COURTS AFFECT GUIDE PENALTIES

There is a close relationship between law enforcement and the disciplinary process of guiding licensees. Disciplinary actions against licensees have historically involved either violation of game laws or guiding without a license. Up until the early 1980s this close relationship was administratively recognized when the Department of Public Safety (DPS) was responsible for administering the guide licensing system.

This relationship is also reflected in the guide licensing statutes. The statutes related to penalties for licensees specifically list four game violations that can result in license revocation: (1) waste of a wild food animal, (2) hunting on the same day airborne, (3) hunting during a closed hunting season, and (4) hunting in areas closed by state or federal regulation.

Because of this close relationship, the licensing board, when taking disciplinary action against license holders, is often in a situation of essentially ratifying a decision made by the courts. The courts often direct that action be taken against an individual's license as part of sentencing. Both BGCSB and its predecessor, the Guide Licensing and Control Board, have disciplined licensees following their arrest and conviction (although conviction is not always required, see inset at right) for game offenses.

GUIDES COMPLAIN OF "DOUBLE JEOPARDY"

Even when guides are found not guilty by the courts, they may still be subject to licensing penalties from BGCSB. Some guides reported to us that they felt this represented "double jeopardy" that is, being tried twice for the same offense.

The Department of Law's position is that the criminal prosecution and licensing action under the administrative procedures act are two separate judicial processes. Each process requires a different standard of proof.

In a criminal action before the courts, the State must prove guilt "beyond a reasonable doubt." At an administrative hearing the State must only show that an individual is guilty of the accusation by a "preponderance of evidence."

On occasion, the State's "case" is strong enough to meet the preponderance of evidence standard, but not strong enough for the reasonable doubt standard. In those instances, guides often face the same evidence, the same testimony of FWP officers, and the same attorney arguments. As a result, they may find themselves facing a licensing penalty despite being found "not guilty" in court.

FWP investigations affect licensees

The relationship with law enforcement also results in DPS officers (Fish and Wildlife Protection officers, and to a lesser extent the Alaska State Troopers) playing a central part in the investigations and hearings involved in the licensing process. Likewise, the efforts of federal game officers, are also relied on in assessing penalties against licensees.

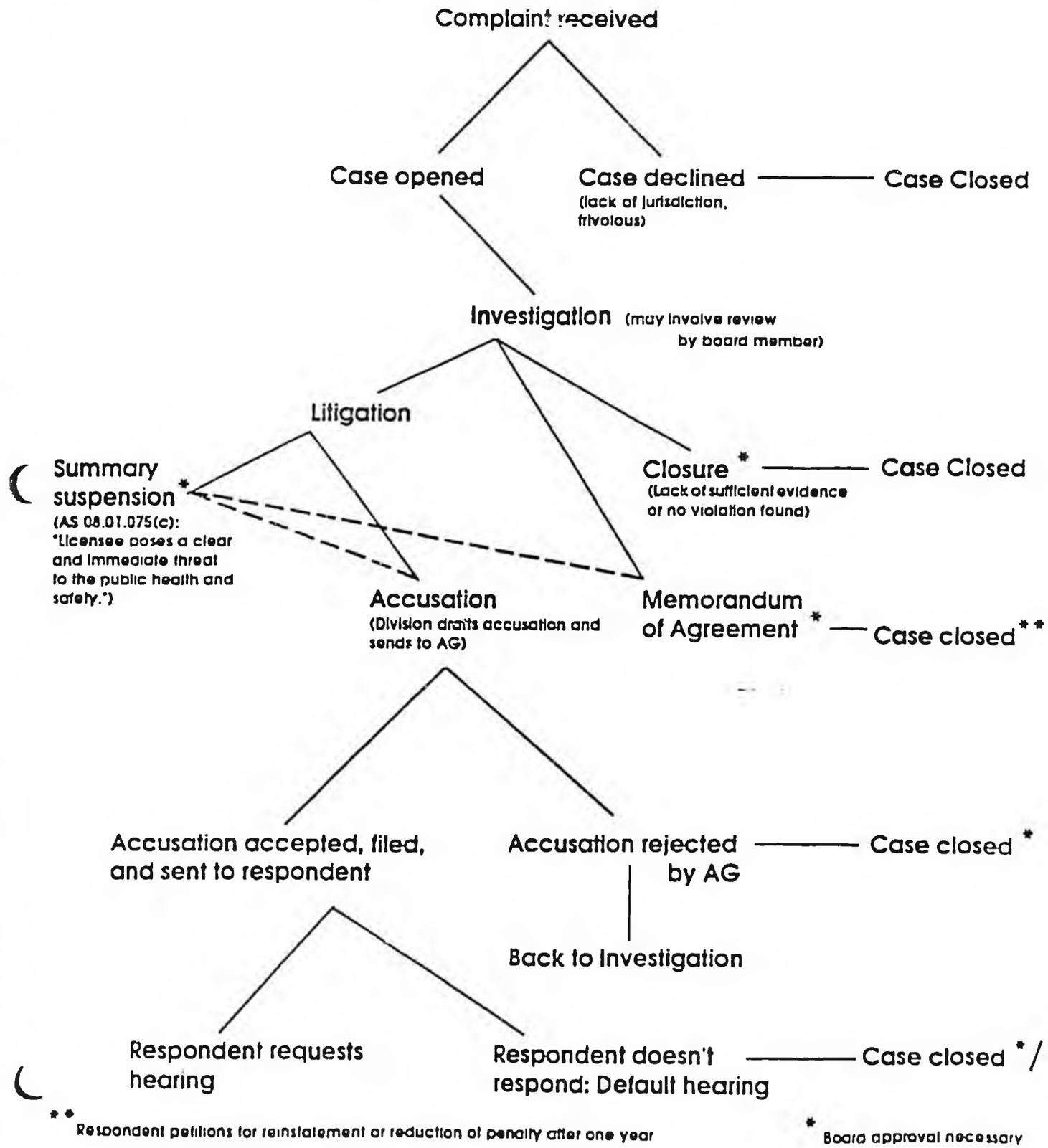
Investigators at the Division of Occupational Licensing still do play a role in developing accusations involving licensees. However, most of the sanctions taken against licensees are primarily from the arrests made by FWP and Federal game officers. As a result, the manner in which these organizations conduct investigations and develop cases has a direct impact on how effective BGCSB is, and how objective it is perceived to be, in policing its licensees.

ADMINISTRATIVE PROCEDURES ACT

The procedures followed by the Division of Occupational Licensing and BGCSB in disciplining guides are illustrated by the Investigation and Administrative Hearing flowcharts on opposite and following pages respectively. Investigation (typically started by receipt of a notice of judgment, if a guide has been convicted in court) results in an administrative hearing or case closure. Administrative hearing begins with an accusation drafted by the Division of Occupational Licensing and reviewed by the attorney general.

State of ALaska
Department of Commerce & Economic Development
Division of Occupational Licensing

Investigation

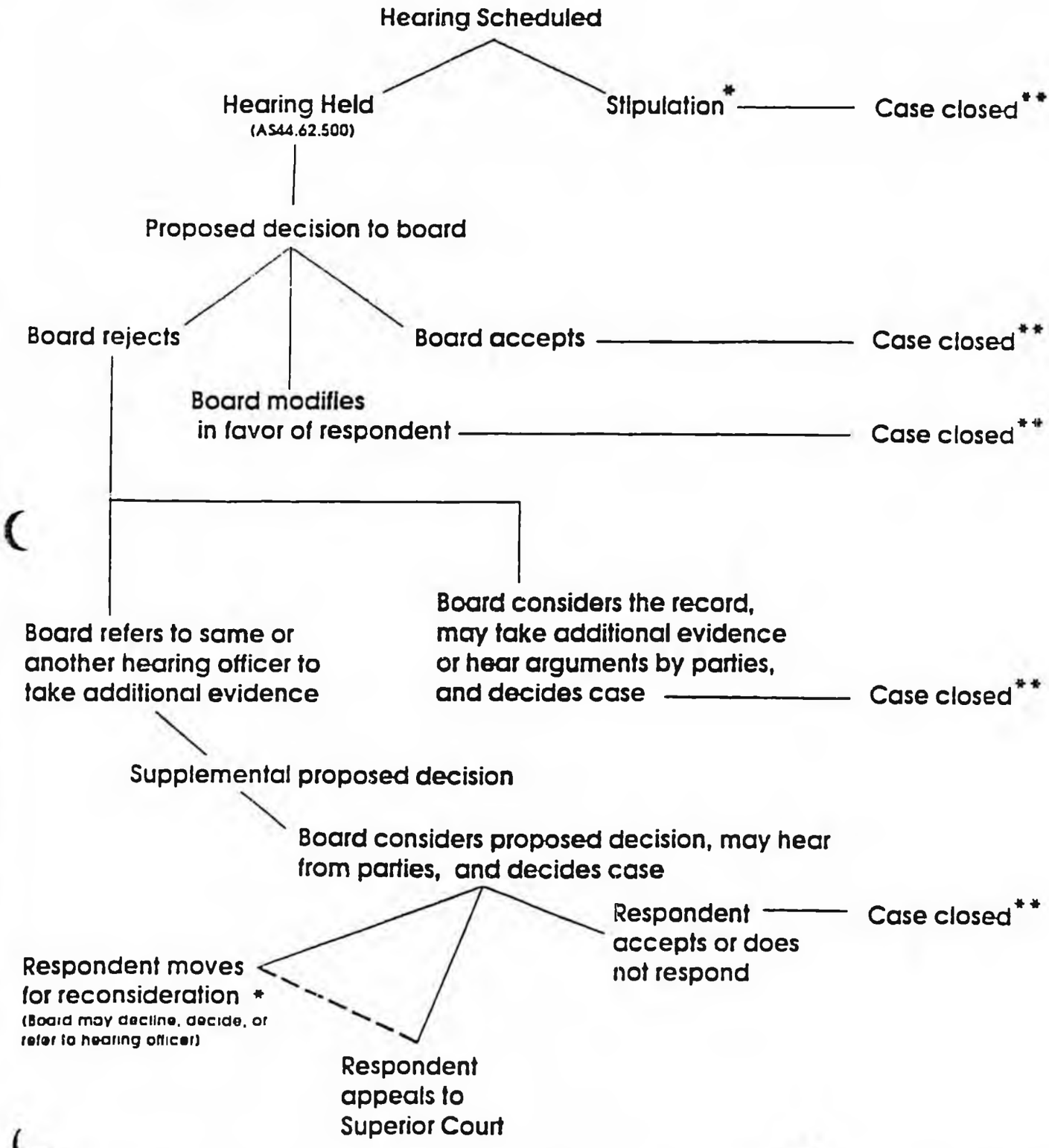


** Respondent petitions for reinstatement or reduction of penalty after one year

* Board approval necessary

State of ALaska
Department of Commerce & Economic Development
Division of Occupational Licensing

Administrative Hearing



Respondent petitions for reinstatement or reduction of penalty after one year

* Board approval necessary

Once an accusation has been accepted by the attorney general, it is sent to the guide or "respondent" who then can request a formal hearing. If the individual does not respond to the accusation, a default hearing is held and a proposed decision is prepared for board consideration and action.

The respondent may request a hearing, but even after it is scheduled the guide may contact the Department of Law and work out an agreement. This agreement, called a stipulation, is essentially a negotiated settlement between the respondent and the Department of Law which sets out various restrictions and penalties.

If a hearing is held, the hearing officer listens to the evidence presented by both the State and the respondent. The hearing officer then issues a proposed decision to the board. The board may in turn reject, accept, or modify the decision to reduce the recommended penalties.

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REPORT CONCLUSIONS

As discussed in the Background Information section, penalties involving an individual's guide license may be imposed by the courts prior to any sanction imposed by the Big Game Commercial Services Board (BGCSB). When this happens, the board's disciplinary action essentially ratifies the decision of the courts. Because of differing circumstances involved with each case, the penalties imposed by the courts for similar offenses may vary. Such differences, while within the latitude granted the courts in imposing sentences, often makes BGCSB appear inconsistent in the actions it takes against licensees. Aside from these apparent differing sanctions, we found that, with one exception (see inset below) BGCSB has been consistent in the penalties and sanctions it has imposed on various license holders.

Results of Review

Since December 1989, BGCSB has taken 17 licensing sanction actions. Of those actions, two have gone completely through the administrative hearing process. In both instances the board adopted the hearing officer decisions unanimously.

In five of the eleven actions where licenses were revoked or suspended, the penalty imposed was directed by the courts as a condition of sentencing. In two instances the courts made recommendations regarding license sanctions, but the board chose to impose a more severe penalty. In the four remaining cases, the courts made no recommendation, but the board either suspended or revoked the license.

ONE INSTANCE WHERE BGCSB ACTED INCONSISTENTLY

Two guides both pled no contest to charges of unlawful possession or transportation of game. In both their cases, the courts recommended probation for two years. For one guide, BGCSB followed the court's recommendation. No action was taken against his license but he was put on a two-year probation period.

In contrast, the other guide was prohibited from obtaining a license for three years (his license had expired after the violation) and was placed on probation for two years if he obtained a new license when again eligible.

We found no documented evidence why these two apparently similar situations were treated differently.

Stipulated agreements contained different sanctions

Two assistant guides were both convicted of failure to salvage game. In both cases the court required each individual be denied licensure for two years. Subsequent to this court action the board reached stipulated agreements with both individuals. The board suspended one guide's license for 3½ years as part of her stipulation. The other guide, by contrast, received a 4 year suspension as part of his stipulation agreement.

It has been reported to us that when a stipulation agreement is being developed that the individual being disciplined is generally an active participant in the negotiation process. While it is unclear why there was a difference in the sanctions imposed, it would seem that the slight difference in sanctions is a result of the negotiating posture and success of the two respondents rather than any active decision on the part of BGCSB.

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The Division of Fish and Wildlife Protection (FWP) should emphasize and strictly enforce its policies prohibiting participation in the guiding industry.

In December 1984, then Department of Public Safety Commissioner Sundberg issued a policy prohibiting outside employment as guides for all departmental personnel. In a January 1985 memorandum he wrote in response to a FWP officer, he discussed the reasoning behind the policy. Commissioner Sundberg wrote the officer, who had asked that the policy be reconsidered, that

> *. . .I am convinced that a conflict of interest exists between guiding and enforcement. . . .*
>
> *Also, the probability of risk to the officer's career and of embarrassing this agency is increased if we allow our personnel to become engaged in this activity. Public perception can be as harmful as an actual occurrence. A complaint, even if unfounded, could cost the Department thousands of dollars to investigate and create unfavorable publicity. . . .*
>
> *Your request for reconsideration for outside employment as a guide is denied.*

Supervisors did not support, and even contradicted, policy

Since 1984, the department's policy has not always been consistently enforced. In the past, supervisory management did not believe that guiding was necessarily a conflict with enforcement. Accordingly, there appears to have been little effort to enforce the policy, and it has been reported that supervisors actually encouraged officers to work in the guiding industry.

Although one officer in particular was widely known to work as an assistant guide, his evaluations did not reflect any concerns over this activity and the individual was even promoted from sergeant to lieutenant during this period.

The clearest reflection of this past attitude on the part of supervisory management can be found in the department's response to the 1988 ombudsman investigation (see discussion in inset on the next page). In response to the ombudsman's report involving an officer's guiding activities, the department stated that the individual had not violated departmental policy because he did not receive compensation. In defending this rather narrow perspective involving the interpretation of the policy, the department wrote that:

[Guiding] is not incompatible or in conflict with the proper discharge of official duties. We have assigned other members of this division to assistant guiding activities in a guide's camp to increase their knowledge of, and familiarity with, guiding operations. It actually makes them better in their enforcement work. . . .

In the case at hand [the department does not] think that there has been a violation so [we] have not passed the complaint on to any other authority. Furthermore we have gone beyond what I think is strictly required and prohibited the activity in question just to avoid the appearance of conflict.

FWP OFFICER CONTINUED TO GUIDE DESPITE DENIAL

The officer who was denied continued outside employment as a guide by Commissioner Sundberg, continued his guiding activities. According to records filed with the Division of Occupational Licensing, the officer guided during 1985, 1986, and 1987. His file included recommendations from hunters he accompanied in the field and evidence that he intended to apply for, and take, the guide licensing examination to be certified as a guide.

1988 Ombudsman Investigation

In September 1988, the Ombudsman investigated a complaint alleging that the officer involved had violated both departmental policy and Executive Branch Ethics Act prohibitions against outside employment that present a conflict of interest with official duties. In a December 1988 finding the ombudsman made a determination that the complaints lodged against the officer were partially justified.

In our view, these statements are not consistent with the intent of the original policy. Such a position by a middle-management DPS official is indicative of a past lax attitude by departmental supervisors regarding the policy. By failing to be sure both the spirit as well as the letter of the policy was enforced, the department allowed its investigatory methods and approaches to be called into question. Since its response to the ombudsman in December 1988, the department is beginning to recognize these past practices and attitudes as a problem.

Department recognizes importance of policy

By November 1990, DPS was taking compliance of the policy much more seriously. The department emphatically reprimanded an officer regarding his unpaid guiding activities. While acknowledging that unpaid assistant guiding may comply with the letter of the policy, the department clearly felt that the activities violated its spirit.

Additionally, DPS acknowledged that the requirements of the Executive Branch Ethics Act of 1986 made it clear that no employee may work in a situation that presents a conflict of interest, irrespective of whether or not they are paid for the work. The department acknowledged that the guiding activities caused the very accusations and allegations that the

policy was designed to avoid and was a source of embarrassment to DPS.

The tone and emphasis of this position represented a different attitude, that is consistent with the intent and philosophy behind the department's original policy. The department should reevaluate the current policy within the context of the Executive Branch Ethics Act, and clearly communicate both the letter and spirit of the prohibition on guiding to all affected personnel.

Recommendation No. 2

DPS should conduct an internal review regarding the basis and procedures involved in developing undercover law enforcement actions on guiding and game violations.

According to the director of FWP, most game law violations are detected and prosecuted through the use of undercover police operations. Our review of disciplinary actions taken against guides by the Big Game Commercial Services Board, tend to confirm this observation. Seven of the ten disciplinary actions reviewed used undercover operations to make the original arrest. The director acknowledged that there is a great deal of discretion allowed over who to "target" for an undercover operation. The officer most prominently involved working as an assistant guide was in the position to influence and use his discretion over who would and would not be subject to an undercover operation.

COMPENSATION A KEY PART OF THE STATUTE'S DEFINITION OF GUIDING

It late 1988 it was DPS' position that the officer involved in allegations of guiding did not violate departmental policy because he did not receive compensation. If the officer did not receive compensation, it appears that he may have misled the Division of Occupational Licensing.

On application forms filed with that agency, the officer attested that he was indeed acting as an assistant guide, and submitted written documentation that he guided hunters under the supervision of a licensed guide. The officer also testified in court that he was not paid as an assistant guide.

AS 08.54.240 (3) defines guiding as:

> accompanying or directing a hunter in the field, personally or through an assistant, *for compensation*, while the hunter or the person accompanying or directing the hunter spots, stalks, pursues, tracks, kills, or attempts to kill big game. . .

Under this definition, if the officer did not receive compensation, then it appears that representations made to the Division of Occupational Licensing were inaccurate.

As discussed in the Auditor's Comment section of this report, BGCSB should scrutinize any assistant guiding experience claimed by this individual, in the context of the statutory definition, if in the future he should apply for licensure as a guide.

At a minimum, these circumstances give the appearance that this individual could suppress information regarding the activities of licensed guides with which he was associated, while at the same time making decisions to target others who were competitors of his guide associates. We believe it is important that FWP satisfy the guiding public that undercover operations are appropriately directed and are carried out on the basis of sufficient and reliable criteria.

OMBUDSMAN DISCUSSES POSSIBILITY OF FUTURE BENEFIT

In response to the complainant who initiated his agency's 1988 investigation, the Ombudsman replied that

> *You allege that the real conflict in [the FWP officer's] work as an assistant guide will not be realized until he retires. You assert upon retirement, [the officer] can and will reactivate his assistant guide time (allegedly acquired improperly while he was employed by the division as a fish and wildlife protection officer) and apply it toward his application for a master guide license.*
>
> *It is altogether possible that this may happen. It is also possible that it will never happen. We can only know for certain what [the officer] will do when he retires when that time comes. I cannot and will not make a guess about [the officer's] future behavior. I cannot hold a case open for years, waiting for a potential conflict of interest to emerge in the form of [the officer's] application for a master guide license.*
>
> *If, and when, [the officer] does apply for the master guide license, the use of his assistant guide time will be a factual issue. With your keen interest in [the officer's] activities, it is reasonable to expect you to submit testimony to the [BGCSB] if that event occurs in the future. Today, it is a speculative issue....*
>
> *With the transmission of this letter, I am closing the complaint. You are free to file a new complaint if and when [the officer] reactivates his assistant guide time in an application for a master guide license. You may also file a written complaint under the auspices of the Executive Ethics Act if you wish to press that issue further.*

The Ombudsman's response suggests that the only avenue to resolve the complainants issues lies in how the licensing board will view the "experience" of the FWP officer, if and when he attempts to use it in applying for his guide license.

AUDITOR'S COMMENTS

Former Commissioner Sundberg warned in 1985 about the dangers of allowing Department of Public Safety personnel to participate in the guiding industry. As cited in Recommendation No. 1, his concerns over embarrassment to the agency, negative public perceptions, and the cost of investigating and dealing with even unfounded complaints all proved to be prophetic.

BGCSB should scrutinize any future guide application

As observed by the Ombudsman, (see inset on the opposite page) the real possible incentive or compensation for the FWP officer-assistant guide, is in the future at the time of his retirement or separation from an FWP.

In our view, the Big Game Commercial Services Board (BGCSB), may offer the best opportunity to provide some equitable, objective resolution of the situation. The board can do this by carefully scrutinizing any assistant guiding experience accumulated while an individual served as an FWP officer.

As discussed in the inset on page 15, accompanying individuals on a guided hunt is not necessarily guiding. The statute requires that an individual receive compensation for guiding a hunter in order for the experience to be relevant to the licensing process. An FWP officer has submitted an application for licensure as a guide, (an application that subsequently has been withdrawn) with documentation substantiating his assistant guiding activities. However, if he was unpaid, as he testified to in court, BGCSB should carefully consider whether or not this experience meets the statutory definition of guiding.

Such scrutiny would nullify any advantage or "indirect" compensation that the FWP officer gained by acting as an assistant guide. Leaving aside the legal discussion of whether uncompensated assistant guiding is qualifying experience in the strictest sense of the law, such scrutiny and consideration would enhance the integrity of the regulatory process.

BGCSB relies in large part on the efforts of FWP to effectively meet its statutory mandate. Any flaw in the integrity of that enforcement effort, either real or perceived, reflects to some degree on the board. By carefully scrutinizing the circumstances and documentation supporting any former FWP officer's application for a guiding license, the board can enhance the integrity of the investigatory efforts of both FWP and itself.

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ISSUES NEEDING FURTHER STUDY

Department of Public Safety (DPS), Fish and Wildlife Protection (FWP) officers have testified in court that decisions regarding investigations and development of possible undercover operations often have been developed from "tips" received through a program known as the Wildlife Safeguard Program.

The Wildlife Safeguard Program encourages the public to phone a toll-free "800" number and report any observations or information they may have about possible game law violations. If these tips are used in the successful prosecution of an individual, then rewards are paid to the hotline informants. The program is run by a private nonprofit organization, and does not receive any direct state funding. DPS does provide support services to the organization such as answering the hotline, selling fund-raising posters, and arranging for the organization to raffle off a hunting permit to raise funds.

As discussed in Recommendation No. 2 in the Findings and Recommendations section, we suggest that DPS reevaluate the criteria it uses to develop undercover operations. In addition, we suggest that the Legislative Budget and Audit Committee may want to consider reviewing the information received over the Wildlife Safeguard hotline and determine if it is being used in a consistent, objective, and unbiased manner.

The conflict of interest discussed at length in this report may be reflected not only in what cases and reported violators that FWP have elected to pursue, but also in the tips and information that may have been ignored. If the agency has received numerous complaints regarding possible violations by a professional guide, the fact that no investigatory action was taken may be significant.

Controls over reward payments may also be possible area of concern

Although state funds are not being directly used, FWP protection officers have, in the past, been involved in passing rewards to informants. Reportedly the rewards are paid in cash, and have been as much as $2,000. Payouts of these amounts in cash, with the involvement of state employees, provides another possible area or issue that may warrant further study or review.

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WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

OFFICE OF THE COMMISSIONER

P.O. BOX D
JUNEAU, ALASKA 99811-0800
PHONE: (907) 465-2500

November 21, 1991

Mr. Randy Welker
Legislative Auditor
Legislative Budget and Audit Committee
Division of Legislative Audit
P.O. Box W
Juneau, AK 99811

Dear Mr. Welker:

Thank you for the opportunity to review the preliminary audit report regarding consistency of disciplinary penalties of the Big Game Commercial Services Board.

The department concurs with Recommendation No. 1, The Division of Fish and Wildlife Protection (FWP) should emphasize and strictly enforce its policies prohibiting participation in the guiding industry. We believe a state policy should go a step further and include Division of Occupational Licensing staff involved in licensing and investigations of guide-outfitters, as well as Department of Fish and Game employees/biologists who are involved in game management/harvest decisions. During the time period of Commissioner Sundberg's policy on prohibiting outside employment as a guide for FWP employees, the Division of Occupational Licensing requested its employees who were, at the time, licensed as assistant guides, but not employed or associated with any guides, to voluntarily not renew their assistant licenses. This request was made on the basis of possible public perception of impropriety rather than actual complaints. Most recently, it has been brought to our attention that the activities of the Department of Fish and Game employee(s) who are licensed guides and conducting guiding activities may be causing some concern within the guiding industry and public. We believe that employees should be allowed to place their licenses in a suspended status for reactivation at the same level when they leave employment in the job which creates the conflict.

With regard to Recommendation No 2, DPS should conduct an internal review regarding the basis and procedures involved in developing undercover law enforcement actions on guiding and game violations, the department agrees that there should be a system in place which ensures some degree of uniformity and consistency in developing undercover operations.

Again, thank you for this opportunity to comment.

Sincerely,

Glenn A. Olds
Commissioner

GAO/ra037.GAO
112191b

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF PUBLIC SAFETY

OFFICE OF THE COMMISSIONER

P.O. BOX 111200
JUNEAU, ALASKA 99811-1200
PHONE: (907) 465-4322

December 5, 1991

Mr. Randy S. Welker
Legislative Auditor
Alaska State Legislature
P. O. Box W
Juneau, AK 99811

Dear Mr. Welker:

Re: Audit No. 08-4402-91

I am writing in response to your letter and preliminary audit report of October 28, 1991. Thank you for the opportunity to review and comment on the preliminary report, and for your courtesy in allowing us an extension of time. My comments are as follows:

Recommendation No. 1: "The Division of Fish and Wildlife Protection (FWP) should emphasize and strictly enforce its policies prohibiting participation in the guiding industry."

I agree, and we are doing just that. Under the Executive Branch Ethics Act, all requests for outside employment (paid or unpaid) must be submitted to and approved by me. I assure you that I will not approve any requests for involvement in the guiding industry while I am Commissioner. F&WP personnel are well aware of this.

Recommendation No. 2: "DPS should conduct an internal review regarding the basis and procedures involved in developing undercover law enforcement actions on guiding and game violations."

I agree, and we are doing this. The FWP Director and his staff are drafting a policy statement for my review. I anticipate that a final policy will be in place by early next year. For your information, since being appointed Commissioner I have reestablished an Office of Planning and Research within the Department. My staff are reviewing all existing DPS policies and procedures and suggesting revisions for my consideration.

On page 15 of your report, in the first paragraph under Recommendation No. 2, I suggest the following changes to the present language: "According to the director of FWP, [most game law violations] most serious guiding violations are detected and prosecuted through the use of undercover police operations." I believe this is a more accurate summary of Col. Jordan's comments, in the context in which they were made. Also: "At one time, the officer most prominently involved working as an assistant guide..." This additional language would make it clear that the situation being described is not the current one, but refers to the past.

Other comments: On page 15 of your preliminary report there is a colored block of text which discusses your office's interpretation of the statutory definition of "guiding" as it relates to licensure requirements. I asked the Alaska Department of Law to review the relevant language, and found that they do not agree with your legal interpretation. In light of this, I do not agree with your conclusion that "if the officer did not receive compensation, then it appears that representations made to the Division of Occupational Licensing were inaccurate." I have attached a copy of the memorandum which we received from the Department of Law on this issue.

On page 19 of your report, you suggest that the Legislative Budget and Audit Committee may want to consider reviewing the information received over the Wildlife Safeguard hotline. We certainly have no objection to such a review, and we are confident that information received over the hotline is being handled appropriately, with no bias or special interests involved.

Regarding your comments on controls over reward payments, we would welcome suggestions about the best way to get rewards to informants, while still protecting confidentiality. As you undoubtedly know, no rewards are paid out unless authorized by the Safeguard Boards, which are made up entirely of volunteer private citizens. Contrary to the impression left by your report, the majority of rewards are paid by check. If the informant insists upon anonymity, however, obviously a check cannot be issued. On those occasions when cash must be used, Wildlife Safeguard considers using commissioned officers to deliver it as the safest procedure. The one $2,000 payment to which you refer was delivered personally to the informant

by the Director of FWP. If you can think of a safer or more reliable way to handle these payouts to sources who wish to remain anonymous, please let us know.

Thanks again for the opportunity to comment on your preliminary report. I would be glad to discuss my responses with you further, if you would like.

Sincerely,

Richard L. Burton
Commissioner

Attachment

MEMORANDUM

State of Alaska
Department of Law

TO: Gayle Horetski
Deputy Commissioner
Department of Public Safety

DATE: December 4, 1991

FILE NO.: 663-92-027

TEL. NO.: 465-3428

SUBJECT: Assistant guiding under former AS 08.54.110

FROM:

Dean J. Guaneli DG
Assistant Attorney General
Criminal Division Central Office

This is in response to your request for our opinion whether one of the qualifications for becoming a registered guide, under former AS 08.54.110 (repealed in 1989), was that a person have received compensation for acting as an assistant guide. After reviewing the applicable statutes, it is my opinion that, prior to July 1, 1986, it was not necessary to have received compensation in order to have accumulated the necessary level of experience as an assistant guide to become a registered guide, and that after that date a person would not have been acting unreasonably in coming to that same conclusion.

The genesis of your question is an ombudsman's draft report which concludes that to have "performed the services of an assistant guide" under former AS 08.54.110 meant "being employed by a registered guide."[1] The draft report therefore proposes to find that a departmental employee "improperly made conflicting statements" by saying he was qualified to be a registered guide, while at the same time asserting that he had not received compensation for being an assistant guide. For the reasons set out in this memorandum, the ombudsman's conclusion is incorrect.[2]

Prior to 1989, in order to have been qualified to become a registered guide, a person must have previously "performed the services of an assistant guide." Former AS 08.54.110(a)(7) (prior to 1986 numbered AS 08.54.110(a)(8)). There was no definition of

---

[1] A preliminary audit report by the Legislative Budget and Audit Committee reviewed an earlier version of the ombudsman's report and came to the same conclusion. Neither the ombudsman's report nor the auditor's report contains any detailed analysis of the statutes involved.

[2] There also exists an opinion, written by a private attorney representing the subject of the ombudsman's report, concluding that the ombudsman is incorrect. While I have agreed as a general matter with the private attorney's conclusion, I disagree with his analysis and reasoning.

the phrase "performed the services of an assistant guide," although the verbs "guide" and "guiding" were defined in former AS 08.54.240 to include the requirement of compensation.

Under this definition, if you were assisting or directing a hunter in the field for compensation you were "guiding."[3] This definition appears, however, to have been inclusive, rather than exclusive, that is, it established that anyone assisting hunters for compensation had to be licensed as a guide, rather than establishing that one who did not receive compensation could not be considered to have performed as a guide.[4]

This definition does not, therefore, answer the question of whether a person must have accepted compensation to have been acting as an assistant guide for purposes of qualifying to become a registered guide. To answer that question, other statutes must be analyzed.

Former AS 08.54.130 required that a "class-A assistant guide" be "under the supervision" of a registered or master guide. There was no requirement of compensation, nor was there a requirement of an employment relationship. Perhaps it was an oversight, but there was no similar requirement that non-class-A assistant guides be supervised by a registered guide, much less employed or compensated. Former AS 08.54.140. In addition, prior to July 1, 1986, AS 08.54.210(a)(6) made it unlawful for a registered or master guide "to employ or supervise" more than three assistant guides at the same time, thus indicating a difference between the concepts of employment and supervision. (Emphasis added.) Again, there was no requirement of compensation.

Moreover, in former AS 08.54.110(a) the legislature used the phrase "performed the services of an assistant guide," rather than the simpler phrase "employed as an assistant guide." The obvious purpose of AS 08.54.110(a) was to assure that, before someone became a registered guide, he had obtained sufficient experience as an assistant guide. There is no indication the legislature intended to require that an assistant guide have accepted compensation.

Based on this statutory scheme, prior to July 1, 1986, a person could have "performed the services of an assistant guide" under former AS 08.54.110, and have been qualified to become a registered guide, without having accepted compensation.

---

[3] The definition of "guiding" changed somewhat in 1986, but that change does not affect this opinion. Sec. 23, ch. 71, SLA 1986.

[4] The definition of "guide" was used to determine whether a person had committed the offense of "guiding without a license". Former AS 08.54.210.

July 1, 1986, was the effective date of amendments to some of the statutes in AS 08.54. Ch. 71, SLA 1986. In particular, former AS 08.54.210 was amended to make it unlawful for an assistant guide to be along on a guided hunt "except while employed and supervised by a registered or master guide." Former AS 08.54.210(a)(8). (Emphasis added.) Despite this new statute which seemingly required that assistant guides be both employed and supervised by a registered or master guide, there was no change made to former AS 08.54.130, which required class-A assistant guides merely to be under the "supervision" of a licensed guide, with no requirement of either "employment" or "compensation." There was, however, a new statute enacted that required non-class-A assistant guides to be employed and supervised by a registered guide. Former AS 08.54.141.

This ambiguity is difficult to resolve, however a definitive resolution is not necessary. In my opinion, even after July 1, 1986, a reasonable person could have concluded that a person "performed the services of an assistant guide" under former AS 08.54.110, and was qualified to become a registered guide, without having accepted compensation.

Even if there was a requirement of both employment and supervision, the statutes made no mention of "compensation" for assistant guides. The ombudsman's draft report seems to refer to employment and compensation interchangeably, but it appears that in AS 08.54 the legislature treated them differently and recognized three types of master-servant relationships: "supervision," "employment," and "compensation."

Before 1986, the definition of "guide" in AS 08.54.240 included the concept of "monetary or material remuneration." In 1986 that definition was modified to refer to "compensation or with the intent to receive compensation." Neither version of the definition referred to "employment." If the legislature had simply intended to refer to the concept of being "employed," it could have more easily done so than using the complicated phrases necessary to convey the concept of money changing hands.

It is not necessary at this point to try to fully explain the differences between "supervision," "employment," and "compensation." Suffice to say that, even after July 1, 1986, a person, who had waived payment or received only transportation and food while acting as an

assistant guide on a hunt, would not have been acting unreasonably in asserting that he had not received "compensation," while at the same time seeking to rely on that experience as an assistant guide in attempting to become qualified as a registered guide under AS 08.54.110.[5]

Please contact me if you have questions.

DJG:jf

cc: Division of Occupational Licensing
Department of Commerce and Economic Development

[5] It should be noted that the current definition of "compensation" in AS 08.54.590 excludes "reimbursement for actual expenses incurred", which suggests that an assistant guide who obtains transportation and food has not accepted "compensation". It should also be noted that the current guide-outfitter statutes in AS 08.54.350 -- 590 contain the same ambiguity as past statutes, by continuing to refer to the concepts of "supervision", "employment" and "compensation". As a practical matter, the division of occupational licensing did not previously, and does not now, inquire whether assistant guides have been paid in determining their qualifications to become a registered guide.

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ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE
Division of Legislative Audit

P. O. Box W
Juneau, AK 99811-3300
(907) 465-3830
FAX (907) 465-2347

January 2, 1992

Members of the Legislative Budget
and Audit Committee:

A formal legal review of the language in the guide licensing statutes is included in the response of the Department of Public Safety. The analysis addresses the issue raised in the inset on page 15 regarding the concept of compensation and how it relates to the statutory definition of guiding. From a layman's reading of the statute it appears that if an individual serves as an assistant guide but is not paid for their services, then perhaps that experience does not qualify as assistant guiding experience.

The Department of Law's (DOLaw) analysis concluded that

> *...prior to July 1, 1986, it was not necessary to have received compensation in order to have accumulated the necessary level of experience as an assistant guide to become a registered guide, and that after that date a person would not have been acting unreasonably in coming to that same conclusion.*

The analysis is developed from DOLaw's review of the history of the changes in statutory language, especially with the amendments made in 1986. After concluding that the concept of compensation was absent from the statutes prior to July 1, 1986, DOLaw feels the changes made created some ambiguity by introducing the concept of compensation. The analysis goes on to conclude

> *This ambiguity is difficult to resolve, however a definitive resolution is not necessary. In my opinion, even after July 1, 1986, a reasonable person could have concluded that a person "performed the services of an assistant guide" under former AS 08.54.110, and was qualified to become a registered guide, without having accepted compensation. ... Suffice to say that, even after July 1, 1986, a person, who had waived payment or received only transportation and food while acting as an assistant guide on a hunt, would*

> *not have been acting unreasonably in asserting that he had not received "compensation," while at the same time seeking to rely on that experience as an assistant guide in attempting to become qualified as a registered guide . . .*

The primary purpose of raising the point in the audit report was to more fully substantiate our audit evidence that the Fish and Wildlife Protection officer was on record as serving as an assistant guide. The issue of compensation and the apparent contradiction with court testimony was a secondary issue that had been raised by the investigator at the Division of Occupational Licensing at the time of the original internal investigation. In our review of the records and documents related to that investigation, we found no evidence that this particular issue had been satisfactorily resolved or analyzed. In view of DOLaw's response this issue has now been formally addressed.

The central point of our discussion remains unaffected. To restate, the Big Game Commercial Services Board (BGCSB) has a vital interest in maintaining the integrity and independence of the investigations involved in the licensing disciplinary process. The board should do all it can within its statutory powers to strengthen and improve that process. Accordingly, BGCSB should carefully consider granting guide licenses to individuals who gained necessary, qualifying experience when they were employed in positions involving either real or apparent conflicts of interest.

Randy S. Welker, CPA
Legislative Auditor

STATE OF ALASKA
DEPARTMENT OF PUBLIC SAFETY
DIVISION OF FISH AND WILDLIFE PROTECTION

OFFICER'S INFORMATION MANUAL

APPROVAL: Jack D. Jordan	Policy No.: C-9
	Date: July 16, 1990
PAGE 1 of 2	SUBJECT: OUTSIDE EMPLOYMENT

All requests for employment outside the Department are reviewed by the Commissioner's Office on a case by case basis. However, the following guidelines have been previously established concerning certain types of work which will not be approved.

1. Alcohol dispensary business
2. Guiding profession
3. Commercial fishing or sport fish guiding

The permission may be withdrawn if a conflict or the appearance of a conflict, with the discharge of the employee's official duties arises.

In the Ethics Law governing outside employment (AS 39.52.170), there is further clarification stating; no public employee may work for (paid or unpaid) an organization other than the employee's own department if that work is incompatible, or in conflict with the proper discharge of official duties.

Please note two important points above:

1. The work is paid or unpaid.
2. Appearance of a conflict is sufficient grounds for disapproval.

Permission for outside employment must be renewed annually.

Requests for outside employment should be made in memo form and must be accompanied by a blue Ethics Disclosure Form. An example of the form follows this policy. Forms are available from the Commissioner's Office and the Department of Public Safety Personnel Office.

Please note that under the Executive Branch Ethics Act, the only person authorized to sign the Ethics Disclosure Form for this Department on behalf of the Commissioner is the "Designated Ethics Supervisor", Special Assistant Gretchen Pence.

Ethics Disclosure Form

Outside Employment or Services Notification

To: Designated Supervisor

Subject: Certification of Outside Employment or Services (AS 39.52.170)

In accordance with AS 39.52.170(b), I hereby officially report my employment or provision of services outside the Department of _____

These outside duties will in no way affect my usual State duties or duty hours in this Department. This employment or service consists of the following:

_____

_____

_____

_____

Hours and days of the week _____

I understand that for any employment outside State service, no State owned/operated facilities, supplies, equipment and/or vehicles (including personnel time and effort) shall be utilized in any manner whatsoever.

_____	_____
(Signature)	(Date)
_____	_____
(Printed Name)	(PCN)
_____	_____
(JobTitle)	(Location)

Designated Supervisor's Acknowledgement

Your notification of engagement in outside employment or service has been received.

Acknowledgement of your outside employment or service is made with the understanding that your outside work will not in any way detract from or be in conflict with the proper discharge of your official duties as an employee of this Department.

Please note that any change in your outside service or employment must be reported when it occurs.

_____	_____
(Signature-Designated Supervisor)	(Date)

STATE OF ALASKA DEPARTMENT OF FISH AND GAME STANDARD OPERATING PROCEDURE	No. II-040	PAGE 040-1
	ISSUED 06/19/91	EFFECTIVE 06/19/91
SUBJECT: ETHICS/STANDARDS OF PROFESSIONAL CONDUCT		
CHAPTER: DEPARTMENT POLICIES		
SUPERSEDES: No. / PAGE / DATE ALL PREVIOUS EDITIONS	APPROVED BY Carl L. Rosier	

PURPOSE

This policy shall be known as the departmental ethics code or Standards of Professional Conduct. Its intent is to establish uniform standards of conduct for employees of the Alaska Department of Fish and Game (ADF&G). The policy is adopted pursuant to AS 39.52.920 which states:

> Subject to the review and approval of the attorney general, an agency may adopt a written policy that, in addition to the requirements of this chapter, limits the extent to which a public officer in the agency or an administrative unit of the agency may
>
> (1) acquire a personal interest in an organization or a financial interest in a business or undertaking that may benefit from official action taken or withheld by the agency or unit;
>
> (2) have a personal or financial interest in a state grant, contract, lease, or loan administered by the agency or unit; or
>
> (3) accept a gift.

OBJECTIVE

The objective of establishing Standards of Professional Conduct is to recognize and ensure the legal rights, privileges, and personal beliefs and activities of departmental employees are protected while providing guidance regarding activities which might substantially and materially call into question an employee's integrity. It is the intent of this policy to protect the rights and reputations of departmental employees by providing standards of conduct that will apply to all similarly situated employees of the department. Employees who engage in activities appearing to be outside the bounds of these standards may request a review of such activities by the designated supervisor as defined in AS 39.52.960(8)(A) and (G). Decisions regarding the activities of department employees will be made based on AS 39.52, applicable Personnel Rules, and the following Standards of Professional Conduct. Acceptance of employment with ADF&G is an affirmation of acceptance on the part of the employee that the rights and obligations established in the Standards of Professional Conduct are necessary for both the employee and the department.

STATE OF ALASKA DEPARTMENT OF FISH AND GAME STANDARD OPERATING PROCEDURE	No. II-040	PAGE 040-2
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DISTRIBUTION

All SOP manual holders.

RATIONALE

ADF&G is mandated to "manage, protect, maintain, improve, and extend the fish, game and aquatic plant resources of the state . . ." [AS 16.05.020(2)]. The people of Alaska have thus placed in the hands of the employees of the department their faith and trust in the department's ability to meet its obligations of professional resource stewardship. Public acceptance of the department's programs depends, to a great degree, on how the public perceives the activities of employees, both in the workplace and to an extent in their personal lives. This high degree of public trust carries an obligation to maintain high standards of professional conduct. If the public recognizes employees of the department as impartial and unbiased, regardless of their position within the department, the management programs developed by professional employees have a far better chance of being approved and publicly accepted. As professional resource managers, employees of the department must accept that the public expects higher standards of them in conducting certain activities than is expected of other public employees. While some might see this as burdensome, it can better be seen as an indication of the public's high expectations and high degree of interest in the work of the department.

Employees generally recognize that it is difficult for many citizens of the state to see a department representative on one occasion as a professional manager of a resource, and another time that same employee is seen engaged in a commercial activity involving the same resource. However, the extent and degree of this public perception varies widely. The department recognizes that substantial and material conflicts that call into question the integrity of the employee or the department must be prevented. Instances of perceived conflict will be individually evaluated pursuant to AS 39.52, pertinent Alaska Personnel Rules, and the Standards of Professional Conduct, including the following considerations:

1. The extent of management jurisdiction an employee may have over a departmentally managed resource and the extent to which

an employee may have access to information not generally distributed to the public.

2. The potential an individual employee may have by virtue of his or her position in the department to affect or influence management decisions.

3. The extent to which a conflict is real or immediate or whether it is significant, conjectural, or contrived.

4. The extent to which a perceived conflict will adversely affect the credibility of the employee and the department. If the conflict is found to be genuine in nature and perception, the department and the employee will be called upon to determine a remedy that will remove or acceptably minimize questions regarding the credibility of either.

DEFINITIONS

Commercial Activities: Activities for which an employee receives compensation, as defined in AS 39.52.960(7).

Commercial Guiding: Accompanying or being present with a hunter or fisherman in the field, personally or through an assistant, for direct financial compensation. "Commercial guiding" does not include:

1. Accompanying or being present with a hunter or fisherman guided by another person if the employee has also engaged the services of a guide.

2. Providing transportation to or from the field, if the persons providing transportation and the persons being transported do not stalk, pursue, track, kill, or attempt to harvest fish and wildlife resources.

3. Engaging in personal, lawful recreational or subsistence hunting or fishing, either alone or with friends or relatives, when such activities are not conducted for the purpose of, or with the intent of, receiving compensation. (Inconsequential compensation, such as sharing expenses, is not guiding. Also see AS 39.52.130.)

Commercial Harvest: An activity which involves the taking or harvest of a resource managed by the department for compensation from a commercial processor, fur buyer, guide client, or retailer. (Also see ethics policy, department findings on exclusions to this definition.)

Benefit: As defined in AS 39.52.960(3).

Department Employee: A person with official status, holding a position control number, and receiving compensation for work performed, but does not include the employee's spouse, children, siblings, or other family members for the purposes of this ethics policy. (Note: Certain additional prohibitions extend to an employee's spouse, blood relation to the second degree of kindred, and members of the employee's household under the Executive Branch Ethics Act. See AS 39.52).

Designated Supervisor: The commissioner or the commissioner's designee.

PROFESSIONAL CODE OF CONDUCT

In an effort to maintain high professional standards of the department and to retain the public trust necessary for the department and its employees to meet statutory obligations, each department employee shall:

1. Use sound biological information in an unbiased manner in recommending and making management decisions.

2. Present information to the public and to peers factually and impartially, and not let personal preference or bias interfere with this obligation.

3. Recognize that some activities and actions may be perceived by the public as inappropriate for an employee of the department.

4. Recognize that employee activities associated with natural resource use, particularly commercial uses, are often viewed unfavorably by the public and peers.

5. Refrain from commercial harvest activities unless specifically approved by this policy or the division director and the designated supervisor.

6. Use discretion expected of professional employees when conducting activities which might tend to call into question personal or departmental credibility, and consult with supervisors if there is any such doubt in an employee's mind.

7. Obey fish and game laws and regulations.

8. Not use their positions for personal financial gain or to give unwarranted benefit or treatment to any person or group, or to coerce subordinates for his or her personal or financial benefit.

9. Recognize that off-duty activities of many department employees substantially benefit their job performance, public acceptance, and confidence expressed in the department. Fishing, hunting, trapping, photography, camping, and other similar activities provide employees the opportunity to obtain personal awareness and understanding of the public's involvement in the resources managed by the department. Membership in professional societies and community clubs and organizations, to the extent suggested by the standards, provides benefits to both the individual and the department.

INTERPRETATION

This policy will be interpreted in conformity with the Executive Ethics Act (AS 39.52). All employees are urged to read "Ethics--A Handbook for Public Employees," available through personnel officers or from the designated supervisor. Provisions of the Standards of Professional Conduct will apply to all employees of ADF&G.

Any departmental employee convicted of violating a state or federal fish and game law or regulation is subject to disciplinary action by the department. The violation will be reviewed by the appropriate division director, the designated supervisor, and the commissioner.

Disciplinary action taken as a result of a violation of these standards may range from a verbal warning, to a written reprimand, to termination, depending upon the severity of the violation and any extenuating circumstances.

STATE OF ALASKA DEPARTMENT OF FISH AND GAME STANDARD OPERATING PROCEDURE	No. II-040	PAGE 040-6
	ISSUED 06/19/91	EFFECTIVE 06/19/91

SUBJECT	ETHICS/STANDARDS OF PROFESSIONAL CONDUCT			
CHAPTER	DEPARTMENT POLICIES			
SUPERSEDES	No. ALL PREVIOUS EDITIONS	PAGE	DATE	APPROVED BY Carl L. Rosier

Decisions regarding outside employment, possible conflicts with these standards, and remedial actions taken to relieve conflict with the standards will be rendered only by the designated supervisor in consultation with the division directors.

All employees of the department, subject to provisions of the ethics policy, may not participate in commercial fishing, commercial game or fish guiding, trapping, mariculture, or aquaculture activities unless specifically approved by the division director and the designated supervisor. Provisions in the ethics policy do not apply to seasonal or temporary employees when they are on leave without pay status.

Employees may participate in secondary outside employment related to fish and game, providing the annual disclosure form has been completed, approved, and signed by the designated supervisor.

ETHICS POLICY

A. Commercial Activities

Exclusions

The department finds that no substantial and material conflict exists, but prior approval by the appropriate division director and designated supervisor is required if:

1. Employees participate in the commercial take of fish and game if those resources are not regulated by the department or the Board of Fisheries and Game.

2. Employees acting as a commercial guide for purposes other than fish or game harvest, such as photography or recreational camping, if no harvest or attempted harvest by the employee or the client of fish or game is involved in such guiding activities.

3. Employees trap, and their total annual compensation for sale of furs obtained from trapping does not exceed $2,500.

Except for the above exclusionary findings, the prohibitions for commercial activities which relate to fish and game shall be based on divisional jurisdiction and region of employment.

Divisional Prohibitions (all employees)

Divisions of FRED, Commercial Fisheries, Sport Fish, External and International Fisheries Affairs, and Commissioner's Office: No commercial harvest of fishery resources except as identified in number 1 under Exclusions.

Division of Wildlife Conservation and Commissioner's Office: No commercial harvest of game resources, including the sale of furs of more that $2,500 annually.

All other divisions: Commercial harvest approved subject to disclosure and prior approval.

Geographical Prohibitions (all employees)

In addition to jurisdictional (divisional) prohibitions, the following geographical prohibitions also apply.

Regional restrictions: No commercial harvest of fish or game resources within the region of employment, as defined by divisional geographic boundaries.

Headquarters staff and staff located outside of Juneau with statewide responsibilities shall assume a regional prohibition of where they are stationed and/or where they primarily work.

B. Use of Information and Materials

1. Employees are encouraged to prepare job-related, general interest, and technical papers on official and personal time. Employees may not, however, accept any compensation for an article, paper, or photograph produced on state time or with state equipment.

2. Department employees appearing as speakers at meetings where they are representing only themselves and not the department shall not use department materials that are not generally available to the public unless they have obtained the approval of their supervisor. Department materials that are broadly distributed and of common access may be used by employees in the same manner as they might be by a citizen who is not an employee. In instances where the presentation might directly benefit

an employee's personal or financial interest, the employee should carefully review the provisions of this policy and the Executive Ethics Act (AS 39.52), and consult with an immediate supervisor or the department's designated supervisor.

C. Use of State Equipment and Facilities

1. Department employees shall not use state equipment or facilities in the pursuit of personal activities, other than those uses which are minor and inconsequential, under that distinction in AS 39.52.110(a)(3). A factor indicating that a use is minor and inconsequential is that no additional cost will be incurred by the state. Activities which result in the employee receiving compensation, as defined in AS 39.52.960, are not minor and inconsequential. In field situations, at the discretion of the relevant division director, normal living activities of division employees will not constitute personal time for purposes of use of state equipment and facilities:

   a. No additional costs will be incurred by the state.

   b. The activities will not occur when the employee is on state time.

   c. The activities do not result in the employee's receiving compensation, as defined in AS 39.52.960.

D. Use of Photographs

1. Employment with the department may provide employees with unique photographic opportunities. Consequently, a significant potential exists for both real and perceived conflicts of interest. The department's policy is to allow employees to pursue an interest in photography while clearly distinguishing between ethical and unethical personal gain that may come from photographs taken while working for the department.

2. When photography occurs during normal or assigned working hours and with the use of state equipment or film, the products of all such photography shall be considered

property of the state. If personal equipment or film is used, the photos may be kept for personal use, but shall not be commercially used.

3. Photography at times other than normal or assigned working hours shall be considered a personal activity. If personal film and equipment are used, the photos shall be considered personal property and may be commercially sold or given to the state. However, if state equipment or film are used, the photos are state property and may not be used for personal gain.

E. Advisory Committees and Private Organizations

1. Department employees shall assist advisory committee and regional councils of the Boards of Fisheries and Game, but shall not participate in nominating or voting on candidates for office nor vote on items before the committee or council while attending such meetings representing the department. An employee is considered to be representing the department when he or she has: (a) been specifically requested to appear by a board or council member to comment on a proposal before the body; (b) is appearing, while on duty during his or her normal working day, as a member of a group of departmental employees; or (c) has been directed to appear by a supervisor to represent the department. In the event none of the above apply and an employee is asked to comment on a proposal before the committee or council, the employee must clearly convey that, in this instance, he or she is not speaking in an official capacity for the department. Employees of the department, who by job title or designated duties, are assigned management authority may not serve as members or officers of advisory committees to the Boards of Fisheries and Game, or as members or officers of regional councils. Management authority for purposes of this section includes the ability to take "official action" as defined in AS 39.52.920(14).

2. Department employees are encouraged to participate in private organizations with purposes related to fish and game resource use or conservation and to make public statements, as long as the employee does not purport, or

appear to purport, that he or she is speaking or acting in an official department capacity. All employees must recognize that in circumstances when their outside activities conflict with department positions or policies, the employee's credibility and/or job effectiveness may be jeopardized. Accordingly, employees should consult their regional supervisor for guidance to reduce potential conflicts.

Example 1: Ernie is a fisheries biologist working on the Kenai Peninsula. He has been asked by a local sport fishing club (of which he is a member) to testify at a public hearing about the need to allocate more fish for sport use. After consulting with his regional supervisor, Ernie determines that it would be professionally unethical for him to testify as a private person since the public's trust in his credibility as an unbiased department management biologist would likely be significantly reduced.

Example 2: Ann is a habitat biologist in interior Alaska. She has been asked by a professional society (The Ecological Society of America) to testify before a House Agricultural Subcommittee in Washington, D.C., about the effects of a newly developed wastewater treatment system for placer mining on aquatic organisms (her area of expertise). Although the State of Alaska has endorsed this technology, after discussion of the request with her regional supervisor, Ann decides to testify but limit her testimony to the biological tradeoffs associated with this treatment technology. Ann's testimony is presented as a professional scientist, not as a representative of the state, and further, carefully avoids addressing the political or economic aspects of the issue.

Example 3: Bill is a Division of Wildlife Conservation area management biologist who attends an advisory committee meeting where officers will be elected and regulations will be discussed. Because area biologists speak on proposals and are commonly viewed by the public to represent the department, Bill does not vote in the committee elections.

3. The department specifically encourages employee participation in professional societies and recognizes such organizations (e.g., The Wildlife Society, American Fisheries Society, Ecological Society of America, American Statistical Association, Professional Secretaries International, etc.) as distinctly different from other special interest groups. In some situations it may be beneficial to the department for individuals to participate in activities of such societies on state time, and requests to do so shall be made through the division director and the designated supervisor.

4. Department employees may not accept payment or reimbursement for travel or other expenses from any source other than as provided for in AS 39.52.130.

F. Patent/Copyright

The department will reserve all rights to any invention, discovery, material, equipment, or intellectual property designed, developed, and produced by department employees:

1. During working hours.

2. With a contribution by the department or the state of facilities, equipment, material funds, or of time and services or other state or department employees on official duty.

3. Which bears a direct relation to, or is made in consequence of, official duties of the inventory.

DISCLOSURE

One of the best ways to avoid even the semblance of impropriety is for all department employees to provide full and detailed prior disclosure, in writing, of the precise nature of any association, relationship, business arrangement, or circumstance which suggests that decisions may be made contrary to the best interest of the general public, resources, or the department; for the employee's personal financial gain; or for reasons contrary to the department's statutory responsibilities. All such prior disclosures shall be done through division directors to the designated supervisor.

Example 1: Carol is a clerk typist who wants extra money for the holidays and takes an after-hours waitress job October through December. Disclosure is necessary.

Example 2: Sid is a permanent full-time technician working at the Fin Perfect Hatchery who builds and sells crab pots in his spare time. Disclosure is necessary.

REQUEST FOR AUTHORIZATION FOR EXEMPTION

A. Department employees shall submit written requests for authorization to participate in commercial activities, or to conduct other activities identified in this policy, through their director to the designated supervisor at least thirty working days before participating in the activity. Expedited requests will be considered by the designated supervisor in instances where the employee could not reasonably provide the thirty-working-day advance notice. Such requests must be accompanied by a written explanation of the factors which prohibited advance notice. The written request shall include:

1. Type of activity.

2. Duration or dates of activity.

3. Approximate location of activity.

4. Justification for authorization or exception.

5. Name, division, address, and phone number of the employee.

Detailed and complete answers on the "Ethics Disclosure Form" shall satisfy this requirement.

B. The designated supervisor shall indicate if an ethical problem exists with a request for authorization because of an employee's specific employment responsibilities, and shall recommend appropriate action in a memorandum to the employee, with a copy to the division director within twenty working days upon receipt of a request.

STATE OF ALASKA DEPARTMENT OF FISH AND GAME STANDARD OPERATING PROCEDURE	No. II-040	PAGE 040-13
	ISSUED 06/19/91	EFFECTIVE 06/19/91
SUBJECT: ETHICS/STANDARDS OF PROFESSIONAL CONDUCT		
CHAPTER: DEPARTMENT POLICIES		
SUPERSEDES: No. / PAGE / DATE: ALL PREVIOUS EDITIONS	APPROVED BY: Carl L. Rosier	

APPEAL PROCESS

Department employees may utilize the grievance procedure in the Personnel Rules (2 AAC 07.435) if they disagree with the designated supervisor's decision. However, it is recognized that in all cases, provisions of AS 39.52.910(b) apply.

DIVESTITURE PERIOD

Employees of the department who hold an interest or are otherwise involved in an activity precluded by this policy have until January 1, 1992 to divest themselves of that interest or activity. The effective date, January 1, 1992, applies only to those items precluded by the departmental policy. The Ethics Act (AS 39.52) is in effect and its prohibitions and requirements presently apply to all departmental employees.

CORRECTIVE ACTION

Violation of the Executive Branch Ethics Act (AS 39.52) includes not only a conflict of interest, but also failure to file a disclosure form or inadequately or falsely filing a disclosure form.

If a department employee is found to have violated the Executive Branch Ethics Act (AS 39.52), the State Personnel Rules (2 AAC 07), or these standards, the commissioner or designated supervisor may, by written memorandum: Order the employee to stop engaging in the prohibited activity; temporarily or permanently reassign job responsibilities to eliminate the potential conflict; order divestiture, establishment of a blind trust, restitution, or forfeiture; or take administrative disciplinary action against that employee. Disciplinary action, depending on severity, will range from: A verbal reprimand; a written reprimand placed in the employee's personnel file; suspension without pay; or termination of employment with the department [see AS 39.52.410(a)].

PUBLIC COMPLAINT PROCESS

Complaints will be handled according to the provisions of AS 39.52.210 and AS 39.52.230.

State of Alaska
Ombudsman
Duncan C. Fowler

Reply to:

- P.O. Box 102636
  Anchorage, AK 99510-2636
  (907) 277-8848
  (800) 478-2624
- P.O. Box WO
  Juneau, AK 99811-3000
  (907) 465-4970
  (800) 478-4970
- P.O. Box 74358
  Fairbanks, AK 99707-4358
  (907) 452-4001
  (800) 478-3257

February 7, 1992

Patrick Rodey, Chairman
Senate State Affairs Committee
Alaska State Legislature
Capitol Building
Juneau, Alaska 99801-1182

RE: SB-375

Dear Senator Rodey:

The Office of the Ombudsman supports the purposes of SB-375. I believe that law enforcement officers with involvement in areas they have responsibility for enforcing are in an unfortunate conflict of interest. Any person charged with the responsibility of enforcing laws faces a challenge of not only having to be, but needing to appear even handed in the performance of their duties.

SB-375 helps set out the state policy that it is inappropriate for enforcement officers to be in the position of working as a guide or an assistant guide while they are involved in enforcing state fish and wildlife protection laws. This policy makes it clear that those charged with enforcing our state laws must take an arms-length approach in their off-duty activities to ensure they maintain the necessary independence so their enforcement activities may not be questioned.

Through our investigations, I have become aware of at least one public safety employee in this situation. He volunteered to work under the tutelage of licensed guides to apparently obtain the necessary work experience which would allow him to apply for and receive a guide license after leaving law enforcement work. Although an employee in this situation may not have received monetary compensation for their work, they clearly intend to profit from their off-duty activities. Their volunteer experience will convert to dollars upon receipt of a guide license. It clearly has a long-term benefit to the employee involved.

A situation such as this also presents a potential enforcement problem. The opportunity exists to perhaps apply a different standard when enforcing state laws involving the friendly guide who is providing off-duty guiding supervision. It can

also create the appearance of being biased when he must enforce game laws against his friend's competitors.

It is my information that the Department of Public Safety has had a policy prohibiting such conflicting off-duty activities for several years. However, if a public safety employee did work and obtain guide experience credits in conflict with that policy in the past, there was no prohibition to prevent the Guide Board from acknowledging that experience and allowing it to be applied towards the licensing requirements. Ann Boudreaux, director of the Division of Occupational Licensing, told me that the board would probably accept that past experience as there was nothing which would allow them to discount either the quality or applicability of that experience.

I would propose that the committee consider modifying the "ethical conduct" standards and definitions in AS 08.54 to include a person's past non-guiding employment history. Clearly, the concept I propose needs refining and defining. However, I do believe it would be improper for guiding experience credits, which have been obtained contrary to the policies of their employer, be allowed when applying for a state license.

I am sorry I am unable to meet with the committee at its hearing this afternoon. I am committed to meet with another committee. Please let me know if you have any additional questions about this matter.

Sincerely,

Duncan C. Fowler
Ombudsman

DCF:pjc
cc: Senator Lyman Hoffman

SB

379

HB 411

Alaska Forest Association, Inc.

MAIN OFFICE:
111 STEDMAN SUITE 200
KETCHIKAN, ALASKA 99901-6599
Phone 907-225-6114
FAX 907-225-5920

GOVERNMENT AFFAIRS OFFICE:
217 SECOND, SUITE 206
JUNEAU, ALASKA 99801
Phone 907-463-3175
FAX 907-463-5515

POSITION PAPER

The following is the Alaska Forest Association position on using oil spill mitigation funds to purchase standing timber:

The Alaska Forest Association is concerned with the premises of legislation which assumes that the purchase of private timber lands will somehow mitigate or prevent further environmental damage which might be caused by the Prince William Sound oil spill. The fact is there is no ligitimate connection between timber harvesting and the oil spill. Forest Practices Act regulations insure that timber harvesting does not permanently destroy habitat and does not cause environmental harm.

Timber harvesting does the same thing that nature does through blowdown, disease, insect infestations (i.e., spruce bark beetle), etc. Timber harvesting simply converts an overmature forest into useable products and creats jobs, promotes communitiy stability and additional opportunities for developed recreation.

Much of the upland area in Prince William Sound is within the Chugach National Forest--the second largest national forest in the nation. The majority of the seven million acres of the Chugach are restricted from timber harvest because they have been placed in a Wilderness classification or are reserved for protection of fisheries, game management or recreational uses. The sale quantity for the Chugach for 1992 and 1993 is only proposed to be 500 thousand board feet per year--not enough to supply even one small sawmill if the mill owners were able to purchase all of the timber available.

There is a tremendous amount of timber volume already reserved from harvest in the Prince William Sound area. Further set asides will have no mitigating benefit to any problems which might have been created by the oil spill.

The purchase of private lands for public use should have a legitimate best interest of the public as its objective. It is conceivably legitimate to establish more parks where there are none, or to develop specific recreational opportunities not otherwise available or to gain access to or enhance other uses of state owned lands.

If private land is purchased, it should be based on a willing buyer/seller concept. The seller's motivations are known only to him. In this case, the buyer is the State and the State's motivation should be informed by state policy clearly articulated. The proposed legislation does not logically define or justify the motivation for a timber purchase.

The Alaska Forest Association believes the oil spill money should be utilized to maximize the mitigation to those people and resources actually damaged by the spill.

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 1/31/92 FURTHER: Finance

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED
INTO OFFICE: _____

Resources Committee considered SB 379

"An Act making appropriations for restoration projects relating to the Exxon Valdez oil spill; and providing for an effective date."

and recommends:

[ ] replace with _____ CS _____(_____)

[ ] attaches amendment(s)

[ ] same title
[ ] new title
[ ] technical title change (HB only)

[ ] adopts _____Letter of Intent

[ ] further referral to the _____

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

NEW FISCAL NOTES: **Dept/Date**

[ ] **zero** fiscal notes _____

_____

_____

[ ] fiscal notes _____

_____

_____

[ ] **appropriation**--no fiscal note

PREVIOUS FISCAL NOTES: **Dept/Date**

[ ] **Governor's bill** with fiscal notes:

zero fiscal notes _____

_____

fiscal notes _____

_____

_____

DO PASS:

OTHER RECOMMENDATIONS:

_____

Chair: Signature and Recommendation

SB

383

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 2/3/92
2/5/92-add Jud

FURTHER: Judiciary
Finance

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED
INTO OFFICE: _____

Resources Committee considered SB 383

"An Act relating to air quality control and the prevention, abatement, and control of air pollution; relating to civil and criminal penalties, damages, and other remedies for air quality control violations; relating to use of the oil and hazardous substance release response fund; and providing for an effective date."
and recommends:

[ ] replace with _____ CS _____(_____)

[ ] attaches amendment(s)

[ ] same title
[ ] **new** title
[ ] technical title change
(HB only)

[ ] adopts _____Letter of Intent

[ ] further referral to the _____

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

NEW FISCAL NOTES: **Dept/Date**

[ ] **zero** fiscal notes _____
_____
_____

[ ] fiscal notes _____
_____
_____

[ ] **appropriation**--no fiscal note

PREVIOUS FISCAL NOTES: **Dept/Date**

[ ] **Governor's bill** with fiscal notes:
zero fiscal notes _____
_____

fiscal notes _____
_____
_____

DO PASS:

_____
_____
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OTHER RECOMMENDATIONS:

_____
_____
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_____
Chair: Signature and Recommendation

QUESTIONS ON SENATE BILL 383

Q: When will EPA promulgate its final regulations governing state air permit programs? How can this Legislature finalize and adopt this bill without seeing the final EPA regulations? I understand that at least four states consider the lack of EPA's final regulations a serious enough impediment that the states have filed a notice of intent to sue EPA (New York, Connecticut, Maine and Massachusetts). If the Legislature decides to make as many improvements as possible to this legislation during the present session, and then reintroduce the improved bill and adopt it early in 1993, wouldn't the department be able to meet the November 15, 1993 deadline for submitting a complete program to EPA? Why couldn't the department get started now on developing draft regulations, so that not all of the regulation drafting work will remain to be done after adoption of the statute?

Ans: We cannot tell when EPA's final regulations will be out; all we know is that they are still under review at OMB, and have been for some time. Apparently there are several points that have turned out to be highly controversial.

SB 383 has been drafted based on the fairly detailed federal statute, placing as little reliance as possible on EPA's draft regulations, and deferring until the state regulatory stage the decisions that cannot be made until EPA's final regulations are available.

If the Legislature were to indicate it wishes the department to get started now on developing draft regulations, instead of awaiting adoption of the state air bill, the department could do so. That would make it possible for Alaska to meet the November 1993 deadline for submitting a complete program to EPA (including adopted regulations), even if final adoption of the state air bill is held over until the 1993 Legislature and final adoption occurs by April or early May of 1993. Under such a plan, the department would be ready to send proposed regulations out for public comment as soon as the legislation is adopted.

Q: We understand that under the Clean Air Act Amendments of 1990, the federal LPA will be regulating a lot more kinds of chemical air pollutants and a much greater variety of sources of air pollution. Does SB 383 allow the Department of Environmental Conservation (ADEC) to regulate even further than the federal program requires of states?

- more kinds of sources/facilities?

- more kinds of chemicals (air contaminants)?

- more stringent emission limits than EPA's?

- more stringent ambient standards than EPA's?

Ans: Yes, to all of the above, but the existing state air quality statutes (at AS 46.03) already give ADEC authority to exceed federal regulation of air contaminants in all of the foregoing ways.

Q: With the extensive new regulation EPA will have to do under the 1990 amendments, why will there any longer be a need for ADEC to have authority to regulate air pollution sources beyond those the state will have to include in its program as a result of EPA's new regulations of more and more air pollution sources and air pollutants?

Ans: There would be almost no need for the state to regulate types of sources or types of air pollutants beyond those that EPA will be regulating. Even in the past, under EPA's extremely limited regulation of hazardous air pollutants (only 5 chemicals were regulated by EPA), the state has only regulated two air pollutants not regulated at the federal level, ammonia and hydrogen sulfide. Congress has already identified 189 hazardous air pollutants which EPA must regulate, and EPA has authority to proceed with regulating more than those; so the need for Alaska, with its very limited industry, to regulate

hazardous air pollutants that EPA does not, will become rare to nonexistent in the future.

Q: How much additional staff (and money to fund that staff) is the Administration anticipating, for each year during the next five years, to implement the program envisioned under SB 383? What fraction of this additional new staffing (and funding) is caused by the authority to regulate more extensively than the federal law requires?

Ans:

Q: What air pollutants and types of sources does the department expect to need to regulate, beyond those which the federal program will require states to regulate?

Ans:

Q: Please explain what is meant by "risk assessments" in proposed § 46.14.010(a). If these are health-based standards which the department proposes to develop, what scientific capability is there within the department to perform this type of analysis? What additional scientific staffing will be needed and at what cost per year, for each of the coming five years?

Ans:

Q: Please explain exactly how the department would utilize the results of "risk assessments" in setting standards; and especially explain why the standards and limitations (page 2, line 2) could be set based on risk assessments only, rather than on a combination of factors that include available technology and economic feasibility?

Ans:

Q: If Alaska sets source emission standards that are more stringent than the federal standards, or for more sources than

the federal program requires states to regulate, what will be the effect on the competitive position of Alaska industries when they are forced to compete against industries which do no more than meet the federal requirements?

Ans:

Q: Referring to subsection (d) of proposed § 46.14.200 (top of page 3), under what circumstances would the department wish to have the flexibility not to exempt a source that the EPA administrator has exempted? In other words, why should we not change the words "may exempt" to read "shall exempt"?

Ans:

Q: Please list all the types of functions the department will have to implement under this program, for which the department does not anticipate issuing regulations. For example, referring to proposed § 46.14.210(b), why would it ever be necessary for the department to issue a permit or enforce provisions of the statute, unless the department had

previously promulgated regulations governing the category of source and type of air contaminant involved?

Ans:

Q: It is my understanding that the federal statute requires state programs to allow facilities to make small changes without going through a modification of their permit, so long as the changes do not cause the emission levels in the existing permit to be exceeded. How much flexibility will a facility with a permit have to modify its operating procedures or make small mechanical changes without going through the process of obtaining a modification of its permit?

Ans: This is one of the subjects that has been hotly disputed in the debate that is going on at the federal level (and which has contributed to the delay in the issuance of EPA's final regulations). We will not know the answer to this until EPA's final regulations are published. SB 383 attempts to accommodate this uncertainty by requiring the state's permit procedures to provide maximum flexibility in the operation of the facility; refer to § 46.14.210(a)(6). Absent EPA's final regulations, we cannot do more than this in the drafting of

this legislation, but will have to take care of this in the drafting of the state's regulations.

Q: It appears that this expanded regulatory program will affect quite a few owners of facilities that never have had to deal with air operating permits before. Referring to proposed § 46.14.220, why should we not give facility owners the entire 12 months after the date their facilities become subject to a regulatory requirement to submit their applications, rather than allowing the department to set a shorter time limit, as now appears at page 5, line 6?

Ans:

Q: Referring to the department's processing of permit applications, specifically proposed § 46.14.225, why does the department need 18 months to process an application for an operating permit? Why should the statute not be changed to limit the department to 6 months after receipt of a complete application?

Ans:

Q: I understand that the federal statute gives a permit applicant the benefit of a "shield" from being in noncompliance with the requirement to have an operating permit, once the facility owner has turned in a complete application. Surely the department will be deluged with a large number of permit applications during the startup phase of this program. Why should SB 383 not contain provisions defining when an application is considered "complete," and a provision setting a certain time limit (such as thirty days) after which the application will be deemed complete for purposes of the shield if the department has not given any response to the applicant by that time? It is my understanding that such a provision is at least encouraged, if not required, by the draft EPA regulations.

Ans:

Q: Why should the bill not require the department to give preferential priority in application processing and permit

issuance to those applications that are for construction of new facilities and modification of existing facilities, inasmuch as they must have a permit in order to proceed, whereas existing facilities can continue to operate once they have turned in an application?

Ans:

Q: Is it your reading of proposed § 46.14.230 (review of permit action), that a person who had not even participated in the public comment process on a draft permit would be able to seek an adjudicatory hearing challenging the permit, and after that, judicial review? Why should the right to seek review of permit action not be limited to those who come forward and comment during the public comment process? Shouldn't the department have an opportunity to hear the comment, and attempt to respond to the comment and resolve the problem if a genuine problem has been raised, prior to issuance of the permit?

Ans:

Q: Concerning general operating permits (proposed § 46.14.240), why should we slow down the state's process by requiring EPA approval of a master general permit, rather than simply relying on the 45 day window within which EPA can object to any proposed permit? Secondly, if a general permit has been issued, and a individual facility owner then wishes to have his facility come within that general permit, why should it not be enough for the facility owner to submit a complete application to the department (on forms the department would provide), with the department having 30 days within which to notify the applicant if the facility does not qualify to come under that general permit or notify the applicant that the application is not complete? In other words, why should the department be burdened with having to respond to every application for a general permit?

Ans:

Q: In proposed § 46.14.245 (objection by federal administrator), what role does the department intend to play in cases where the EPA administrator objects to a particular permit? Will the department be assisting the permit applicant to promptly resolve the objections from EPA, so that the permit can be

issued? Why should there not be a provision in the bill that requires this of the department?

Ans:

Q: Referring to proposed § 46.14.245 (objection by administrator), if a petition is filed under subsection (b) or if the federal administrator has objected to the permit, my understanding of the federal statute is that Congress intended the "shield" provided by the application to continue in effect during the pendency of any such petition or objection. Where in the words of the bill is it made clear that there is a continued entitlement to the protection of the shield during the pendency of any petition or federal objection?

Ans: That is not expressed in the present text, but could be added.

Q: I understand that the permit fees collected must be sufficient to support the operating permit program and the small business assistance program required by the amended Clean Air Act. How does the department presently envision the permit fee program will be structured? For example, how will the department assure that, as between different kinds and sizes of sources

and facilities, the fees charged are equitable? How will the department assure that the permit fee for each permit bears a reasonable relationship to the complexity of the permit and the workload placed on the department for processing that permit? What mechanism will there be for a permit applicant to negotiate with the department, to recommend and obtain department adoption of technologies, monitoring instrumentation and procedures, and the like, which will limit the permit fee but still meet the actual requirements? Exactly what costs will be included as "indirect costs"?

Ans:

Q: The late payment penalty provision (proposed § 46.14.255) is not federally mandated in state programs, is it? Won't there be sufficient incentive for facility owners to make timely payment of their permit fees without a penalty provision? For example, if the fee is accruing interest at the statutory rate, and the facility owner knows he cannot get his permit renewed without paying the fee, and knows that the department can take a short and simple debt collection action against him in court, isn't there sufficient incentive without this late payment penalty provision?

Ans: The federal statute does not require any late payment penalty provision in state air permit programs. The only reference to late payment penalty provisions in the federal statute is that EPA will have that available in states where EPA is implementing the program because the state has not done so. In the House version of the bill, the Administration has already agreed to reduce the 50% late payment penalty to one that increases at the rate of 5% per month of lateness, up to a maximum total of 25% of the amount of the permit fee. However, the department certainly could collect late permit fees through a simple collection action in state court; this is the kind of work that is routinely and often done by municipalities collecting late sales taxes, and much of the cost would be borne by the defendants, because the court will award attorney fees and costs against them under Civil Rule 82.

Q: Referring to proposed § 46.14.260 (duration of operating permits), why should any permit (other than those for temporary locations, under § 285) have a duration of less than five years? Permits will be subject to reopening to insert any new regulation that comes down from EPA if the permit has a remaining term of three years or more. Adequate control over the actual performance of a facility can surely be maintained by the department through the compliance schedule

that will be part of any permit for a facility that is not already in compliance with the emission limits in its permit. Why is there any need for permits with a shorter duration than five years?

Ans:

Q: Regarding the reopening of permits to insert new emission standards (proposed § 46.14.265), why should the permits susceptible to reopening not be limited to those with a remaining duration of three years (as I understand the EPA draft regulations allow)? If we are not careful how we structure this legislation, some permits may be almost continually in the process of reopening and modification. Could we not assure some undisturbed period of time on which facility owners could rely once they have a permit? Why should we require permits to be reopened sooner than 18 months after their issuance, renewal, modification, etc.?

Ans:

Q: It is my understanding that many environmental laws, at least at the federal level, allow for a brief period of excursion beyond the emission limits at the time of plant startup or shutdown, and a brief period of excursion above emission limits due to sudden and unavoidable equipment malfunction as long as the equipment has been responsibly maintained. Where does the bill provide for this kind of realistic relief for facility owners?

Ans: It does not, but such a provision could be added.

Q: Does the federal statute require that state programs have an <u>administrative</u> penalties provision (proposed § 46.14.295)? If not, why is this section in the bill, considering that there are major daily civil penalties, plus criminal penalties, for violations?

Ans: No, the federal statute does not require state programs to include an administrative penalties provision. EPA, when it is enforcing its air program in states which have not adopted an air program, will have administrative penalties available, in addition to civil and criminal penalties. But state programs are only required to have civil penalties (the federal statute specifies that the maximum daily civil penalty must be no less than $10,000 per day); and state programs must

have criminal penalties (the draft EPA regulations specify that the maximum daily criminal penalty must be no less than $10,000 per day). The administrative penalties provision is here in SB 383 because the Department of Law wants it as an additional enforcement tool.

Q: In the small business assistance program, there is a compliance advisory panel (proposed § 46.14.430). Considering the nature of the assistance intended to be provided to small businesses, it appears that the membership of this panel as described in the bill is not going to provide the kind of capability needed to do the job. I would have supposed that such a panel should be made up of people with scientific, technological, engineering, and environmental economics backgrounds related to air pollution. If you were able to rewrite the text governing the membership of this compliance advisory panel, what kinds of qualifications would you set for panel membership, and how would you like to see this text rewritten?

Ans:

Q: Concerning municipal or local air quality programs, why do municipalities or local air quality districts need authority to have programs that are more stringent in any way than the state's program? Reference is to proposed § 46.14.500(f). Which municipalities now have their own air quality programs? Of these, which have requirements that are more stringent than those in state regulations?

Ans:

Q: Concerning civil penalties for air pollution violations, is it true that the Department of Law has been utilizing an internal document (not subjected to public review and comment and promulgated as a regulation) to determine what percentage of the maximum daily civil penalty to seek in a given instance of air quality violation? Why should the department not be required, by statute, to promulgate civil penalty assessment criteria or policies as a regulation, just as has been proposed in the section on administrative penalties?

Ans: Yes, the Department of Law has been utilizing EPA's air program document containing EPA's penalty assessment policies; and EPA did not publish this document through the regulatory process either. The Administration has no objection, however, to having a requirement added to SB 383 that civil penalty

assessment criteria or policies be adopted through the regulatory process.

Q: Why are sections 20 and 21 of the bill (page 27) needed, and what will be the consequences of this cross-linkage into the array of other statutes governing hazardous substances? Why should the Legislature authorize a raid on the 470 fund for purposes related to air contaminants?

Ans:

Q: What other provisions are there in SB 383 that go beyond what the Clean Air Act requires in state programs, besides those about which I have already asked?

Ans:

SB383

WALTER J. HICKEL
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 3, 1992

The Honorable Richard I. Eliason
President of the Senate
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear President Eliason:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to air quality and the prevention, abatement, and control of air pollution. Passage of this bill is necessary if Alaska is to maintain primary jurisdiction in the implementation of the air quality program, thus avoiding a federal takeover. Moreover, Alaska must restructure its air permits program by November 15, 1993, or the federal government may withhold federal highway money and other federal money.

At present, the air pollution control program in the Department of Environmental Conservation (DEC) consists of 11 statutory provisions codified as AS 46.03.140 - 46.03.245. Those provisions were enacted in 1971 and have become somewhat dated. This bill repeals those sections entirely and places state air quality law in a new chapter, AS 46.14. The bill, if enacted, would update existing air quality law to reflect changing needs in the state and to respond to new federal air quality requirements. This letter briefly describes the key areas of the bill.

First, the bill, if enacted, would reestablish and enhance the state's existing authority to establish emission controls and to classify sources of air pollution (see proposed AS 46.14.010 - 46.14.020).

Next, the bill would create an emission control permit program designed to meet the criteria established in the 1990 Clean Air Act. The bill would expand the state's existing authority regarding permits for facilities already subject to existing

regulations. Further, it establishes for the first time the state's authority to issue operating permits for smaller facilities that will be subject to the new chapter. The bill contains a variety of sections establishing the parameters of that new permitting program. See proposed AS 46.14.200 - 46.14.295.

A significant aspect of the new permitting program is that the program must be financially self-sustaining. Section 502(b) of the federal Clean Air Act (42 U.S.C. 7661a(b)) sets out the "minimum elements of a permit program to be administered by any air pollution control agency." One of the required elements is an obligation to collect an annual fee from permittees adequate to pay for all direct and indirect aspects of the permitting program.

The federal law also restricts the use of fees, and any interest or penalties on them, collected by the department. Under the federal law, that money may only be spent on the permitting program and activities directly related to that program, such as the small business assistance program, as discussed below. Failure to establish a direct link between fees charged and benefits given is likely to result in the federal government invalidating Alaska's program. The Clean Air Act's mandate for a separate, "dedicated" fund for fee-related money is a requirement "by the federal government for state participation in a federal program," within the meaning of art. IX, sec. 7, of the Alaska Constitution. Accordingly, the bill establishes a dedicated fund, called the clean air protection fund, for financing the newly established program.

Additionally, the bill reestablishes a motor vehicle pollution control program, without significant changes. The bill simply reenacts the existing statutory provision for the control of motor vehicle emissions, with minor revisions (see proposed AS 46.14.300).

Furthermore, as required by federal law, the bill establishes a small business assistance program related to the state air quality control program. The small business assistance program would help the regulated industry comply with emission control requirements. An ombudsman is to be designated in DEC to assist businesses. Also, various educational programs are established. Additionally, a compliance advisory panel is established in DEC to act as liaison between the air quality control section in DEC and the United States Environmental Protection Agency (EPA) in matters pertaining to the impacts of the emission control program on small businesses. See proposed AS 46.14.400 - 46.14.430.

The new chapter also contains a series of general provisions. One of those pertains to public records. Like the hazardous waste program, the federal

government imposes certain obligations on DEC and on authorized local agencies to allow public access to certain information received from permittees. Therefore, proposed AS 46.14.500 supplements Alaska's public records law to specifically allow access to these records. A counterbalancing section, proposed AS 46.14.510, makes confidential certain proprietary business information if disclosure would likely affect the business's competitive position. See proposed AS 46.14.500 - 46.14.900.

As before, municipalities and other entities may implement a local air quality control program if they desire. Provisions enabling those entities to establish local air quality control programs are found in proposed AS 46.14.520 - 46.14.550.

Another significant "general" provision is located at proposed AS 46.14.560. Throughout the bill, both owners and operators of air contaminant sources are legally responsible for performing all obligations imposed by the bill, if enacted. Proposed AS 46.14.560 clarifies that owners and operators are not required to perform redundant actions, but liability for nonperformance can be imposed on both owners and operators.

The bill amends many of the enforcement provisions in existing AS 46. Most of the amendments are minor and technical in nature, to recognize the newly created chapter so that existing legal remedies for environmental violations can apply to the air quality control program. Among these amendments is a clarification regarding use of the oil and hazardous substance release response fund for air-polluting releases (see secs. 19 and 20 of the bill).

In addition to these general provisions, the bill proposes to establish new administrative penalties for air pollution. If a person is found to have violated the air quality statutes, the department may conduct an administrative proceeding and assess administrative penalties without having to resort to judicial process. Experience has demonstrated that less serious violations often go unpunished because the costs of litigation are disproportionately large in comparison to the dollars expected to be recovered. The proposed administrative penalty provision gives the department more flexibility to resolve disputes over air pollution compliance. The bill also allows a person to challenge, through an appeal to the court, administrative penalties assessed. See proposed AS 46.14.295.

Under the bill, the criminal penalty for a class A misdemeanor offense related to the new chapter is $10,000 per offense per day instead of the $5,000 penalty currently established in AS 12.55.035(b)(3). The $10,000 minimum is required by federal law.

A variety of terms in the air quality control provisions of the bill are defined in proposed AS 46.14.900. Most of the definitions come from existing state or federal regulations or state or federal law.

Several statutes not in AS 46 make reference to provisions of AS 46 that are being repealed by this bill (i.e., AS 44.46.025). These provisions have been amended to acknowledge changes made to AS 46 by the bill, and to coordinate with the substance of the newly created program.

The sections of the bill take effect at differing times. The staggered effective dates accomplish several things. First, several key areas of the bill concerning the permit process must meet strict federal requirements or the EPA may disapprove Alaska's program and assume federal administration in Alaska. A delayed effective date for those provisions will allow an opportunity for the state and the EPA to review enacted legislation and recommend any technical changes before its effective date, to assure compliance. Next, a delayed effective date for new requirements will allow DEC an opportunity to develop state regulations, to be adopted when certain key provisions of the bill take effect at a later date. Finally, an immediate effective date is provided for certain portions of the bill, to improve enforcement and to allow existing parts of the air permit program to continue without interruption.

I urge your prompt consideration and passage of this bill.

Sincerely,

Walter J. Hickel

Walter J. Hickel
Governor

FISCAL NOTE

No. 1

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill Version: SB 383

(S) Publish Date: 2-3-92

Revision Date: _____ **Department Affected:** Environmental Conservation

Title: Alaska Air Permit Statutes **BRU:** Division of Environmental Quality

Component: Air Quality Management

Sponsor: Governor Walter J. Hickel

Requestor: Governor **COMPONENT SERIAL NO.** 1016

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93*1	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	938.8	0	523.2	196.9	160.6	193.0
TRAVEL	253.2	0	106.3	48.7	39.7	47.5
CONTRACTUAL	369.2	0	142.5	65.2	53.2	63.6
SUPPLIES	85.0	0	35.7	16.1	13.3	15.9
EQUIPMENT	216.0	0	86.5	39.6	32.3	38.6
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	1862.2	0	894.3	366.5	299.1	358.6
CAPITAL						
REVENUE (See Note #2) FUND SOURCE:	1320.1	0	894.3	366.5	879.5	506.5

FUNDING: (Thousands of Dollars) (Increment Increases)

GENERAL FUND	0 (Note #3)	0	0	0	(38.3)	(147.9)
FEDERAL FUNDS	542.1	0	0	0	(542.1)	0
OTHER GF Program FUND SOURCE:	1320.1	0	894.3	366.5	879.5	506.5
TOTAL	1862.2	0	894.3	366.5	299.1	358.6

POSITIONS:

FULL-TIME	14	0	8	4	3	2
PART-TIME	.5	0	0	0	0	0
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Note 1. General Fund program receipts are contained in the Governor's FY93 Operating Budget.
Note 2. Revenue Fund Source consists of program receipts deposited in the General Fund. Following passage of this bill, program receipts are to be deposited in the Clean Air Protection fund.
Note 3. No additional general funds will be needed for this program over FY92 levels.

Leonard D. Verrelli

Prepared By: Leonard D. Verrelli **Phone:** 465-5100

Division: Environmental Quality **Date:** January 6, 1992

Approved by Commissioner: Dan A. Sandor

Agency: Department of Environmental Conservation **Date:** 1/6/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

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