I. Introduction.

This memorandum highlights the key changes to the Alaska Administrative Procedure Act, (APA), AS 44.62.010 - 44.62.950, made by ch. 87, SLA 2014 (HB 140 or the new law) enacted last legislative session. Since the changes will require agencies to use new forms when preparing a regulations package, we have attached copies of the new forms.

II. General aspects of HB 140.

Effective date. HB 140 takes effect October 14, 2014 and applies to "proposed regulations first published under AS 44.62.190 on or after the effective date of this Act." Rev 1
Revised forms needed to comply with the new law are attached and will be posted on the Department of Law Internet website on October 14, 2014.

Application. The new law only affects a state agency, board, or commission that adopts regulations under the APA. The new law does not apply to emergency regulations, but would apply should the emergency regulation be made permanent.

Exempt bodies. The Regulatory Commission of Alaska, the Board of Fisheries, the Board of Game, and the Alaska Oil and Gas Conservation Commission are exempt from most provisions of the new law, except for a provision (discussed below) on the title of electronic mail and documents. Despite being exempt from most provisions of HB 140, the exempt boards and commissions will still need to use new forms when publishing notice of proposed regulations. 2

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1 Sec. 12, ch. 87, SLA 2014.

2 Specially, Appendices D-3, E-2, and T-3 (attached).
III. Specific aspects of HB 140.

A. Subject line of electronic mail and document titles.

New subsection (f) of AS 44.62.190 requires, "[t]o the extent feasible, the subject line of electronic mail and the title of a written publication [on proposed regulations] must give the reader a fair idea of the substance of the proposed new regulation, the proposed amended regulation, or the regulation proposed for repeal."\(^3\) To comply, agencies may want to consider putting the subject of the regulations at the beginning of the electronic mail or document title. For example, it may be more helpful to the reader if the electronic mail subject line reads "Food Safety: Proposed Regulations of [name of agency]" rather than "Proposed Regulations of [name of agency] relating to Food Safety".

B. Information on the reason for the proposed action.

1. Identification of federal law or decision of a federal or state court that is the basis for the proposed action. AS 44.62.190(d) is amended to require agencies to include as part of the additional regulations notice information, "if applicable, an identification of the law, order, decision, or other action of the federal government or a federal or state court that is the basis for the proposed action . . . ." See, sec. 3, ch. 87, SLA 2014 and new Appendix E-1 (attached).

   Legislative history indicates this requirement to identify federal law may be satisfied "in a sentence or two." Minutes, House Judiciary Committee, 28th Alaska Legislature (April 8, 2013, 2:27 p.m. (testimony of Krista Vonbergen, staff to Rep. Lora Reinbold).

2. Cost estimate of the proposed action. In addition, AS 44.62.190 (d) is amended to require a state agency, when estimating the annual costs of a proposed regulation, to "make a good faith effort to estimate the costs in the aggregate . . . using the information available to the state agency" to private persons, other state agencies, and municipalities to comply with the proposed action. See, sec. 3, ch. 87, SLA 2014 and new Appendix E-1 (attached).

   Legislative history indicates the "compliance costs would be estimated in the aggregate form for stakeholders." Minutes, House Finance Committee, 28th Alaska Legislature, (March 13, 2014, 9:12 a.m.) (testimony of Rep. Lora Reinbold.). If you have questions about the information required by AS 44.62.190 (d), contact the Legislation and Regulations Section of the Department of Law, or your agency attorney.

\(^3\) Sec. 4, ch. 87, SLA 2014.
C. **Publication on the Alaska Online Public Notice System.**\(^4\) AS 44.62.200(c) is amended to require that a complete copy of each proposed adoption, amendment, or repeal of a regulation and any document or other material incorporated by reference (if feasible and not prohibited by copyright) be made available on the Alaska Online Public Notice System by "providing an electronic attachment, or a link to the complete text."\(^5\) To comply, an agency can provide a link (mostly likely to the agency's own website) to the document on the Alaska Online Public Notice System. In the alternative, a portable document format (PDF) of the document could be attached to the Alaska Online Public Notice System notice without linking to a separate website.

Even if posting material online would not be feasible (such as maps or very lengthy documents) or could be prohibited by copyright (such as some technical manuals), the Department of Law still requires the agency to have that material on hand and available for public review during the comment period. The Department of Law should be contacted if there are questions about whether copyright restrictions apply prior to publishing materials to be adopted by reference.

D. **Agency contact with the public.** The new law addresses agency interaction with the public in the course of "developing a regulatory action and before the agency provides a notice of proposed action." During that time, an agency "may contact a person about the development of the regulatory action and the agency may answer a question from a person that is relevant to the development of the regulatory action."\(^6\)

After publishing notice of a proposed regulation, an agency "shall make a good faith effort to answer, before the end of the public comment period, a question that is relevant to the proposed action, if the question is received in writing or asked at a public meeting at least 10 days before the end of the public comment period. If a question is received after the 10-day cut-off date, the agency may answer the question."\(^7\) The agency must make the questions and answers "available to the public." The agency can satisfy these requirements by posting the questions and answers on the Alaska Online Public Notice System and by giving a "single consolidated response" to questions that are substantially similar. To see our suggestion for informing the public of this provision, see, appendices D-1 and D-2 (new paragraph on questions during the comment period).

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\(^4\) [http://aws.state.ak.us/OnlinePublicNotices/Default.aspx](http://aws.state.ak.us/OnlinePublicNotices/Default.aspx)

\(^5\) Sec. 5, ch. 87, SLA 2014.

\(^6\) Sec. 7, ch. 87, SLA 2014, adding new AS 44.62.213 (a).

\(^7\) Id., adding new AS 44.62.213(b).
E. **Record of comments.** Under AS 44.62.215 agencies have been required to keep a record of their response to written comments submitted during the public comment period. Section 215 has been amended to require boards and commissions (except those exempted from HB 140) to also keep a record of response to public comment. In addition, agencies, boards, and commissions (except those exempted from HB 140) must now keep a record of public comments received *orally* in addition to those received in writing. ⁸ An oral public comment is one received at a public meeting on proposed regulations.

F. **Amended material adopted by reference.** In instances where AS 44.62.245 authorizes an agency to adopt future versions of material adopted by reference, the agency is required to publish the amended version and post it on the Alaska Online Public Notice System. Under amended AS 44.62.245(c), members of the legislature's Administrative Regulation Review Committee must also receive notice when amended materials are adopted by reference. *See*, sec. 9, ch. 87, SLA 2014.

G. **Post adoption review.** Under AS 44.62.040(c), state agencies subject to the APA were required to submit adopted regulations to the governor prior to submitting the regulations to the lieutenant governor for filing. The governor is authorized to return the regulations to the agency "(1) if they are inconsistent with the faithful execution of the laws, or (2) to enable the adopting agency to respond to specific issues raised by the Administrative Regulation Review Committee." ⁹

The new law changes these requirements in a few ways. First, the exemption for boards and commissions is eliminated. ¹⁰ Second, the review by the governor is to be "within 30 days". Third, at the same time the adopted regulations are submitted to the governor, they must also be submitted (along with fiscal information, if any) to the members of the Administrative Regulation Review Committee (ARRC). Under AS 44.62.320(d) the chair of the ARRC may "[w]ithin 10 days of receiving a regulation . . . submit to the governor, by legislative memorandum or letter, comments on the regulation." *See*, sec. 11, ch. 87, SLA 2014.

For practical purposes, these changes do not alter the process that agencies currently follow. Under current practice, after adoption of the regulations, an agency sends the final regulations package (including an extra copy of the regulations) to the Department of Law for legal review and approval. ¹¹ This will continue to be the practice except that the adopted regulations will be submitted to the Governor's office and the Administrative Regulation Review Committee at the same time as required by sec. 11, ch. 87, SLA 2014, (new AS 44.62.320 (c) and (d)).

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⁸ Sec. 8, ch. 87, SLA 2014, amending AS 44.62.215.

⁹ AS 44.62.040(c).

¹⁰ Except for the Regulatory Commission of Alaska, the Board of Fisheries, the Board of Game, and the Alaska Oil and Gas Conversation Commission.

H. Protection from court challenges. New AS 44.62.300(b) provides that "a person may not bring an action in court to challenge the adoption, repeal, or amendment of a regulation by a state agency for:

(1) insufficiency or inaccuracy of the notice provided under AS 44.62.190(d) or (g);

(2) failure of the subject line of electronic mail or the title of a written publication to meet the requirements of AS 44.62.190(f);

(3) failure of the brief description required by AS 44.62.200(d) to comply with the requirements of AS 44.62.200(d) relating to
   (A) the clarity and readability of the brief description; or
   (B) the description of the changes made by the proposed adoption, amendment, or repeal of a regulation; or

(4) inaccuracy or insufficiency of the answer to a question provided by the state agency under AS 44.62.213."

IV. Drafting Manual.

The Drafting Manual for Administrative Regulations will be formally updated to account for the requirements of ch. 87, SLA 2014 in August of 2015. In the meantime, we have prepared new versions of the following appendices and forms for everyone's use. These appendices and forms should be used for proposed regulations first published on or after the October 14, 2014. The new versions will also be posted on the Department of Law's web site at http://www.law.state.ak.us/doclibrary/drafting_manual.html.

Appendix A: Agency Checklist - "Regular" Regulations
Appendix B: Agency Checklist - Emergency Regulations
Appendix D-1: Public Notice - Newspaper
Appendix D-2: Public Notice - Non-Newspaper
Appendix D-3: Public Notice (exempt boards and commissions)
Appendix E-1: Additional Reg. Notice Information
Appendix E-2: Additional Reg. Notice Information (exempt boards and commissions)
Appendix K: Affidavit of Agency Record of Public Comment
Appendix T-1: Notice of Adopt. of Emerg. Regs - Newspaper
Appendix T-2: Notice of Adopt. of Emerg. Regs - Non-Newspaper
Appendix T-3: Notice of Adopt. of Emerg. Regs (exempt boards and commissions)
Appendix W: Notice of Amended Mat'l Adopted by Ref.
Appendix X: Affidavit of Notice of Amended Material Adopted by Reference
Appendix Y: Agency Attorney Final Review Checklist/ "Regular" Regulations
Appendix Z: Agency Attorney Review Checklist/Emergency Regulations
V. Conclusion.

Contact the Legislation and Regulations section in the Department of Law for legal advice on how to comply with the requirements of ch. 87, SLA 2014.

SRP:pav

Attachments

cc: Scott Meriwether, AAC Coordinator
    Office of the Lt. Governor

    Randy Ruaro, Policy Director
    and Special Counsel to the Governor
    Office of the Governor