

MEMORANDUM

State Of Alaska

Department of Law

To: The Honorable Paul Seaton
345 W. Sterling Highway
Suite 102B
Homer, AK 99603

Date: January 17, 2006

File No.: 661-06-0263

Telephone: 269-5235

Subject: Natural Resource
Conservation and
Development Board:
Appointment and Removal
of Board Members, and
Conflict of Interest Filings

From: Steven G. Ross
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Your aide, Louie Flora, has asked us to provide advice on the following questions:

1. Are the governor's appointments to the Alaska Natural Resource Conservation and Development Board (NRCDB) subject to legislative confirmation?
2. Does the governor have the authority to exempt NRCDB members from "conflict of interest" filings?
3. Does the governor have authority to replace the entire board at once?

In brief, the answers to these questions are as follows: First, the governor's appointments to the NRCDB are not subject to legislative confirmation. Second, NRCDB members are subject to the disclosure requirements of the Alaska Executive Branch Ethics Act. Although we are not aware that the governor has ever attempted to exempt NRCDB members from the disclosure requirements of the Ethics Act, there is no provision in the Ethics Act which would provide the governor with such authority. Third, NRCDB members serve at the governor's pleasure, and therefore he can replace the entire board at the same time if he so chooses.

BACKGROUND

The NRCDB is a five-member board organized pursuant to the state soil and water conservation law (AS 41.10) and under the authority of the Commissioner of the Department of Natural Resources (DNR). The NRCDB was formerly known as the

Alaska Soil Conservation Board and the Alaska Soil and Water Conservation Board.¹

The duties of the NRCDB are purely advisory; it does not have any regulatory (rulemaking) or quasi-judicial (adjudicatory) authority.² For example, at the request of the DNR commissioner, the board advises the commissioner in the exercise of the commissioner's powers, duties, and functions under the statute.³ The board also receives and reviews reports regarding the use of soil resources in the state; holds public hearings and meetings to determine if land is being used in a manner consistent with sound soil and water conservation practices; makes recommendations for specific action necessary to provide for effective and orderly development of agricultural, forest, and grazing land in the state; reviews appeals by an applicant or lessee from a decision of the director of the division of lands concerning a sale or lease of state agricultural or grazing land and submits non-binding recommendations to the commissioner or hearing officer; advises soil and water conservation districts in the state; and advises the commissioner and director of the division of agriculture in the review of farm conservation plans for all state agricultural land sales in the state.⁴

The NRCDB also serves as the board of the Alaska Soil and Water Conservation District, which comprises the area of the state not located within the boundaries of any other soil and water conservation district organized under AS 41.10.⁵ The boards of soil and water conservation districts also act in a purely advisory capacity pursuant to those

¹ The Alaska Soil Conservation Board was created by the enactment of sec. 1, ch. 82, SLA 1960, as amended by sec. 2, ch. 69, SLA 1983 (name changed to the Alaska Soil and Water Conservation Board), as amended by sec. 1, ch. 127, SLA 1996 (name changed to the Alaska Natural Resource Conservation and Development Board).

² The opinion request suggests there may be examples of regulations "that have been influenced directly by the NRCDB," but to our knowledge, the NRCDB has never promulgated any regulations because that would be outside the scope of its statutory authority.

³ AS 41.10.100(a).

⁴ AS 41.10.100(b)(1) – (b)(6).

⁵ AS 41.10.130(b).

duties and powers delegated by the commissioner to the district boards as necessary to accomplish the purposes of AS 41.10.⁶

ANALYSIS

Appointment of Board Members

According to AS 41.14.050,⁷ the governor's appointments to the NRCDB are subject to legislative confirmation. However, in *Bradner v. Hammond*,⁸ the Alaska Supreme Court held that the legislature can only require the confirmation of appointments by the governor to boards or commissions to the extent authorized by the Alaska Constitution.⁹ Under the Alaska Constitution, only appointments by the governor to state boards and commissions which are at the head of a principal department or a regulatory or quasi-judicial agency are subject to legislative confirmation.¹⁰

In this case, the NRCDB is not at the head of a principal department, nor is it an agency with regulatory or quasi-judicial powers. The fact that the NRCDB reviews

⁶ AS 41.10.110 sets out the powers of the commissioner under the statute, which can be delegated by the commissioner to the district boards as the commissioner considers necessary in order to accomplish the purposes of the statute. See AS 41.10.130(a).

⁷ AS 41.14.050 was enacted in 1960 and provides that "[t]he governor shall appoint members of the board subject to confirmation by a majority of the members of the legislature in joint session." Sec. 1, ch. 82, SLA 1960.

⁸ *Bradner v. Hammond*, 553 P.2d 1, 7 (Alaska 1976).

⁹ See Alaska Const. art. III, §§ 25 and 26. As the court in *Bradner* stated, "the provisions of Sections 25 and 26 of Article III are clear and unambiguous . . . [and] mark the full reach of the delegated, or shared, appointive function to Alaska's legislative branch of government." 553 P.2d at 7.

¹⁰ Only Section 26 of Article III relating to the governor's appointments to boards and commissions is relevant here, which provides in pertinent part: "[w]hen 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."

appeals regarding the sale or lease of state agricultural or grazing land, and submits non-binding recommendations to the DNR commissioner or hearing officer, does not constitute a “quasi-judicial” function.¹¹ As our office has stated in the past, a board or commission which makes non-binding recommendations is only acting as an advisory body.¹² Accordingly, since the NRCDB is purely an advisory board, its members are not subject to legislative confirmation notwithstanding any statutory requirement to the contrary in AS 41.10.050. This conclusion is also consistent with our previous attorney general opinion to then-Governor Hammond which concluded that the governor’s appointments to the Alaska Soil Conservation Board (the predecessor of the NRCDB) was not subject to legislative confirmation, notwithstanding that AS 41.10.050 required such confirmation.¹³

In addition to the more general question regarding confirmation, you have also asked if either of the following departmental orders issued by DNR give the NRCDB the type of powers which would make its members subject to legislative confirmation: DNR

¹¹ Black’s Law Dictionary defines “quasi-judicial” as “[a] term applied to the action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature,” and “quasi-judicial power” as “[t]he power of an administrative agency to adjudicate the rights of persons before it.” *Black’s Law Dictionary* 1245 (6th ed. 1990).

¹² See 1986 Inf. Op. Att’y Gen. at 1 (Dec. 11; 663-87-0256) (no legislative confirmation required for the governor’s appointments to the State Officers Compensation Commission because it was an advisory body). See also *The Legal Aid Society v. Ward*, 457 N.Y.S.2d 250, 252 (N.Y. App. Div. 1982), *aff’d* 472 N.Y.S.2d 914 (N.Y. 1984) (a board which makes recommendations and submit reports of its findings is performing “an advisory rather than a quasi-judicial function.”); *Thomas v. Beaver Creek*, 663 N.E.2d 1333, 1336 (Ohio App. 1995) (“[t]o be considered a quasijudicial proceeding, the proceeding must resemble a court proceeding in that an exercise of discretion is employed in adjudicating the rights and duties of parties with conflicting interests” and “proceedings of administrative officers and agencies are not quasi-judicial where there is no requirement for notice, hearing and the opportunity for the introduction of evidence.”); *Thompson v. Amis*, 493 P.2d 1259, 1263 (Kansas 1972) (an administrative board exercising “quasi-judicial” functions is generally empowered to investigate facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of a judicial nature).

¹³ 1977 Op. Att’y Gen. at 8 (Feb. 3).

Department Order 120 – “Consultation with the ASWCB & with the local SWCD’s” (Aug. 2, 1985); and DNR Department Order 114 – “Delegation of Powers to the Soil & Water Conservation District” (Jan. 25, 1993). The answer is “no” because each of these orders relates to the functions of local soil and water conservation districts, not the NRCDB, and neither order confers any regulatory or quasi-judicial powers on the NRCDB (or on the district boards) that might otherwise subject NRCDB members to legislative confirmation.¹⁴

“Conflict of Interest” Filings

Alaska has two so-called “conflict of interest” statutes: the Public Official Financial Disclosure law, AS 39.50 (“Financial Disclosure Law”), and the Alaska Executive Branch Ethics Act, AS 39.52 (Ethics Act). The Financial Disclosure Law applies to a “public official”, which is defined as the chair or a member of certain state commissions or boards listed in the statute.¹⁵ The NRCDB is not one of the commissions or boards listed in the Financial Disclosure Law and therefore the statute does not apply to the NRCDB.

The Ethics Act applies to all “public officers” within executive branch agencies, including members of statutorily created boards and commissions.¹⁶ Since the NRCDB is a board within the executive branch, its members are subject to the disclosure requirements of the Ethics Act.¹⁷ Moreover, although we are not aware that the governor

¹⁴ For example, DNR Department Order 120 (Aug. 2, 1985) provides that interagency review notices regarding land use plans, forest management plans, reclamation of land, and certain state land sales or leases be sent to the chairman of local soil and water conservation districts when such activities occur wholly or partially within their particular district so that the affected district can provide advice and comment on the matter to DNR. DNR Department Order 114 (Jan. 25, 1993) delegates powers vested in the commissioner under AS 41.10.110 directly to the districts to accomplish the purpose of the soil and water conservation law, as permitted by AS 41.10.130(a). However, none of these delegated powers are regulatory or quasi-judicial in nature.

¹⁵ AS 39.50.200(a)(9)(E), .200(b).

¹⁶ AS 39.52.910(a). The Ethics Act defines “public officer” to include members of boards or commissions established by statute in the executive branch. AS 39.52.960(4), (21)(B).

¹⁷ Even members of boards or commissions that merely act in an advisory capacity (such as the NRCDB) are subject to the Ethics Act. *See* 1992 Inf. Op. Att’y Gen. at 1 (Mar. 5; 661-92-0388).

has ever attempted to exempt NRCDB members from the disclosure requirements of the Ethics Act, there is no provision in the Ethics Act which would provide the governor with such authority.

Removal of Board Members

The ability of the governor to remove an appointee to a state board or commission is an incident of the governor's executive power of appointment,¹⁸ and limited only to the extent provided in Sections 25 and 26 of Article III of the Alaska Constitution.¹⁹ In this case, Section 26 provides that members of those state boards or commissions which are subject to legislative confirmation "may be removed as provided by law." Consequently, the legislature's power to prescribe the grounds for removal is limited to those appointees who serve on state boards or commissions which are subject to legislative confirmation, i.e., at the head of a principal department or a regulatory or quasi-judicial agency.²⁰ Since the members of the NRCDB are not subject to legislative confirmation, they serve at the governor's pleasure and can all be removed by the governor at the same time.

CONCLUSION

The NRCDB is purely an advisory board, and as such, the governor's appointments to the board are not subject to legislative confirmation notwithstanding any statutory requirement to the contrary. NRCDB members are subject to the Alaska Executive Branch Ethics Act, but not the Public Official Financial Disclosure law. Although we are not aware that the governor has ever attempted to exempt NRCDB members from the disclosure requirements of the Ethics Act, there is no provision in the Ethics Act which would provide the governor with such authority. Finally, NRCDB members serve at the pleasure of the governor, and therefore he can replace the entire board at the same time if he so chooses.

¹⁸ The governor's ability to assure that appointees remain faithful to his or her philosophies and programs is preserved when appointees may be removed at the governor's pleasure. *See* 1991 Inf. Op. Att'y Gen. at 2 (June 11; 883-91-0071).

¹⁹ *Bradner*, 553 P.2d at 2.

²⁰ *See supra* note 18, concluding that the legislature lacked the power to restrict the governor's removal power with respect to members of Alaska State Pension Corporation board of trustees because the corporation was not a regulatory or quasi-judicial agency.