MEMORANDUM

State of Alaska

Department of Law

TO: Diane E. Mayer, Director
Division of Governmental Coordination
Office of Management & Budget

DATE: June 4, 1998

FILE NO.: 663-97-0153

TELEPHONE NO.: 465-3600

SUBJECT: ACMP "Homeless Stipulations"

FROM: Steven C. Weaver
Assistant Attorney General
Natural Resources Section - Juneau

The Office of Management and Budget, Division of Governmental Coordination (DGC) has asked whether a state agency, having issued a permit related to land or water use, is authorized or obligated to enforce a "homeless stipulation": a permit condition that is attached not under the agency's own statutory authority but rather to comply with the Alaska Coastal Management Program (ACMP).[1] *See* AS 46.40. In a related vein, DGC has asked if a municipality that has issued a land or water use permit is also authorized or obligated to enforce conditions for ACMP compliance that are not otherwise within municipal planning and zoning authority.

We conclude that a condition upon a state or municipal permit to ensure compliance with the ACMP may be enforced by revocation or suspension of the permit, accompanied if necessary by an agency suit for injunctive relief from the courts. However, an agency is not obligated to enforce a homeless stipulation.[2]

---

[1] Specifically, DGC asks us to update an unpublished memorandum dated August 27, 1990, in which we discussed the same topic with the Department of Fish and Game. *See* Memorandum from Gary I. Amendola, Ass't Att'y Gen., to Hon. Don W. Collinsworth, Comm'r of Fish & Game (Aug. 27, 1990; 663-90-0326).

In its most common sense, a "stipulation" is a term or condition reached by an agreement or bargain between parties to a contract, or between opposing parties in litigation. Strictly speaking, a "homeless stipulation" is not a stipulation, at least not from the perspective of the permit applicant, who must comply with the condition regardless of whether the applicant agrees with it.

[2] This opinion does not address enforcement of ACMP-related conditions placed upon a *federal* permit or license under 16 U.S.C. § 1456(c)(3)(A) (Coastal Zone Management Act).

A. MAY a State Agency Enforce a Permit Condition Related Only to the ACMP?

A "consistency review" evaluates a project against the ACMP's two components: statewide standards and the local management programs of coastal resource districts. *See* AS 46.40.210(3); *Hammond v. North Slope Borough*, 645 P.2d 750, 761 (Alaska 1982). State agencies and municipalities are required to "administer land and water use regulations or controls in conformity with district coastal management programs approved by the council . . . and in effect." AS 46.40.100(a). Accordingly, if a state agency requires a permit for a use or activity, that agency must find that the use or activity is consistent with the ACMP. *See* 6 AAC 80.010(b); *see also* sec. 2(6), ch. 84, SLA 1977.

This arrangement is in line with legislative intent: to make coastal management a part of *existing* agency processes and not to create either a stand-alone coastal management permit or an independent enforcement authority.[3] The resulting "final consistency determination" represents the consensus of the state resource agencies and lists the conditions to become part of the state permits under review.[4] Thus the ACMP sets up "what is essentially a 'piggy-back' arrangement," which requires a state agency to implement the ACMP by making consistency with the ACMP a condition of an agency permit.[5]

Implementing the ACMP through existing permits narrows the options for enforcement. Under well-established Alaska law, administrative agencies "are creatures of statute, and therefore must find within the statute the authority for the exercise of any power they claim."[6] The statutory chapter authorizing the ACMP contains no authority to enforce

---

[3] *See* AS 46.40.100(a), 46.40.200; sec. 2(5), ch. 84, SLA 1977 (calling upon state to "utilize existing governmental structures and authorities, to the maximum extent feasible"); 6 AAC 80.010(b); Memorandum from Laura L. Davis, Ass't Att'y Gen., to Hon. Richard Nevé, Comm'r, Dep't of Envtl. Conservation 2-3 (Aug. 16, 1984; 366-072-85) (unpublished).

[4] *See* AS 46.40.096(d)(3) (providing for "subsequent reviews" by the state resource agencies); 6 AAC 50.070(i), (k). The state resource agencies consist of the Departments of Environmental Conservation, Fish and Game, and Natural Resources. *See* AS 44.19.152(4); 6 AAC 50.190(15).

[5] 1982 Inf. Op. Att'y Gen. 847, 851 (July 16; J66-502-81); *see also* 1978 Op. Att'y Gen. No. 27, at 1, 3-4, 13-15 & n.1 (Oct. 26).

[6] *McDaniel v. Cory*, 631 P.2d 82, 88 (Alaska 1981). *Accord Warner v. State*, 819 P.2d 28, 30

a purely ACMP-related permit condition directly against a permittee. Therefore, if a permittee violates a purely ACMP-related permit condition, the state may respond only with legal action within the permitting agency's own statutory authority.[7]

The authority for an agency to issue permits implicitly includes the power to revoke or suspend them.[8] If a permit attached a condition to ensure compliance with the ACMP, then revocation or suspension of that permit for violation of the condition would be legally defensible. If a person continues an activity for which a permit has been revoked or suspended, the state permitting agency may pursue injunctive relief from the courts.[9] An injunction is designed to prevent future harm and does not impose money damages or penalties.[10] For example, a court could order an activity to be ceased entirely.

(Alaska 1991); *Rutter v. State*, 668 P.2d 1343, 1349 (Alaska 1983).

[7] The ACMP allows some persons to file a petition to the Coastal Policy Council, should they believe that a district coastal management program has not been "implemented, enforced, or complied with." AS 46.40.100(b). Council orders that decide petitions are enforceable in superior court. AS 46.40.100(e). However, as structured, a petition may address only a government's errors. *See* AS 46.40.100(b)(1), (c), (d). Subsequent permit violations by a private person are not listed as a subject for Council review. *See id*. Accordingly, the federal government viewed petitions as a means of conflict resolution, while viewing denial and modification of permits as the principal enforcement tool. *See* State of Alaska, Office of Coastal Mgmt. & U.S. Dep't of Commerce, Office of Coastal Zone Mgmt., *State of Alaska Coastal Management Program and Final Environmental Impact Statement* 143, 152 (1979).

[8] *McHugh v. Santa Monica Rent Control Bd.*, 777 P.2d 91, 98 (Cal. 1989) ("It is well established . . . that administrative agencies with licensing power also have the authority to revoke or suspend licenses.").

[9] *See Dal Maso v. Board of County Comm'rs*, 34 A.2d 464, 467 (Md. 1943).

[10] *See, e.g., People v. Pacific Land Research Co.*, 569 P.2d 125, 129 (Cal. 1977); *May Dep't Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 978 (Colo. 1993); 13 James W. Moore et al., *Moore's Federal Practice* §§ 65.02[2], 65.06[1] (Matthew Bender 3d ed. 1998). Usually, a court will not grant injunctive relief if an adequate "remedy at law" -- that is to say, money damages -- is available. *See May Dep't Stores*, 863 P.2d at 978; 13 J. Moore, *supra*, at 65.06[1] & n.2. However, if a statute specifically authorizes injunctive relief, then that relief is available whether or not there is a remedy at law. *See LeDoux v. Kodiak Island Borough*, 827 P.2d 1121, 1123 (Alaska 1992); *see also May Dep't Stores*, 863 P.2d at 978.

In comparison, a penalty's primary function is to punish past activity, rather than to

Sanctions beyond permit revocation or injunctive relief pose harder legal questions. On the one hand, Alaska courts strictly construe statutory grants of authority to agencies regarding the availability of money damages, whether punitive or compensatory, as an administrative remedy.[11] In other words, an agency cannot assess damages without express statutory authority, and it must remain within that authority's express confines. On the other hand, an agency with a broad statutory mandate may have greater flexibility to craft problem-specific remedies, or to seek from a court damages that the agency itself could not award.[12] Whether to pursue damages is a question to be decided case by case, and would depend at a minimum upon: (1) the breadth of the permitting agency's statutory mandate; and (2) how closely related the ACMP condition is to that agency's mission.

Authority to impose a sanction also hinges upon whether the sanction compensates for harm or instead penalizes a wrongdoer. The rule in most jurisdictions is that, without express statutory authority, agencies cannot pursue civil or criminal penalties as an enforcement measure.[13] In general, courts construe penalty statutes narrowly, placing discrete limits on when penalties or punitive damages may be used.[14]

---

compensate for harm done or prevent future harm. *See Pacific Land Research*, 569 P.2d at 129; *Missouri-Kansas-Texas R.R. v. Standard Indus*., 388 P.2d 632, 634-35 (Kan. 1964); *Hidden Hollow Ranch v. Collins*, 406 P.2d 365, 368 (Mont. 1965).

[11] *McDaniel*, 631 P.2d at 88; *see also Warner*, 819 P.2d at 31 & n.1; *Gore v. Schulumberger Ltd*., 703 P.2d 1165, 1166 (Alaska 1985).

[12] *See Alaska Pub. Util. Comm'n v. Municipality of Anchorage*, 902 P.2d 783, 787-89 (Alaska 1995) (upholding commission's implied power to order a refund of utility rate overcharges to consumers); *Far North Sanitation, Inc. v. Alaska Pub. Util. Comm'n*, 825 P.2d 867, 871-73 (Alaska 1992) (recognizing implied power to set refundable interim rates); *McDaniels*, 631 P.2d at 87; *Loomis Elec. Protection v. Schaefer*, 549 P.2d 1341, 1343 (Alaska 1976).

[13] *See, e.g., L.P. Steuart & Bro., Inc. v. Bowles*, 322 U.S. 398, 404 (1944); *Groves v. Modified Retirement Plan*, 803 F.2d 109, 117 (3d Cir. 1986); *Gold Kist, Inc. v. U.S. Dep't of Agric.*, 741 F.2d 344, 348 (11th Cir. 1984); *Hardin Oldsmobile v. New Motor Vehicle Bd*., 60 Cal. Rptr. 2d 583, 585 (App. 1997); *People v. Harter Packing Co*., 325 P.2d 519, 521 (Cal. App. 1958); *Lussier v. Maryland Racing Comm'n*, 684 A.2d 804, 822-23 (Md. 1996) (Bell, J., dissenting); *In re Comm'r of Ins*., 606 A.2d 851, 860 (N.J. App. 1992), *aff'd*, 624 A.2d 565 (N.J. 1993); *see also Constantine v. State*, 739 P.2d 188, 188-90 (Alaska App. 1987) (overturning a large civil penalty absent legislative intent to impose penalties of that size); *Beran v. State*, 705 P.2d 1280, 1286-87 (Alaska App. 1985) (striking down criminal penalties for violations of regulations, absent legislative intent that those violations, regardless of violator's mental state, be punishable by imprisonment); 1

For example, the Department of Environmental Conservation may, among other things, file a civil action seeking compensatory damages for the violation of various antipollution statutes, the department's regulations or orders, or a department permit or permit condition "issued under [AS 46.03] or AS 46.04 or AS 46.09." AS 46.03.760(a)-(b). Through the attorney general, the department may also sue for injury to "the environment of the state," and recover restoration costs. *See* AS 46.03.780. Alternately, or at the same time, the department may send a notice of intent, which directs the violator to report measures taken to correct the violation, and which authorizes the department to issue a compliance order requiring the violator to take specified corrective action. *See* AS 46.03.850; 18 AAC 95; *cf. Stock v. State*, 526 P.2d 3, 13-14 (Alaska 1974) (construing predecessor to AS 46.03.850). If a "homeless stipulation" appeared on a DEC permit and was violated, DEC could issue a notice of intent or could issue a compliance order requiring corrective action. DEC could also revoke or suspend its permit. The superior court could enforce DEC's order, and award injunctive relief at a minimum. *See* AS 46.03.765, 46.03.850(f). Relief beyond an injunction would depend on the relationship of the ACMP condition to DEC's primary mission, the extent of DEC's statutory authority, the breadth of DEC's statutory mandate, and whether the relief sought was compensatory or punitive.

Norman J. Singer, *Sutherland Statutory Construction* § 4.26 (5th ed. 1994). *But see Lussier*, 684 A.2d at 806 (looking to statutes, legislative background, and policies pertinent to an agency to determine if state agency is authorized to impose a penalty without express statutory authority).

If a statute authorized a penalty, but a person refused to pay the penalty in contempt of an agency order, the agency would have to approach the courts to compel payment, because contempt powers reside with the judiciary alone. *See, e.g., Edros Corp. v. City of Port Huron*, 259 N.W.2d 456, 458-59 & n.3 (Mich. App. 1977); *see also Advance Mach. Co. v. Consumer Prod. Safety Comm'n*, 510 F. Supp. 360, 364-65 & n.3 (D. Minn.), *rev'd on other grounds*, 666 F.2d 1166 (8th Cir. 1981); *McHugh*, 777 P.2d at 106; *County Council v. Investors Funding Corp.*, 312 A.2d 225, 243 (Md. 1973); *cf. State ex rel. Iowa Dep't of Natural Resources v. Shelley*, 512 N.W.2d 579, 580-81 (Iowa App. 1993) (distinguishing judicial review of agency action from judicial enforcement of agency orders); *City of Rock Hill v. South Carolina Dep't of Health & Envtl. Control*, 394 S.E.2d 327, 330 (S.C. 1990) (distinguishing power to assess penalties from legal action to compel compliance).

[14] *See, e.g., Commissioner v. Acker*, 361 U.S. 87, 90-91 (1959); *Gold Kist*, 741 P.2d at 348; *Gore*, 703 P.2d at 1166; *see also Johnson v. Alaska Dep't of Fish & Game*, 836 P.2d 896, 906 (Alaska 1991) (disallowing punitive damages against state without specific statutory authority); *Constantine*, 739 P.2d at 188-90.

B. MUST a State Agency Enforce a Permit Condition Related Only to the ACMP?

The power to enforce a "homeless stipulation" does not imply a duty to enforce one. As a rule, the decision to enforce is within an enforcing agency's absolute discretion and is presumed unreviewable by the courts. *See Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985); *see also State, Dep't of Fish & Game v. Meyer*, 906 P.2d 1365, 1372 (Alaska 1995); *Vick v. Board of Elec. Examiners*, 626 P.2d 90, 94-95 (Alaska 1981). Courts presume enforcement decisions unreviewable for several reasons:

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.

Chaney, 470 U.S. at 831 (emphasis added). If a person besides the agency could force it to pursue enforcement proceedings, a waste of government resources would result:

> Thousands of discretionary decisions must be made daily by officials of the executive branch. Many of these decisions are made in advance of taking formal government action affecting legal rights. Numerous executive decisions must be made on whether . . . to bring civil actions, and whether to commence administrative proceedings. If these were invariably made subject to judicial review at the instance of a person who disagreed with the official's decision, the increased burden on public officials and the courts would be enormous.

Vick, 626 P.2d at 94-95. Alaska courts recognize only one exception to the presumption of unreviewability, for cases where a statute expressly withdraws an agency's enforcement discretion. *See Meyer*, 906 P.2d at 1373; *see also Federal Election Comm'n v. Akins*, ___ U.S. ___, slip op. at 14 (June 1, 1998). Additionally, if the means of enforcement is litigation in the courts, assessment of the strengths of the case and the decision to litigate itself fall within the exclusive prosecutorial discretion of the attorney general. *See Public Defender Agency v. Superior Court*, 534 P.2d 947, 950 (Alaska 1973).

The concerns that support the presumption of unreviewability would apply doubly in an effort to enforce a "homeless stipulation." By definition, a homeless stipulation is a permit condition that the agency could not impose under its own authority alone. Unable independently to impose that condition, the agency is unlikely to have the experts on hand to investigate or even to recognize subsequent violations. For most homeless stipulations, the enforcing agency would have to marshal not only its own resources, but also the technical expertise and investigatory skills of outside agencies.[15] Those agencies in turn have different enforcement priorities and budgetary constraints. Additionally, coordination of multiple agency efforts would impose costs of its own. The decision to incur these costs is a policy matter, which plainly lies best with the agencies themselves.

Further, there is no statutory provision that expressly takes away a state agency's enforcement discretion. Within the ACMP, only AS 46.40.100 pertains even remotely to enforcement, and no provision there expressly creates a duty to enforce homeless stipulations.[16] Alaska Statute 46.40.100(a) requires only that state agencies and municipalities "administer" land use and water use controls in conformance with district coastal management programs. The term "administer" covers a broad spectrum of executive action, and it is simply too general to equate with the specific statutory directive that the *Meyer* court construed.

---

[15] In the past, the recommended course of action for violations of a permit's "homeless stipulations" has been to refer the violation to the Department of Law for further action. As an initial step, such a referral is certainly not improper, particularly given the attorney general's broad authority to prosecute cases involving violation of state law. *See* AS 44.23.020. However, neither the permitting agency nor any other state agency should expect that a referral to the Department of Law will relieve that agency from conducting investigations, providing expert testimony, furnishing other technical expertise, or committing any other resource necessary for the Department of Law to bring consequent litigation to a successful outcome.

[16] Though the heading to AS 46.40.100 is entitled "Compliance and enforcement," headings within the Alaska Statutes do not constitute substantive law. AS 01.05.006; *Saunders Properties v. Municipality of Anchorage*, 846 P.2d 135, 138 n.5 (Alaska 1993); *Ketchikan Retail Liquor Dealers Ass'n v. State, Alcoholic Beverage Control Bd.*, 602 P.2d 434, 437-38 (Alaska 1979), *modified on other grounds*, 615 P.2d 1391 (Alaska 1980).

C. The Power or Duty of Municipality with Planning and Zoning Power to Enforce a "Homeless Stipulation."

In addition, DGC has asked if a municipality that has planning and zoning power, and that has issued a land or water use permit, is authorized or obliged to enforce conditions for ACMP compliance that are not otherwise within municipal planning and zoning authority. Given that district coastal management programs are often codified as part of municipal land use ordinances,[17] the odds are substantially reduced that an ACMP condition upon a municipal permit will actually be "homeless." Nonetheless, if a homeless stipulation is violated, we believe that the municipality, like the state, may revoke an approval or permit and seek injunctive relief, but may not employ penalties as a means of enforcement.

A municipality's powers, although liberally construed, are confined to those that are expressly listed in Title 29 of the Alaska Statutes, those that may be necessarily or fairly implied from Title 29 powers, or those that may be incident to the purpose of Title 29 powers.[18] The adoption, amendment, or repeal by municipalities of comprehensive plans, land use regulations, building and housing codes, or zoning regulations must be by ordinance.[19] In addition, all provisions for fines or penalties must be established by ordinance.[20] They are narrowly construed and limited to their express terms, just as with statutory penalties.[21] However, a municipality may also seek injunctive relief to stop a

---

17 *See, e.g.*, City & Borough of Juneau Ord. 49.70.900 - 49.70.1097.

18 *See Kenai Peninsula Borough v. Associated Grocers Inc.*, 889 P.2d 604, 606 (Alaska 1995); *see also* AS 29.35.400 - 29.35.410.

19 AS 29.25.010(6); AS 29.40.030(b), 29.40.040(a); *see also Lazy Mountain Land Club v. Matanuska-Susitna Borough Bd. of Adjustment & Appeals*, 904 P.2d 373, 378, 380 (Alaska 1995).

20 AS 29.25.010(2), 29.25.070(a).

21 *Cf. City & Borough of Juneau v. Thibodeau*, 595 P.2d 626, 635 n.31 (Alaska 1979) (applying general tenets of statutory construction to zoning statute). In some jurisdictions, zoning ordinances in general are strictly construed in favor of the property owner, on the grounds that they are in derogation of common-law property rights. *See, e.g., Saunders v. Clark County Zoning Dep't*, 421 N.E.2d 152, 154 (Ohio 1981). However, Alaska has joined the majority of jurisdictions to reject that principle. *See Lazy Mountain Land Club*, 904 P.2d at 384 n.64; *Thibodeau*, 595 P.2d at 635 n.31.

zoning violation "notwithstanding the availability of any other remedy."[22] Thus, as with state agencies, a municipality's options for enforcing ACMP "homeless stipulations" are restricted to permit revocation or legal action for injunctive relief, and would not include penalties.

Additionally, municipalities, like state agencies, incur no duty to enforce a permit condition that is "homeless." Most often, enforcement of a "homeless" condition will be a policy call, in which the municipality not only must allocate its own resources but also must assess how much coordination and support it desires or expects from the state. For instance, if a municipal permit condition for a project beside an anadromous fish stream mandated protection of stream-side vegetation under 6 AAC 80.130(b)(7) and arose from neither the municipality's coastal management program nor its planning and zoning authorities, then the municipality would likely have to draw upon the financial resources and technical expertise of the state Department of Fish and Game (ADF&G). If ADF&G were unable or unwilling to commit the resources necessary to prevail in a suit for injunctive relief, then the municipality certainly could not be expected to pursue that suit, any more than another state agency could.

D. Conclusion

If a state or municipal permit included a condition that could be imposed only through the ACMP and not through the separate authority of the state agency or municipality, then the available methods to enforce that condition would be permit revocation and, if necessary, a suit for injunctive relief. The use of penalties to enforce that condition would be extremely hard to defend legally, because the ACMP provides for no independent enforcement authority, and because penalties within the state agency's or municipality's own authority would likely be narrowly confined to their express terms. Finally, the ACMP imposes no duty to enforce upon state agencies or municipalities.

If you have any other questions, please feel free to contact us.

SCW:prm

---

[22] AS 29.40.190(a); *see also LeDoux v. Kodiak Island Borough*, 827 P.2d 1121, 1123 (Alaska 1992). Because AS 29.40.190 authorizes an injunction, the municipality need not show harm or the lack of an adequate remedy at law, as would otherwise be required in a suit for injunctive relief. *LeDoux*, 827 P.2d at 1123.