

## MEMORANDUM

State of Alaska  
Department of Law

		Northern Region DOT/PF	
		Regional Director	
X		M & O Director	
X		Planning/ADM. CHIEF	
X		Design	
		Const.	
X		Row	
		Project Control	
		Safety Officer	
		F.I.A. Manager	
X		Return to Reg. Dir	
		File	

TO: Michael Downing, Director

DATE: November 28, 2000

Statewide Design and

Engineering Services

DOT &amp; PF

FILE NO.: 663-00-0033

TELEPHONE NO.: 465-3600

FROM: William F. Cummings

SUBJECT: Right of Way Management/For  
the Public in General vs. the  
Traveling Public

Assistant Attorney General

Transportation Section - Juneau

I understand you have begun a colloquy with the regional directors, and the commissioner, regarding the philosophic bias that the department should have when managing its highway rights of way. There is one faction among the staff that proposes that DOT&PF's highway rights of way should be managed to fulfill the interests of the public in general. An equally vocal faction of the staff argues that the management of the highway rights of way should be accomplished to further the interests of the traveling public, without reference to the larger interests.

DOT&PF's responsibilities for highways are defined in AS 19.05.125. That statute provides:

The purpose of AS 19.05 - AS 19.25 is to establish a highway department capable of carrying out a highway planning, construction, and maintenance program that will provide a common defense to the United States and Alaska, a network of highways linking together cities and communities throughout the state (thereby contributing to the development of commerce and industry in the state, and aiding the extraction and utilization of its resources), and otherwise improve the economic and general welfare of the people of the state.

(Emphasis added) This statute provides a clear expression of legislative intent for the milieu that DOT&PF is expected to operate within while exercising its management prerogatives. In other words, DOT&PF's mission, as far as highways are concerned, is fairly narrow. The result of its activities is to provide for highways that provide for the national defense and link communities together. It is through these activities that

DOT&PF is expected to make its contribution economic and general welfare of the people of the state.

The Alaska Supreme Court has considered to whom a duty is owed in the management of public improvements. In *Plancich v. State*, 693 P.2d 855 (Alaska 1985), the City of Yakutat operated a seaplane float which it leased from the state. The plaintiff, Plancich, attempted to moor his sea plane to the seaplane float, while he was passing through Yakutat, but could not. The city had allowed fishing boats to moor at the seaplane float. Plancich moored at a private dock, not equipped to deal with seaplanes. A storm blew up and his seaplane sank during the storm.

The city defended the action on the basis that it had no liability to Plancich. The city argued that it was the general public that had the right to use the seaplane float, not any individual member of the public. The superior court agreed and dismissed the law suit. The Alaska Supreme Court reversed. More specifically it said:

We think that by enacting the provisions cited, the legislature intended to ensure that airport facilities would be made available on a priority basis, to that segment of society for which the facilities are designed. Thus, in this instance, the statutes reference to “the public” and the “general public” can only mean the flying public, i.e. those persons operating aircraft or machinery incidental to the operation of aircraft. The equal and public access guaranteed by those sections applies to users in this category, not the public at large. By no stretch of the imagination could the intended category include the operators of fishing vessels.

*Plancich* at 858.

If the logic of *Plancich* is applied to the management of highway rights of way, the breadth of DOT&PF's management authority is narrow. Its responsibility is to manage its highway rights of way for the benefit of the traveling public, which is the segment of the public that the highways are intended to serve.

You provided me with a copy of a decision making matrix prepared by a member of your staff, that assumes that highway rights of way are to be managed to further broader public policy goals, such as resource development. The author cited a number of constitutional provisions and statutes to support the analysis. It is true that the provisions cited do offer very broad general policies that are pro-development. However, when related to the specifics of managing highway rights of way, they are not very helpful. The legislature carved out a much smaller role for DOT&PF in AS 19.05.125. DOT&PF

is to carry out “a highway planning, construction, and maintenance program that will provide a common defense to the United States and Alaska, a network of highways linking together cities and communities throughout the state”. AS 19.05.125. The legislature contemplated that DOT&PF will make its contribution to resource development and furthering the economic well being of the people through the efficient management of the highway program. It did not contemplate that DOT&PF would weigh its management of the highway program by a juxtaposition of a pro-development philosophy against the needs of the traveling public as the proposed decision making matrix seems to suggest.

DOT&PF's regulations in 17 AAC 10 are intended to address the needs of the traveling public. As a general matter, it is only after a finding that a permitted use, i.e. a driveway or an encroachment, will not adversely impact a highway as its use, that a permit will be issued, unless the issuance of the appropriate permit is not in the state's best interest. The proposed decision making matrix immediately balances the state's broader policy goals against the interests of the traveling public. The difference between the two approaches is quite significant. Under DOT&PF's current model, the broader policy goals are a basis to say “no” to a proposed use. Under the proposed decision making matrix, the broader policy goals will compel a “yes” to a proposed use.

WFC:pvp

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## CHAPTER 1

# INTRODUCTION TO REGULATIONS

This manual has been prepared to help state agencies adopt and maintain administrative regulations under AS 44.62, the Administrative Procedure Act (APA), and to ensure that the entire Alaska Administrative Code (AAC) is an accurate and coordinated set of regulations.

An agency that is exempt by statute from the APA should work closely with its agency attorney in adopting regulations. For uniformity and to avoid legal challenges (such as due process), the guidelines set out in this manual should still be followed for non-APA regulations projects. Appendix AA of this manual sets out a sample adoption order form for use by agencies that are exempt from the APA.

The Department of Law will help agencies comply with this manual, the APA, and other statutes and relevant court decisions. The Department of Law should be consulted early in the development of a regulations project.

It is important to understand the difference between "statutes" and "regulations." Statutes are laws passed by the legislature. Regulations are rules adopted by agencies in the executive branch of the government. An agency's authority to adopt regulations comes from the legislature; this "rule-making" power is a "legislative" power that the legislature has delegated to the agency. If the proper procedure is followed in adopting a regulation, and the substance of the regulation is valid, it will have the "force and effect" of law. To adopt a regulation, an agency must follow the APA as well as any additional statutory requirements set by the legislature that apply to that agency's particular program.

### WHEN ARE REGULATIONS NECESSARY?

In AS 44.62.640, the APA broadly defines "regulation" to include many provisions that a state agency would wish to enforce.

agency should take care not to affirmatively assert by word or conduct that the state agency would never enforce the regulation.

### CONSISTENT WITH STATUTES AND REASONABLY NECESSARY

The APA and case law require that a regulation be "consistent with the statute," "reasonable," and "reasonably necessary."

AS 44.62.030 provides:

If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute. [Emphasis added.]

AS 44.62.020 provides in part: "To be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." A regulation must have a reasonable relationship to the statutory objectives being implemented. However, a regulation may not take away a right clearly created in statute.

When considering the reasonableness and necessity of a proposed regulation, an agency should consider the fiscal ramifications of the regulation -- for the adopting agency itself, for other agencies, and for the public. See Chapter 14 of this manual for more details on fiscal notes for regulations.

### IMPORTANT DEFINITIONS FOR THIS MANUAL

The following terms are used throughout this manual, and understanding how they are used is important:

"**adoption**" is a general term used to describe an agency's action to adopt a new provision, adopt an amendment to an existing provision, or adopt the repeal of an unneeded provision of the AAC; a single adoption for a regulations project might cover a combination of those three agency actions;

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**Existing provisions of regulations**

*17 AAC 10. Engineering: Encroachments, Driveways, and Road Approaches*

- Encroachment permits may be issued to:
  - Government agencies for \$200 (fee may be waived)
  - Lessee or owner of adjoining land for economic rent or \$100, whichever is greater. Exceptions: permanent structures located entirely in the ROW, unpermitted water/sewer facilities, tanks, fueling facilities, unsafe use, use not in best interest of state. Land area of permit may not be used to meet minimum requirements for land use under municipal land use regulations or DEC regulations
  - Anyone for a beautification permit
  - Government agencies for commemorative plaques or historical/interpretive markers in rest stops and pullouts
  - **NOTE:** For, existing structures, permit may be issued *only if* no risk to public, construction of encroachment occurred in good faith, and denial of permit would cause hardship
- Driveway permits
  - Driveway remains property of state, but costs and liability of construction, operation or maintenance remain with lands served

- Small and large driveways have differing requirements. Large driveways require a TIA
- Performance deposit of \$500
- Land disposals
  - Sets out procedures for disposing of excess right of way

#### ***17 AAC 60. Highway Signs for the Traveling Public***

- TODS
- Logo
- Community Services
- RCIA
- General Services

#### ***17 AAC 81. Relocation Assistance Services***

- Adopts federal regulations by reference
- Sets up appeals procedures and appeals board. First level of appeal is administrative review officer (appointed by regional director) who issues decision. Second level of appeal is formal hearing by administrative review panel (D&ES Director plus Regional Directors, except Regional Director of region where appeal arose). Third level of appeal is superior court.

#### ***17 AAC 85. Appeals***

- Appeals for denials of encroachment permits, driveway permits, land disposals, and highway signs for the traveling public permits
- Sets up appeals procedures and appeals board: first level of appeal is administrative review officer (appointed by regional director) who issues decision. Second level of appeal is formal hearing by administrative review panel (D&ES Director plus Regional Directors, except Regional Director of region where appeal arose). Third level of appeal is superior court.

### **Proposed changes to regulations (draft under development)**

#### ***17 AAC 05. Administration***

- Prohibit camping in rest stops and pullouts when posted
- Prohibit soliciting in rest stops and pullouts

#### ***17 AAC 10. Engineering: Encroachments, Driveways, and Road Approaches***

- Add flags, banners, welcome to, and special event signs to allowable types of permits for government agencies
- Clarifies that adjoining land owner/lessee must also be contiguous to permit location
- Prohibits encroachment permit for any permanent structure located partially or completely within the right of way
- Defines permanent structure: "A structure is not considered permanent if the permittee can reasonably remove the structure within 30 days without economic hardship"

- Requires land use for encroachment permits to be an accessory use to the adjoining and contiguous land use

#### ***17 AAC 20. Maintenance***

- Defines on-premise sign, including political campaign headquarters; limits on-premise advertising with time constraints
- Provides for placement of advertising on trash receptacles within 15 feet of bus benches and bus shelters
- Designates the interstate, primary, and secondary highways by reference to a document entitled Federal Aid Highways: Interstate, Primary, and Secondary Highways of Alaska
- Provides specific provisions for the Department to remove outdoor advertising both within and outside the highway right of way, including payment of fees for retrieval of signs removed
- Creates requirements for permits for highway events (i.e., walks, runs, bicycle races, etc), including fees for large events, TCPs, consent from municipality and police.

#### ***17 AAC 60. Highway Signs for the Traveling Public***

- Adds ANCSA corporations to Recreational and Cultural Interest Areas
- Adds memorial sign program
- May repeal General Service Sign provisions
- May clarify other provisions of TODS, RCIA, Logo and Community Service regulations

#### ***17 AAC 85. Appeals***

- Clarifies that decision to dispose of land is not appealable
- Changes administrative review officer's decision to be a recommended decision to the Regional Director, with the Regional Director issuing the decision