





PUBLIC HEALTH

**PROTECTING AND PROMOTING THE
HEALTH OF ALL ALASKANS**

**CSHB 193(HES), a Bill to Consolidate
DHSS Licensing, Certification and
Background Check Functions**

Dr. Richard Mandsager, M.D.
Director, Division of Public Health
Alaska Department of Health and Social Services

5/04/2005

Why are we doing this? What's wrong with things the way they are?



- The existing statutory and regulatory environment is a complex patchwork, with holes, duplication and unnecessary variants.
 - Agencies which offer more than one type of care services must meet different requirements for licensing created by evolving program standards and historical licensing criteria.
 - These differences limit the flexibility of licensing staff to operate across different program types.
 - There is no compelling rationale to maintain these differences, and much benefit to be derived from eliminating them.
- Some provider types are not covered today, for either requirements of licensing or background check requirements, or both.
- Some individuals can currently pass a background screen, who shouldn't.
- Tracking of required care provider information has not been consistent.
- Existing requirements can also raise the costs to care provider applicants.

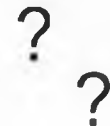
"Recruiting and hiring ... is an area we cannot afford even a single failure of the system." Matthew Jones, Executive Director, Assets Inc.

The existing regulation of long term care has not prevented instances of abuse and neglect.

- A supported living home provider was misappropriating funds from a resident. There is no requirement for the home to be licensed, and no background review had been conducted on the provider.
- An assisted living home attendant was fired for mistreatment, and the facts presented to law enforcement. No charges were filed and the case was dropped. This person remains eligible to work as a care provider.
- Three Alaska Nurse Aides were found by investigative agencies to be mistreating residents in a nine month period. Well after the mandatory reporting time period, two of these findings had not been entered into the registry.
 - One of the two involved physical violence.
- In another state, a person was involved in a stabbing in a convenience store. Months later, this person, recognized by someone who had been in the store, was found working as a long term care provider.
- Personal Care Attendants, who are typically listed by multiple employment agencies, must submit separate fingerprint-based background checks for each agency, at significant cost and duplication of effort.

Besides the gaps in the oversight process and risks to Alaskans in care, there is significant cost and effort to provide the required management of care programs.

- Currently, 19 programs are administered under at least 12 different statutory schemes for licensure by DHSS.
 - The complexity of the different standards and program compliance requirements have resulted in a cumbersome administrative structure.
 - Care providers are faced with a patchwork of regulations and sometimes conflicting requirements for service delivery, particularly the agencies that operate multiple types of care services.
 - For example, under current practices a Care Coordinator might be employable at one agency, but not acceptable to another agency. And an individual acceptable for Care Coordination would not be acceptable to an Assisted Living Home, or an Assisted Living Home employee might not be employable in Child Care.
 - Yet many of the care agencies operate in all these programs
 - Licensing and Certification surveyors/licensing staff must learn and deal with the variants of each service program.
 - A consolidated program promotes greater depth in staff expertise and cross training.
- Three licensing program units have been consolidated within Public Health, but the programs they manage still must be uniquely administered.

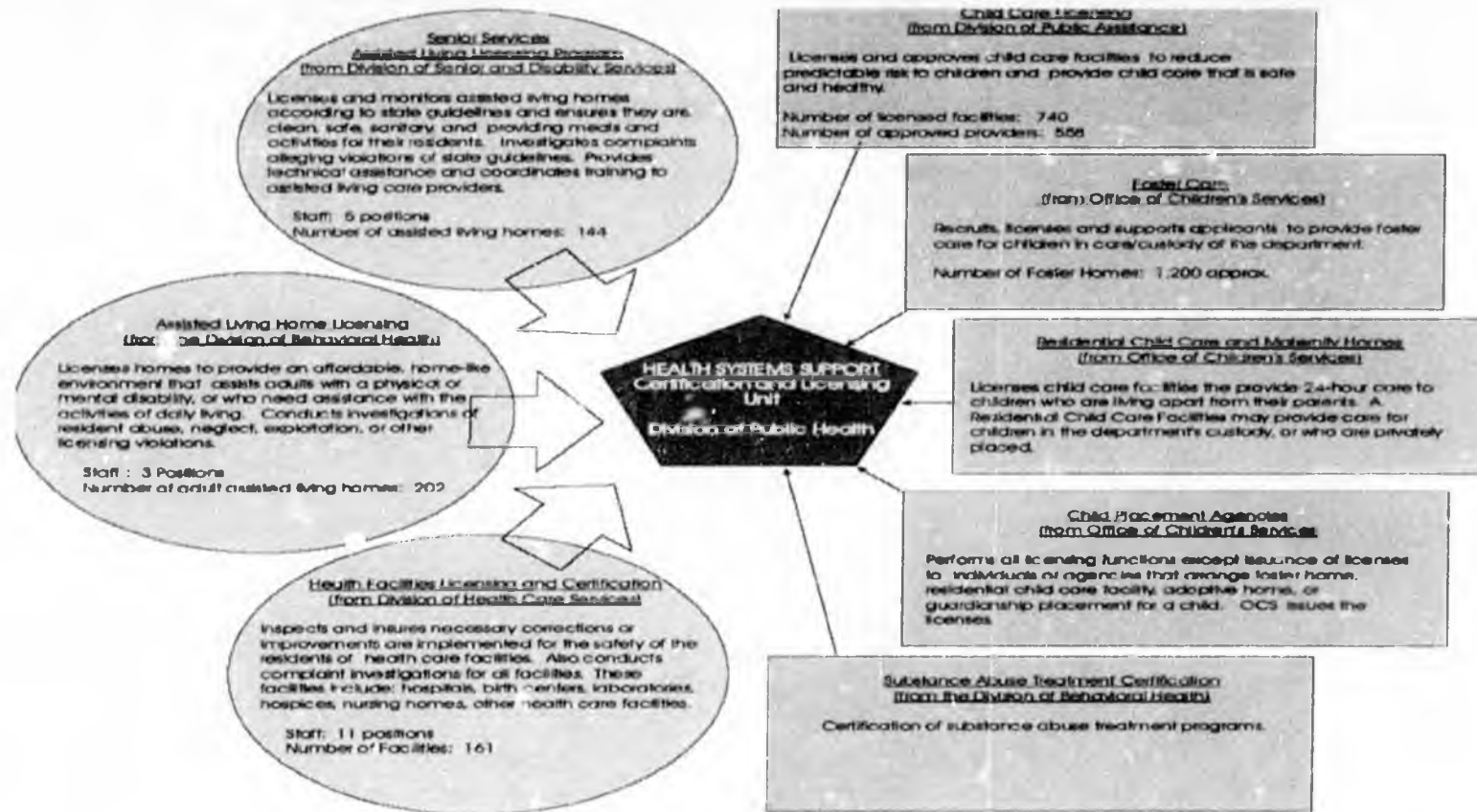


The three units that have been consolidated represent Phase I of the consolidation process.

Department of Health and Social Services Certification and Licensing Integration Project

Phase I – FY 2005

Potential Phase II - FY 2006 – 2009



Our aim is to reduce predictable risk, improve quality of care, foster patient rights, and advance public health, safety and welfare.

- **Centralized Licensing and Related Administrative Procedures, for:**

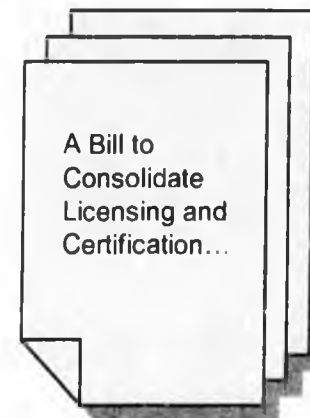
Ambulatory Surgical Centers	Home Health Agencies	Residential Child Care Facilities
Assisted Living Homes	Hospices	Residential Psychiatric Treatment Ctrs
Child Care Facilities	Hospitals	Rural Health Clinics
Child Placement Agencies	ICF/MRs	*Supported Living Homes
Foster Homes	Maternity Homes	*Personal Care Attendants
Freestanding Birth Centers	Nursing Facilities	*Case Mgmt/Care Coordination
		*Adult Day Care/Respite

- **Defines and Consolidates:**

- Definitions
- Requirements to get a license
- License renewal process
- Requirements for a background check
- Conditions for denial of license
- Complaints process and appeals
- Enforcement actions and penalties
- Confidentiality requirements

* Subject to background check provisions only

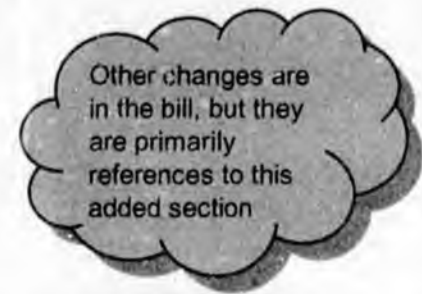
[Licensed Certified Both]



How CSHB 193(HES) impacts the existing statutory definition of current DHSS licensed programs...

18.20.075-085	Hospital reg, risk mgmt, inspection
18.20.300	Nursing Facilities - state policy
18.20.305-390	Nursing regs, penalties, appeals, fines, ...
47.33.005-090	ALH Purpose, applicability, payments, rules, ...
47.33.200-360	ALH rights, grievances, contracts
18.18.100	Hospice licensing requirements
18.18.200	Volunteer Hospice licensing requirements
18.18.300-340	General Hospice requirements
18.18.390	Hospice definitions
18.18.490	HHA definitions
18.20.230-250	Hospital charges
14.43.148	Defines nonrenewal of licenses in general Amended to include children and A/DA licensing
18.20.130	Defines nonrenewal of licenses in general
47.33.990	ALH Definitions, removed references to controlled subs.
47.37.270	Removed selected definitions related to treatment facilities
18.05.040(a)(10)	Direct Entry Midwifery free standing birth centers
18.18.005-040	Hospice regulation
18.20.090-120	Disclosure of information, penalties
18.18.350	Hospice disclosure requirements
18.18.410-470	Home Health Agencies
18.20-18.20.070	Hospitals and intermediate care facility licensing
18.20.302	Criminal background check, nursing employees
47.33.100	ALH criminal background checks
47.33.400-920	ALH Licensing process & procedures
47.35.005-260	Maternity, RPTCs, childrens services process and procedures

Retained
Retained
Retained
Retained
Retained



moved to regulation
moved to regulation
moved to regulation
moved to regulation
moved to regulation



Revised Regulations

Amended

Amended
Amended
Amended



Proposed C&L Consolidation
Bill 47.32.nnn

Repealed
Repealed
Repealed
Repealed
Repealed
Repealed
Repealed
Repealed
Repealed
Repealed



Note: "move to regulation" removes a regulatory level of detail from statute, but retains the spirit and intent of the statute in the forthcoming regulatory rewrite.

Repealed means being deleted as a separate statutory entity. The subject area will be included in the proposed new statute, and usually relates to specifics of licensing, licensing oversight and background check requirements.

Retained indicates those statutory sections remain unchanged. These are typically definitional or program operational in nature.

What's in CSHB 193(HES)?

- **Addition of a new chapter to centralize licensing and administration of covered entities:**
 - Defines what entities must be licensed
 - Defines license conditions, appeals, complaint process
 - Defines DHSS rights and responsibilities
 - Provides confidentiality protections
 - Provides criminal penalties for violations
- **Addition of a new article to centralize background checks and registry functions:**
 - Defines who is required to have background checks
 - Provides for regulatory definition of barrier conditions
 - Requires a centralized registry be created and maintained
- **Updates to existing statutes (see previous page)**
- **Establishes the timeline for implementation**

The key provisions of CSHB 193(HES):

- Barrier conditions to employment in the care provider field will be defined in a consolidated *regulation* definition, with an objective of defining one, or as close to one as possible, common, consistent set of conditions to apply to all provider types.
 - There may be a need to distinguish between barriers to adult care vs. children's care.
- All service providers with direct patient contact must be background checked including volunteers who have regular contact with individuals who receive services
- Charges of a barrier crime may be sufficient to bar employment.
- A confidential employee misconduct registry will be implemented for maintaining employment barrier conditions that may not be reflected elsewhere.
- A standard waivers process will be defined.
- A standard appeals process will be implemented.



Excerpt from just one of the current regulatory crosswalks

1.1.1 SUMMARY OF EXISTING AND PROPOSED NEW SAFETY AND SANITATION STANDARDS TO CERTAIN FACILITIES PROVIDING CARE TO CHILDREN AND TO ADULT RESIDENTS

February 16, 2005

NOTES TO READER: REQUIREMENTS, INCLUDING APPLICABILITY, ARE SUBJECT TO CHANGE AFTER REVIEW OF PUBLIC COMMENTS AND BEFORE ADOPTION.

Bracketed numbers = number of persons licensed for care, if requirements differ by size of facility

"E" = existing requirement (but may differ in proposal) "N" = new requirement "--" = not applicable (unless licensed for more than one category of care)
* = a more stringent requirement applies

ALH = assisted living home; FH = foster home; FGH = foster group home; RGH = residential child care group home; RCCC = residential child care center;
CCH = child care home; CCGH = child care group home; CCC = child care center; RPTC = residential psychiatric treatment center for children;
MH = maternity home; AP = approved provider (child care assistance)

REQUIREMENT	ALH	FH	FGH	RGH	RCCC	CCH	CCGH	CCC	RPTC	MH	AP
7 AAC 10.610. Life and fire safety											
<i>Based on existing child care licensing, 4 AAC 62.510; existing residential child care, 7 AAC 50.510; existing ALH, 7 AAC 75.270</i>											
(b)(1) -- Meet state code for fire safety in 13 AAC 50 and 13 AAC 55 or more stringent if required by local authorities	-- [1-5] E [6+]	E	E	E	E	E	E	E	N	N	
(b)(2) -- municipal building code approvals	-- [1-5] E [6+]	N	N	N	N	N	N	N	N	N	
(b)(3) and (c) -- fire safety inspection	E	E	E	E	E	E	E	E	E	E	
(d)--disaster preparedness emergency evacuation plan	E	E	E	E	E	E	E	E	E	E	
(e) -- emergency evacuation drills	E	E	E	E	E	E	E	E	E	E	
(f) -- keep records of emergency drills	E [1-5] N [6+]	E	E	E	E	E	E	E	E	E	
(g) notification of fire or other emergency	N	N	N	N	N	N	N	N	N	N	
(h) carbon monoxide detector	N	N	N	N	N	N	N	N	N	N	
(i)(1) --at least two means of emergency escape, at least one of which is exterior door	E [1-5] -- [6+]	E	E	E	*	E	*	*	E [1-10] * [10+]	E [1-10] * [10+]	
(i)(2) -- one means of escape from basement	N [1-5]	E	E	E [1-10] * [10+]	*	E [1-5] * [6+]	E [1-5] * [6+]	*	E [1-10] * [10+]	E [1-10] * [10+]	
(i)(3) -- fully-opening window in each bedroom	E	E	E	E [1-10] * [10+]	*	E [1-5] * [6+]	E [1-5] * [6+]	E	E [1-10] * [10+]	E [1-10] * [10+]	
(i)(4) -- screens do not prevent emergency escape	E	N	N	N	N	N	N	N	N	N	

5/4/2005

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STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER

FRANK H. MURKOWSKI, GOVERNOR

P.O. BOX 110601
JUNEAU, ALASKA 99811-0601
PHONE: (907) 465-3030
FAX: (907) 465-3068

April 26, 2005

Honorable Lesil McGuire, Chair
House Health, Education and
Social Services Committee
Alaska State Capitol; Rm. 108
Juneau, AK 99801

Dear Representative McGuire,

The Department of Health and Social Services respectfully requests a hearing in the House Judiciary Committee on House Bill 193 "An Act relating to the licensing, regulation, enforcement, and appeal rights of ambulatory surgical centers, assisted living homes, child care facilities, child placement agencies, foster homes, free-standing birth centers, home health agencies, hospices or agencies providing hospice services, hospitals, intermediate care facilities for the mentally retarded, maternity homes, nursing facilities, residential child care facilities, residential psychiatric treatment centers, and rural health clinics; relating to criminal history requirements, and a registry, regarding certain licenses, certifications, approvals, and authorizations by the Department of Health and Social Services; making conforming amendments; and providing for an effective date."

The proposed bill will streamline the department's licensing processes by consolidating virtually all of the licensing functions related to standards, enforcement, and appeal rights into a single chapter of the Alaska Statutes.

The House Health, Education, and Social Services Committee heard the bill and recommends it be replaced with a House (HES) Committee Substitute with a new title. The department appreciates the work of the House (HES) Committee and supports a number of substantive improvements made in the underlying licensing-related provisions of the bill.

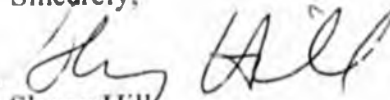
However the department cannot support the provisions of the House (HES) Committee Substitute establishing companion services as a new Medicaid-funded service for persons

on Medicaid waivers. These provisions have no bearing on the underlying purpose of HB 193 and would result in a significant increase in Medicaid costs that cannot be justified in light of budgetary constraints generally and competing Medicaid funding priorities in particular. Therefore the department urges the House Judiciary Committee to delete the companion services language from the bill.

The Governor's transmittal letter providing additional information about the bill and a zero fiscal note from the Division of Public Health addressing the licensing provisions of the bill should be on file with the committee. A new fiscal note addressing the companion services provisions of the House (HES) Committee Substitute has just been submitted to the House (HES) Committee.

Your favorable consideration of this request will be appreciated.

Sincerely,



Sherry Hill
Special Assistant

cc: Honorable Peggy Wilson, Chair
House Health, Education,
and Social Services Committee
Alaska House of Representatives

Kevin Jardell, Legislative Director
Office of the Governor

Dr. Richard Mandsager, Director
Division of Public Health

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB193-LAW-HS-02-28-0
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
 Title "An Act relating to the licensing, regulation, enforcement, and appeal rights of certain ...facilities" RDU CIVIL
 Component Human Services
 Sponsor House Rules
 Requester Governor Component No. _____

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

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

1002 Federal Receipts						
1003 GF Match						
1004						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill would centralize almost all DHSS licensing statutes under a new chapter to AS 47. Currently, there are 12 different statutory schemes for the licensure of different entities by the DHSS. By centralizing these disparate procedures into a streamlined licensing process under a uniform statutory framework, the DHSS hopes to be able to administer these functions in a much more efficient and cost effective manner. Significant revisions to the corresponding regulations will be required and will result in a fiscal impact to the Department of Law in the first year or two following passage of this legislation. The Department of Health and Social Services has received a federal grant, requested in the Division of Public Health's FY 2006 budget, that will allow centralization to occur. The grant includes the funds needed by Department of Law for regulation revision and review.

Prepared by: Kathryn Daughhete, Director Phone 465-3673
 Division Administrative Services Date/Time 4/12/05 3:48 PM
 Approved by: Kathryn Daughhete for David Marquez, Attorney General Date 4/12/2005
 Agency Department of Law

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: HB 193
 (H) Publish Date: 3/2/05
 Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction):

Title RELATING TO LICENSING BY THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES

RDU Public Health

Component Certification and Licensing

Sponsor (RLS) BY REQUEST OF THE GOVERNOR

Requester GOVERNOR

Component No. 245

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES (0)						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: _____

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Because the purpose of this legislation is to streamline the licensing process to achieve those goals of efficiency and cost effectiveness by consolidating virtually all of the licensing functions related to standards, enforcement, and appeal rights in DHSS, no additional costs or staff resources within the department are anticipated.

Prepared by: Richard Mandsager, MD
 Division Public Health
 Approved by: Joel S. Gilbertson, Commissioner
 Agency Department of Health and Social Services

Phone 465-3139
 Date/Time 02/17/2005
 Date 02/28/2005

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: HB 193
 (H) Publish Date: 3/2/05

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
 Title: "An Act relating to the licensing, regulation, RDU: CIVIL
enforcement, and appeal rights of certain...facilities...." Component: Human Services
 Sponsor: _____
 Requester: Governor Component No. _____

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	9.3					
Travel	0.0					
Contractual	1.1					
Supplies	0.2					
Equipment	0.2					
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	10.8	0.0	0.0	0.0	0.0	0.0

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

1002 Federal Receipts						
1003 GF Match						
1004 GF	10.8					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	10.8	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill would centralize almost all DHSS licensing statutes under a new chapter to AS 47. Currently, there are 12 different statutory schemes for the licensure of different entities by the DHSS. By centralizing these disparate procedures into a streamlined licensing process under a uniform statutory framework, the DHSS hopes to be able to administer these functions in a much more efficient and cost effective manner. The Department of Law does not anticipate a significant long-term fiscal impact from passage of this legislation; however, it is clear that significant revisions to the corresponding regulations will be required. It is estimated that approximately 100 attorney hours might be required in such an effort.

Prepared by: Kathryn Daughhete, Director Phone: 465-5427
 Division: Administrative Services Date/Time: 2/28/05 2:15 PM
 Approved by: K. Daughhete for Scott Nordstrand, Acting Attorney General Date: 2/28/2005
 Agency: Department of Law

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 3
 Bill Version: CSHB 193(HES)
 (H) Publish Date: 4/26/05
 Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction):

Title: RELATING TO LICENSING FUNCTIONS OF THE DEPT. OF HEALTH AND SOCIAL SERVICES
 RDU: Senior and Disabilities Svcs
 Component: Senior/Disabilities Medicaid Svc

Sponsor: (RLS) BY REQUEST OF THE GOVERNOR

Requester: HOUSE (HES) Component No. 2662

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims	10,759.6	23,671.2	26,038.3	28,642.1	31,506.3	34,657.0
Miscellaneous						
TOTAL OPERATING	10,759.6	23,671.2	26,038.3	28,642.1	31,506.3	34,657.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES (0)						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	6,195.4	13,629.9	14,992.9	16,492.1	18,141.3	19,955.5
1003 GF Match	4,564.2	10,041.3	11,045.4	12,150.0	13,365.0	14,701.5
1004 GF						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	10,759.6	23,671.2	26,038.3	28,642.1	31,506.3	34,657.0

Estimate of any current year (FY2005) cost: _____
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Revisions to CS HB 193 provide for expansion of reimbursable waiver services for Older Alaskans (OA) and Adults with Physical Disabilities (AD) to include Adult Companion Services.

The addition of Adult Companion Services is intended to restore non-medical care, supervision and socialization services formerly provided as a part of Respite Services.

Con't on page 2 of 3

Prepared by: Janet Clarke, Assistant Commissioner Phone 465-1630
 Division: Finance and Management Services Date/Time 04/25/2005
 Approved by: Joel S. Gilbertson, Commissioner Date 04/26/2005
 Agency: Department of Health and Social Services

FISCAL NOTE

FN # 3

STATE OF ALASKA
2005 LEGISLATIVE SESSION

BILL NO CSHB 193(HES)

ANALYSIS CONTINUATION

The revisions provide for Companion Services as part of a recipient's approved plan of care to allow a primary caregiver to work and to allow a primary caregiver to sleep during normal nighttime hours when the care recipient may not be safely left alone.

Companion Services will not replace other services but would be in addition to existing services including Chore, Respite, and Personal Care Services. Companion Services providers are unskilled and would not be qualified to provide medical based Personal Care Services.

Currently there are 1,915 recipients of OA and AD waiver services. Of those approximately 570 reside in Assisted Living Homes and would not be eligible for Companion Services.

The department estimates that of the 1,345 eligible recipients, approximately 10% have caregivers who would utilize companion services for 10 hours per day to allow them to work full time. At \$19.72 per hour (the current median cost for unskilled Respite Care workers), daytime supervision is estimated at \$49.3 per recipient, per year or \$6,655.5 for 135 recipients each year. This assumes that care would be provided for 10 hrs per day, 5 days a week, 50 weeks per year.

Estimated costs for overnight supervision are based on the assumption that 10% of the 1,340 eligible recipients would be in need of overnight companion services. If these services were limited to 9 hrs per night and 3 nights per week, the cost would be \$27.7 per recipient or \$3,737.7 for 135 recipients each year.

Of the approximately 1,200 recipients who do not qualify for work related or overnight Companion Services, the department estimates that 90% (1,085) would utilize basic Companion Services. If limited to 10 hours per week, the cost would be \$10.3 per recipient per year or \$11,126.0 total.

The fiscal note assumes the program would be operational for one half year in FY06 and growth of 10% a year in succeeding years.

CS HB 193 - Companion Services Fiscal Note Calculation - Revised 4/25/05

	Work Related Supervision	Overnight Supervision	Basic Services	Total
# Recipients	135	135	1085	
Cost Per Hour	\$19.72	\$19.72	\$19.72	
# Hrs Per Week	n/a	n/a	10	
# Hrs Per Day	10	9	n/a	
# Days Per Week	5	3	n/a	
# Weeks Per Yr	50	52	52	
Total	6,655,500	3,737,729	11,126,024	21,519,253

	1/2 Year FY06	Full Yr Plus 10% - FY07	Plus 10% - FY08	Plus 10% - FY09	Plus 10% - FY10	Plus 10% - FY11
Cost	10,759,626	23,671,178	26,038,296	28,642,125	31,506,338	34,656,972
Fed	6,195,393	13,629,864	14,992,851	16,492,136	18,141,349	19,955,484
GF	4,564,234	10,041,314	11,045,445	12,149,990	13,364,989	14,701,487

HB

205

LEXSEE 606 P.2D 769

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

No. 3670

Supreme Court of Alaska

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

February 19, 1980

PRIOR HISTORY: [1]**

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

CASE SUMMARY:

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

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

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

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

LexisNexis(R) Headnotes

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

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

*Governments > Legislation > Enactment
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Legislatures*

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

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

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

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

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

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

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

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

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

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

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

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

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

Governments > Legislation > Suspension, Expiration & Repeal

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

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

Governments > Legislation > Suspension, Expiration & Repeal

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

COUNSEL:

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

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

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

JUDGES:

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

n5 AS 05.15.060(11).

OPINIONBY:

MATTHEWS

OPINION:

[*770] AS 44.62.320(a) provides:

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

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

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

[**2]

I

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

n2 AS 05.15.100.

n3 AS 05.15.120, .210(15).

n4 AS 05.15.150.

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

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

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

n7 As amended the regulation reads:

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

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

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

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

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

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

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

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

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

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

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

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

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

[**5]

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

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

[*772] II

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

n10 [HN1] Art. II, § 13 provides:

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

[HN2] Art. II, § 14 provides:

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

[**7]

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

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

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

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

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

n13 Art. II, § § 15, 16 and 17.

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

The question presented by this case is whether the legislature can exercise its legislative power without following these enactment provisions. In our view the answer must be in the negative, for otherwise they would serve no purpose. In *Plumley v. Hale*, 594 P.2d 497, 502 (Alaska 1979) we held that [HN5] the requirements of Art. II § 14 are mandatory, not permissive. n15 [**773] The minutes of the proceedings of our constitutional [**10] convention indicate that the delegates were fully aware that only by following the enactment procedures could the legislature make law. Thus, Delegate Sundborg stated:

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

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

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

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

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

[**12]

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

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

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

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

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

Id.

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

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

46 P. at 672.

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

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

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

1 N.E.2d at 962.

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

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

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

[**16]

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

n19 Art. III § 23.

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

general administrative rule making was meant to be forbidden.

[**17]

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

n21 Art. III, § 23.

n22 Art. X, § 12.

n23 Art. II, § 1.

III

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

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

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

[**20]

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

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

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

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

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

n27 *Id.* at 10.

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

n29 225 S.E.2d at 848.

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

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

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

n30 U.S. Const. art. I, § 1 provides:

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

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

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

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

IV

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

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

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

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

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

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

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

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

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

n35 Art. III, § 26 provides:

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

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

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

[**28]

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

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

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

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

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

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

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

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

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

n38 This clause provides:

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

[**33]

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

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

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

[**34]

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

DISSENTBY:

BOOCHEVER

DISSENT:

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

I

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

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

There are no constitutional requirements for promulgation of regulations.

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

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

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

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

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

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

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

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

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

II

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

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

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

[**39]

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

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

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

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

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

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

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

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

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

III

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

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

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

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

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

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

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

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

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

IV

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

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

[**45]

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

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

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

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

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

V

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

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

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

[**48]

n14 Article X, section 12, provides:

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

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

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

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

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

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

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

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

VI

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

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

ⁿ¹⁶ 1959 House Journal 52.

ⁿ¹⁷ 1959 House Journal 427.

ⁿ¹⁸ 1959 Senate Journal 708.

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

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

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

ⁿ¹⁹ 1959 Senate Journal 1092.

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

ⁿ²⁰ See ch. 143 (ch. I, art. VII, § 1), SLA 1959.

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

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

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

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

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

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

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

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

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

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

[**55]

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

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

January 17, 2001

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

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

FROM: Tamara Brandt Cook
Director *TBC*

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

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

**LEGAL REVIEW OF COMMITTEE
POWERS**

Representative Lesil McGuire, Chair

January 17, 2001

Page 2

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

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

TBC:glc
01-025.glc

CS FOR HOUSE BILL NO. 205()

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY

Offered:

Referred:

Sponsor(s): REPRESENTATIVES RAMRAS, McGuire

A BILL

FOR AN ACT ENTITLED

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

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

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

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

8 (1) Legislative Affairs Agency;

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

11 (3) Administrative Regulation Review Committee;

12 (4) legislative council.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 (2) to hold public hearings;

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

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

21 (5) [REPEALED

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

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

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

1 AS 24.20.445];

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Talkeetna Alaskan Lodge
CIRI Alaska Tourism Corp.

Sharlene Berg
Director of Hotel Lodging

Fernando Salvador
Food & Beverage Manager - Talkeetna Alaskan Lodge

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

Overall concerns

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

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

Specific Comments

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

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

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

Donegan and Associates
10195 Nantucket Loop
Anchorage, Alaska 99507

March 15, 2005

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

Dear Ms. Ryan:

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

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

Reasons to Revise Regulations

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

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

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

Need for a Study

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

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

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

Study Elements

1. History of food borne illness outbreaks.

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

2. Current inspection levels by operation type.

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Douglas Donegan

FPA



FOOD PRODUCTS
ASSOCIATION

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

March 15, 2005

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

Dear Kristin-

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

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

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

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

WASHINGTON, DC

DUBLIN, CA

SEATTLE, WA

18 AAC 31.012 (p 5)

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

18 AAC 31.020 (p 10)

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

18 AAC 31.030 (p13)

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

18 AC 31.230 (p 31)

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

For consistency with the Model Food Code.

18 AC 31.320 (p 41)

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

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

18 AAC 31.330 (p 42)

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

18 AAC 31.335 (p 45)

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

18 AAC 31.400 (p 45)

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

18 AAC 31.410 (p 53)

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

18 AAC 31.515 (p 63)

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

18 AAC 31.900 (p 81)

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

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

18 AAC 31.900 (p 82)

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

18 AAC 31.915 (p 85)

Delete this section.

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

General Comments:

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

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

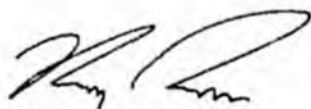
It should also be noted that food service provided at seafood processing operations is unique with regard to preparation, meal disbursement, and management of preparation quantity. This results in large quantity, short prep time meals that are consumed within a time window that does not provide opportunity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

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

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

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

Respectfully,



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

March 15, 2005

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

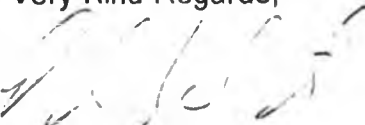
Dear Ms. Ryan:

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

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

I hope you find these comments useful.

Very Kind Regards,



Elizabeth Best

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

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

Comments regarding the review process:

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

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

**DEPARTMENT OF
ENVIRONMENTAL CONSERVATION**



18 AAC 31

Alaska Food Code

**Public Review Draft
January 12, 2005**

Comment periods ends March 15, 2005

**Frank Murkowski
Governor**

**Kurt Fredriksson
Acting Commissioner**

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

Chapter 31. Alaska Food Code.

Article

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

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

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

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

18 AAC 31.011 is repealed and readopted to read:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) The following publications are adopted by reference:

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

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

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

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

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

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

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

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

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

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

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

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

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

(13) the preparation and serving of food at

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

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

.....

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

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

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

.....

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

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

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

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

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

18 AAC 31.014 is amended to read:

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

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

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

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

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

(1) include

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

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

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

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

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

(2) describe the establishment's

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

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

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

(D) potable water supply; and

(E) method of wastewater disposal.

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

(1) food is from an approved source;

(2) food will be served immediately after preparation;

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

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

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

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

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

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

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

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

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

(3) describe the

(A) room used to manufacture and bag ice;

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

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

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

(E) potable water supply; and

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

(4) include a copy of

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

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

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

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

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

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

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

(3) adequate toilet and handwashing facilities are provided;

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

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

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

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

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

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

18 AAC 31.020 is repealed and readopted to read:

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

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

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

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

(b) A permit issued under this section

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

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

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

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

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

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

(f) A separate

- (1) food service permit is not required for
 - (A) a food establishment permitted under this chapter if
 - (i) customers serve themselves with individual prepackaged foods that may be heated; and
 - (ii) single-service tableware and condiments are provided;
 - (B) service of food at an auxiliary site, such as a banquet room, snack room at a labor camp, additional service area, or pushcart, if
 - (i) the auxiliary site is located on the same premises as the permitted food service and has the same operator as the permitted food service;

and

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

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

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

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

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

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

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

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

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

(2) food processing permit is not required for

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

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

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

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

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

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

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

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

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

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

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

(B) that is located within

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

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

(iii) a processing facility permitted under this chapter.

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) the reason for the request; and

(B) the proposed fee payment schedule.

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

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

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

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

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

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

18 AAC 31.030 is repealed and readopted to read:

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

operator shall apply for a permit under this section.

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

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

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

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

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

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

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

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

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

(B) if a commissary is used,

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

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

and

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

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

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

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

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

(B) for each machine,

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

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

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

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

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

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

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

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

(2) the proposed dates of the event;

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

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

(B) location and type of equipment and furnishings;

(4) menu items; and

(5) proposed methods of preparation and service.

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

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

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

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

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

Authority: AS 17.20.005 AS 17.20.180 AS 44.46.020
AS 17.20.072

18 AAC 31.040 is amended to read:

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

(1) a food establishment is to be constructed;

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

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

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

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

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

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

and access for deliveries;

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

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

(4) the construction and design specifications for equipment;

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

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

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

(8) the seating capacity;

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

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

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

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

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

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

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

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

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

(I) for a food service that

....

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

....

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

....

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

18 AAC 31.060 is repealed and readopted to read:

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

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

(A) prepared onsite; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) The operator of a food establishment

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

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

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

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

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

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

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

(3) shall ensure that

(A) raw oysters

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 AAC 31.070. School food establishments.