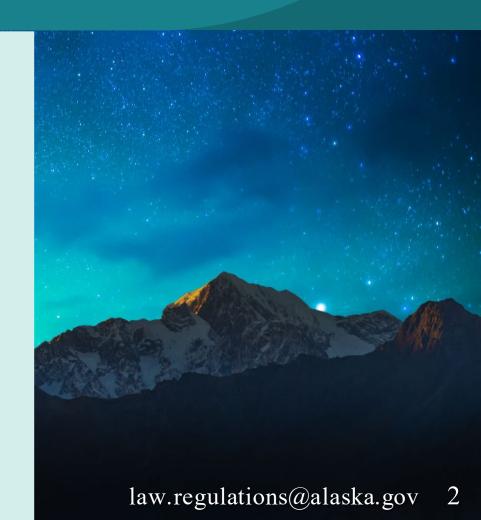


Agenda

- Introductions and the purpose of today's training
- Overview of the roles and responsibilities of the Legislation,
 Regulations, and Legislative Research Section
- Regulations and the Administrative Procedure Act
- Addressing issues and improving processes
- Review the Drafting Manual for Administrative Regulations
- Question and answer period



The Legislation, Regulations, and Legislative Research Section is providing this training to ensure that the regulations process is clear, streamlined, and easy to navigate.

No matter your role in the regulatory process, today's training will provide a comprehensive overview and give you the knowledge and tools to fulfill your role.

You can reach the LRLR Section for any regulatory questions at the following centralized email address:

law.regulations@alaska.gov





"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure..."

AS 44.62.640 (3)



What is a Regulation?

NARROWING THE DEFINITION

Whether a regulation, regardless of its name, is covered by the APA depends in part on whether it *affects the public* or is used by the agency in *dealing with the public*.

Regulations have the effect of rules, orders, regulations, or standards of general application — but regardless of the phraseology, the regulations process *must* be followed per statute.

REGULATIONS MAY INCLUDE

- Manuals
- Policies
- Instructions
- Guides to enforcement
- Interpretive bulletins
- Interpretations

The Administrative Procedure Act (APA)

PURPOSE

- Provides <u>structure</u> by which most state agencies adopt their regulations
- Ensures the public has a <u>meaningful</u>
 <u>opportunity</u> to comment and ask
 questions when regulations are
 proposed
- Establishes *uniform standards* for state agencies for the regulatory process
- Allows <u>exceptions</u> for certain state agencies

DELEGATION

- The Legislature may delegate, by statute, its authority to create rules and standards (regulations) to executive branch agencies
- Through this delegation of authority, the Legislature relies on the subject-matter expertise of state agencies to draft and adopt regulations that are clear, concise, and lawful
- The Legislature retains oversight over the regulations

AUTHORITY

- Regulations have the force of law only if the agency has the <u>statutory</u>
 authority to adopt the regulation in question
- Most executive branch agencies are subject to the APA, but there are exceptions – some agencies, boards, or commissions have statutory authority set out elsewhere
- A substantial failure to comply with the procedural steps whether APA or not may be grounds for a regulation to be invalidated by a court.

Key Players in the Regulatory Process

The Alaska Legislature delegates lawmaking power through statute. The Legislature also receives notice of all proposed regulations.

The Department of Law reviews the regulations in two stages. The agency attorney reviews for legal issues from an agency or program perspective. The LRLR attorney reviews for legal issues from a regulatory perspective.

Both reviews are mandatory.

The Office of the Governor provides general direction to commissioners, and reviews regulations to ensure faithful execution of the law.

Regulation review authority can be delegated to the Office of the Lt.

Governor.

Alaska Legislature

State Agencies, Boards, or Commissions

Department of Law

Office of the Lt. Governor

Office of the Governor

Judicial Branch

Agencies, Boards, or Commissions with adopting authority under statute and/or legislative delegation create draft regulations based on their subject-matter expertise.

The Office of the Lt. Governor files regulations for publication in the Alaska Administrative Code.

Regulations become effective 30 days after the date of filing.

The lieutenant governor may reject regulations before they are filed.

Judicial review presumes the regulation is valid if properly adopted, and the court is unlikely to substitute judgment its for questions that fall under agency expertise.

Legislation, Regulations, & Legislative Research Section





Roles & Responsibilities of the Legislation, Regulations, & Legislative Research Section

Legislation

- Legal counsel to governor's office for legislation matters
- Legal counsel to Office of Management and Budget
- Drafts governor's legislation
- Drafts bill reviews for the governor
- Drafts appropriation bills
- Drafts administrative orders for the governor
- Monitors all legislation for legal issues
- Provides legislative research services

Regulations

- Manages the regulatory process for the State of Alaska
- Legal counsel to governor's office for regulation matters.
- Legally reviews and edits regulations and advises on regulatory process.
- Establishes drafting standards, creates and maintains the Drafting Manual for Administrative Regulations
- Approves or disapproves regulations for filing with the Lt. Governor.



The Role of the Regulations Attorney

The Regulations Attorney is a statutory position under AS 44.62. The Regulations Attorney is responsible for the following:

- Advising state agencies of the nature and use of administrative regulations
- Reviewing regulations and making recommendations
- Assisting with drafting new regulations and providing advice on legal problems encountered
- Advising agencies with respect to public hearing requirements
- Serves as the revisor for the AAC

Legislation, Regulations, and Legislative Research Staff



The LRLR Section works year-round on both legislative and regulatory projects. During the second session of the 32nd Legislature, the LRLR Section drafted over 50 bills, completed roughly 80 bill review letters, and monitored over 600 bills - while managing more than 100 regulations projects. Due to volume, work is assigned based on priority.

The section includes the following staff:

- Six attorneys, including the regulations attorney and the civil legislative liaison, all cross-trained to work on both regulations and legislation
- Two legal editors trained to review both legislation and regulations for conformity, clarity, and accuracy
- Two paralegals to conduct research, manage the legislative and regulatory processes, and assist with special projects

Updated Internal Procedures



Identified Regulatory Process Issues

NOTICE, ADOPTION & FILING

- Regulations projects frequently require re-noticing or supplemental public notices
- Regulations frequently require readoption by state agencies after legal review
- Regulations projects frequently approach "staleness"
- Regulations are not consistently delivered to Lt. Governor for filing or filed by the Lt. Governor on timelines requested by agencies.

ISSUES DURING LEGAL REVIEW

- Agency attorneys and regulations attorneys provide legal advice at different stages of the review process creating notice, adoption, and filing issues.
- Legal issues that arise during the review process delay the project's delivery, filing, and effective date
- Agency attorneys must balance their review processes with their other duties
- Regulations attorneys are frequently pulled to assist with legislation, slowing their review process

OUTDATED PROCESSES

- Notarizing original forms is difficult in light of heavy telework and remote offices
- Requiring originals to be mailed to Juneau office for review slows the process down
- Agencies are unable to pinpoint someone to quickly and effectively answer questions
- Forms are outdated or difficult to use or understand

Changes Already in Place to Internal Procedures

NOTICE, ADOPTION & FILING

- Notice reviews are now conducted by the paralegal - agency and regulations attorneys no longer have to perform this review
- Paralegals re-key the edited regulations so clean copies are delivered to the publisher without pencil edits
- Adoption packets are now reviewed by the paralegal to ensure completeness and accuracy--agency and regulations attorneys no longer have to perform this review

LEGAL REVIEW STREAMLINING

- Technical reviews are now conducted by the legal editor prior to legal review – agency and regulations attorneys no longer have to perform these edits
- All LRLR attorneys are cross-trained to perform both regulations review and legislation work to increase the availability of staff
- Cross-training allows for more efficient legal review by increasing subject-matter expertise across projects

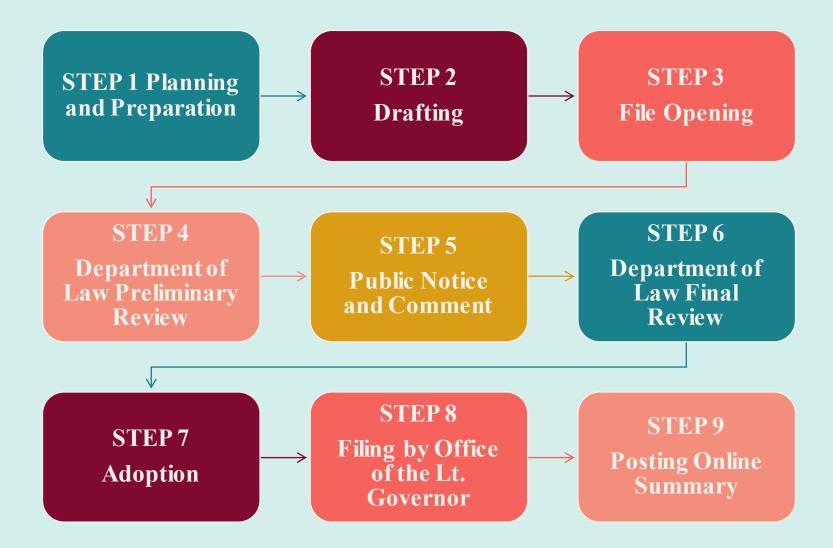
UPDATED **PROCESSES**

- Centralized email address for all regulations-related work: law.regulations@alaska.gov
- Centralized email allows for routing of questions to appropriate staff, faster processing of documents, and project status updates
- Original documents are no longer required for submission
- Electronic signatures accepted
- Electronic delivery to Lt. Governor's office

New Procedures in the Regulatory Process



Regulatory Process for APA Regulations



Step 1: Planning and Preparation

PROJECT INCEPTION



- A state agency, board, public corporation, or commission identifies the need for regulatory action
- The agency may contact their agency attorney to determine if the agency has the authority to adopt regulations, that the regulation is needed, and that applicable standards are met

AUTHORITY TO ADOPT

• General authority can be used to support regulations for statutes that require implementation of a policy but fail to

mention

regulations.

• Agency commissioners have general authority to adopt regulations, but specific authority may be required, depending on the subject matter

NECESSITY



- Does it affect the public?
- Is it consistent with and reasonably necessary to carry out the statute?
- Is it reasonable and not arbitrary?
- Does the agency intend to charge a fee?
- Is there an emergency? (preserving public peace, health, safety, or general welfare)

PREPARATION

- What is the timeline for this project?
- What is the fiscal impact, if any?
- What is the length of the comment period?
- How will comments be accepted from the public?
- What accommodations are being made?
- Will there be an oral hearing?

Step 2: Drafting

INITIAL DRAFT

- All regulations must be drafted to adhere to the standards set out in the Drafting Manual for Administrative Regulations, available on the Department of Law website
- Agencies may work with their agency attorney during the drafting process for advice and recommendations

PUBLIC NOTICE & COMMENT

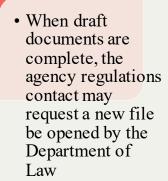
• Agencies should be drafting their public notice paperwork simultaneously with their draft

regulations

• Additional regulations notice information provides a more detailed cost and implementation breakdown, and is required even if there is no additional appropriation

Step 3: File Opening

FILE OPENING REQUEST



• The request must include the request memo, the draft notice paperwork, and the draft regulations. The draft notice and regulations must be in Word format

BOARDS & COMMISSIONS

- When a board or commission submits a file opening form to the Department of Law, the board or commission must also include a copy of their meeting schedule
- Boards must identify at which board meeting they plan to present the regulations pre and post notice

Drafting a Regulation

RESOURCES

- The agency must start with the current version of the regulations
- If the agency does not have access to the latest regulations, the agency regulations contact may request a Word version of the regulations from the LRLR Section
- The agency should have relevant statutes on hand to ensure the proposed regulations fall within the statutory authority of the adopting agency
- The Drafting Manual for Administrative Regulations is the official source for drafting requirements, style guides, and examples when in doubt, consult the manual
- All the appendices in the manual are also available online at law.alaska.gov/doclibrary/drafting manual.html

Agencies versus Boards and Commissions

AGENCIES

- unless exempt, agencies must comply with the Administrative Procedure Act
- agency commissioners approve and adopt regulations, unless authority is delegated to a designee
- must maintain a record of how public comments are treated, but the record does not need to be decisional
- oral hearings are optional

BOARDS AND COMMISSIONS

- unless exempt, boards and commissions must comply with the Administrative Procedure Act
- maintain a regular schedule of meetings
- approve and adopt regulations at regularly scheduled meetings
- adoption orders must be accompanied by meeting minutes reflecting the adoption

Drafting a Regulation – Fees, Fiscal Notes, and Material Adopted by Reference

FEES &

PENALTIES

- Regulations should not provide for penalties without express statutory authority to do so
- Agencies may set out fees in regulations for providing state services IF the fee is authorized by statute and IF the regulations meet APA standards and IF the fee does not exceed the estimated annual cost of providing the service

THE PURPOSE OF FISCAL NOTES

- The APA requires disclosure of fiscal ramifications of proposed regulations
- A fiscal note is required if a proposed regulation would require "increased appropriation" by the state
- Chapter 7 of the drafting manual provides an in-depth guide to fiscal notes, including how to draft them, who needs to draft them, and when they are required

MATERIAL ADOPTED BY REFERENCE

- If the agency has the statutory authority to adopt material by reference, it may do so by following the steps in Chapter 8 of the drafting manual
- Material adopted by reference does not have to follow the same word-processing requirements as the actual regulations
- Material adopted by reference must be available for inspection by the public, and when materials are amended, the regulations must be updated

Step 4: Dept. of Law Preliminary Review

REVIEW OF PACKET



TECHNICAL EDITS



LEGAL REVIEW



APPROVAL TO NOTICE

- The LRLR
 Section conducts
 a preliminary
 review to identify
 and correct major
 issues before
 public notice
- Issues may include a too-short public comment period, missing or incomplete documents, or missing signatures

- The legal editor reviews the draft regulations for clarity and conformance with the drafting manual
- The agency attorney conducts their legal review of the regulations simultaneously, so regulations receive technical and substantive edits in a timely manner

- A regulations attorney also conducts a preliminary review of the regulations for any legal issues
- The LRLR legal review is conducted after the agency attorney's review and the legal editor's technical edits, ensuring the regulations meet all the standards for notice

- After receiving approval from the Department of Law to notice the regulations, the agency may proceed to the next step
- Edits and required changes from the Department of Law must be incorporated before notice

Step 5: Public Notice and Comment

PUBLICATION



DISTRIBUTION



COMMENTS & QUESTIONS



ORAL HEARINGS

- The Public Notice must be published according to the APA requirements
- The adopting agency must publish the notice in the newspaper, as well as the Alaska Online Public Notice System
- Chapter 2, Step 5 of the drafting manual provides step-by-step instructions to publish the notice

• The adopting agency must also distribute the regulations and notice paperwork to the interested parties on the agency's interested-persons list, other persons not listed that the agency believes may be interested in the proposal, appropriate state officials, and the Department of Law

- All public
 questions must be
 answered and
 posted to the
 Alaska Online
 Public Notice
 System
- The agency must consider all public comments and retain them according to its retention schedule
- The record should explain the reasons for the agency's action

- If an agency chooses to hold an oral hearing for public comment, the oral hearing information must be included in the public notice
- If the agency decides to hold an oral hearing after the public notice is distributed, the agency must issue a supplemental notice to announce the hearing

Step 6: Dept. of Law Final Review

FINAL PACKET REVIEW



- After considering all comments and finalizing the regulations, the agency submits the final regulations packet to the LRLR Section for legal review and approval
- A paralegal in LRLR will review the packet to ensure it is complete and correct

TECHNICAL EDITS



- A legal editor will compare the draft and final regulations and identify any additional edits to complete
- The final regulations are rekeyed if subsequent edits are made
- Both the agency and LR attorney review the package at this time

FINAL LEGAL REVIEW



- The regulations attorney or designee conducts the final level of legal review
- After reviewing the regulations packet, the regulations attorney prepares an approval letter to the Lt. Governor outlining the submission (or disapproval letter to the agency)

APPROVAL TO ADOPT

- IF APPROVED, the LRLR Section notifies the agency to prepare an adoption order, advising the agency of the final page count of the regulations
- If the regulations are not approved, the LRLR Section provides advice to the agency and works to find a solution for approval

Filing Step 7: Adoption

ADOPTION

- After receiving approval from the Department of Law, the agency may sign an adoption or certification order
- Board and commissions adopt regulations by voting on their passage at a properly-noticed public meeting
- Additional requirements are found in the drafting manual

GOVERNOR REVIEW

- Unless otherwise noted, the adopted regulations, notice paperwork, and additional regulation information must be sent to the governor for review
- The agency must email the abovereferenced notice and regulations material to the [gov-regs] listserv

LT. GOV. REVIEW

- A governor may delegate the duty to review the regulations only to the Lt. Governor
- Regulations may be returned to the agency if they are "inconsistent with the faithful execution of the laws" under AS 44.62.040(c)

FINAL DELIVERY

- The LRLR
 Section prepares
 the final packet
 for delivery to the
 Lt. Governor's
 office.
- Final packets include the regulation attorney's approval letter, the adoption order, the notice paperwork, and the regulations, rekeyed and without pencil edits

Step 8: Filing

Step 9: Online Summary

FILING NOTICE



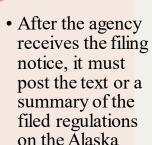
- Once accepted, the agency receives a filing notice from the Office of the Lt. Governor
- Unless the filed regulation was an approved emergency regulation, the regulation is not yet effective

EFFECTIVE DATE



- A regulation takes effect on the 30th day after it is filed
- Agencies may request special effective dates
- The regulation and supporting documents are maintained at the Lt. Governor's office for five years before being transferred to the state archivist for permanent retention

ONLINE SUMMARY



• Posting the summary is the final step in the regulation adoption process

Online Public

Notice System

PUBLICATION IN THE AAC

- The filing notice includes the quarterly register of the Alaska Administrative Code in which the regulation will first appear
- Regulations that are filed beyond a publication deadline are still effective, even if they are not yet reflected in the printed AAC registers

Emergency Regulations

- If a threat to the public peace, health, safety, or general welfare requires *immediate* action, an agency may adopt an emergency regulation without first following the APA procedure of publishing notice and public comment.
- Emergency regulations <u>require approval and a</u> <u>finding of emergency</u> from the <u>Regulations Attorney</u> before proceeding.



Emergency vs. Non-Emergency Regulations

EMERGENCY REGULATIONS

- require a finding of emergency and necessity of project
- do not require notice and comment period prior to filing
- emergency finding must be approved by the Department of Law before filing
- are effective on the date they are filed by the lieutenant governor
- expire automatically after 120 days, unless made permanent by the agency

NON-EMERGENCY REGULATIONS

- do not require explanatory document
- require public notice and a 30-day comment period
- require Department of Law review before filing
- are effective 30 days after filing
- do not expire

Emergency Regulations Process

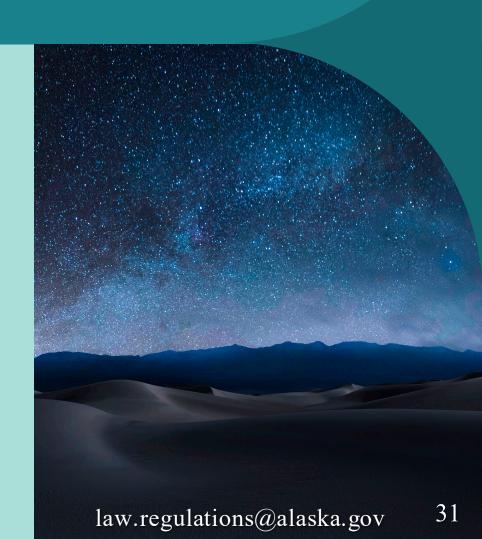


Non-APA Agencies

The legislature has expressly excluded certain agencies from compliance with the Administrative Procedure Act when adopting regulations.

These agencies are most commonly exempt because the entity must retain market participation flexibility, or because the regulation relates to specialized internal management.

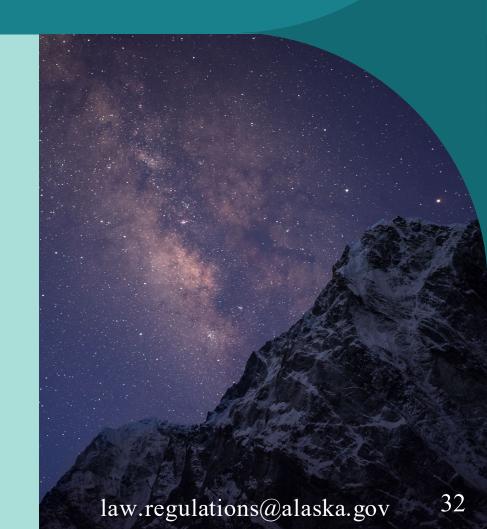
Chapter 11 of the Drafting Manual lists the APA-exempt agencies and how their process differs from the standard APA process.



Conclusion

The Legislation, Regulations, and Legislative Research Section is committed to a streamlined regulatory process that allows for thorough review and timely filing of projects. The new Drafting Manual for Administrative Regulations has much more to offer than this training allows. Please review it often, and if you have further questions, please contact us at

law.regulations@alaska.gov





Questions?