MEMORANDUM

State of Alaska
Department of Law

TO: Marianne See, Director
Statewide Public Service Division
Department of Environmental Conservation

DATE: July 12, 1996

FILE NO.: 663-97-0053

TELEPHONE NO.: 465-3600

SUBJECT: Proposed Amendment of Wastewater Regulations to Eliminate Subdivision Plan Review Requirements, 18 AAC 72.300 • 18 AAC 72.385

FROM: Robert K. Reges
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I. SUMMARY

The Department of Environmental Conservation (DEC) has historically reviewed subdivision plans for the purpose of ensuring that the platted lots are susceptible to development without creating health hazards from wastewater. Due to budget cuts last session, DEC is in the process of eliminating its subdivision review program. Two legal issues arise from this activity: is DEC authorized to repeal the program and, if so, is DEC duty-bound to review those plans submitted prior to repeal?

In a memorandum dated June 28, 1996, legislative counsel Jack Chenoweth opined that "the department is free to eliminate its subdivision plan approval requirement." We unconditionally agree. Legislative counsel has also opined that DEC "may not cease acting on subdivision plan reviews before the effective date of the order modifying or repealing the relevant program regulations." We agree that DEC may not, prior to repeal of the regulations, unequivocally and finally refuse to review those plans submitted to it. But, DEC may postpone plan review until requisite money and personnel are available. If the repeal becomes effective before such resources become available, DEC may return to developers those plans it has not reviewed.

II. STATEMENT OF FACTS

Alaska regulation 18 AAC 72.300(a) restricts free use of private property. "No person may subdivide, transfer, sell, contract to sell, lease, or otherwise convey an interest in a lot within a subdivision unless plans for that subdivision have been approved by the department." This imposes a duty on developers. They must submit plans for review. A corollary duty is that DEC must review those plans. DEC has acknowledged that duty and imposed deadlines for its reviews.[1]

Due to budget cuts last session, there are no funds to finance review. To relieve developers of what is now a meaningless burden, DEC is repealing 18 AAC 72.300 and related regulations. In fairness to those developers who have already incurred expenses in obedience to the regulatory mandate, DEC offered to review all plans submitted to it before close of fiscal year 1996. Those reviews have been completed. Since the start of fiscal year 1997, DEC has informed developers that the program will be abolished. This has given developers an opportunity to hold their plans pending repeal, thereby avoiding the time and expense associated with this governmental oversight.

Some developers have, nonetheless, elected to submit their plans to DEC during fiscal year 1997. These developers have been told that DEC does not have the resources to conduct reviews in the near future, but DEC is holding the plans and could review them if resources become available prior to repeal of the program. If those plans are not reviewed prior to repeal, DEC will return them to the developers.

III. LEGAL ISSUES AND ANALYSIS

A. DEC Is Free to Eliminate Its Subdivision Plan Approval Requirement.

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[1] Subsections 18 AAC 72.300(h) and (g) instruct DEC that it "will issue its decision on subdivision plans within 30 days after receiving all applicable information" or "within five days after the consistency review is completed" if a Coastal Zone Consistency Review is required.

In his June 28 memorandum, Mr. Chenoweth opined that "the department is free to eliminate its subdivision plan approval requirement." We agree. The regulations are predicated on four statutes: AS 44.46.020, 46.03.020, 46.03.050, 46.03.090.

AS 44.46.020 directs DEC to "adopt regulations for the prevention and control of health nuisances" and for "the regulation of sanitation and sanitary practices" but neither of these is so explicitly detailed as to constitute a nondiscretionary mandate to review subdivision plans.[2]

AS 46.03.020 is permissive. It authorizes, but does not direct, development of regulatory programs. We do believe that AS 46.03.020, when coupled with the policy statement of AS 46.03.010, instructs DEC to take whatever actions the agency deems necessary to fulfill the state's responsibility "as trustee of the environment," but that does not rise to the level of a mandate to review subdivision plans.

The third statutory basis for the subject regulations is AS 46.03.050. Again, this broadly worded, permissive provision• which is entitled "Authority"• empowered DEC to adopt the subdivision review regulations but does not prevent their repeal. The final authority, AS 46.03.090, is the most germane of the four.

> **Sec. 46.03.090. Plans for pollution disposal.** The department may require the submission of plans for sewage and industrial waste disposal or treatment or both for a publicly or privately owned or operated industrial establishment, community, public or private property subdivision or development.

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[2] The statute does impose upon •DEC the *duty* to adopt and enforce regulations regarding pollution and sanitation.• *State v. Anderson*, 749 P.2d 1342, 1345 (Alaska 1988). That duty can be exercised through a variety of regulatory programs which may or may not include subdivision review. Even where a statute is fairly prescriptive in its dictates, the implementing agency has some degree of discretion in •defining• what is required. *Kalmakoff v. State, Commercial Fisheries*, 693 P.2d 844, 853 (Alaska 1985).

Legislative history of this section is sparse. Our brief review unearthed several memoranda debating the merits of keeping review and oversight authorities together in one agency but no specific reference to the issue at hand.[3] Consequently, we interpret the statutory provision from its face.

The word "may" is permissive. 1991 Inf. Op. Att•y Gen. (Aug. 12; 663-92-0044). DEC is allowed to, but need not, "require the submission of plans" for review and approval. The legislature believed it might be prudent for DEC to secure and review subdivision plans but imposed no duty to do so.

For the foregoing reasons, the Department of Law concurs in the first conclusion reached by Legislative Counsel Chenoweth: DEC is free to eliminate its subdivision plan approval requirement.

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[3] We looked at the following documents: "Rough Draft" Memorandum Re: Department of Environmental Conservation from Frederick McGinnis, Commissioner, Dept. of Health & Welfare, to John Havelock, Attorney General (March 1, 1971); Memorandum Re: Department of Environmental Conservation from James A. Anderegg, Director, Div. of Envtl. Health, to Frederick McGinnis, Commissioner (March 1, 1971); "For the Record" Memorandum Re: Department of Environmental Conservation prepared by James F. McClain, Admin. Officer, Dept. of Health & Welfare (July 1, 1971).

B. DEC May Not Cease Acting on Subdivision Plan Reviews before the Effective Date of Repeal but May Reprioritize to a Different Timetable.

1. Summary.

Mr. Chenoweth's second conclusion is that DEC "may not cease acting on subdivision plan reviews before the effective date of the order modifying or repealing the relevant program regulations." We think a distinction must be made between unequivocal, final refusal to ever review those plans submitted before repeal and a reprioritized movement of plan review to a timetable that takes into account constraints on DEC's resources. We read Mr. Chenoweth's conclusion to be that unequivocal, final refusal is not permissible prior to repeal. With that limited conclusion, we agree. However, as demonstrated below, it is equally clear and correct to conclude that review may be delayed until such time as DEC can get around to it.

With respect to those plans received before repeal, DEC owes a present duty to calendar a review for a time when resources are available. If, before DEC has the chance to review submitted plans, the "order modifying or repealing the relevant program regulations" becomes effective, developers may withdraw their plans and proceed without review. Plans not voluntarily withdrawn may be returned by the agency without having been reviewed.

2. Analysis.

DEC has the freedom to prioritize its workload and put plan review on a slower track than other programs because, as shown in the first part of this memorandum, plan review is not mandated. Where the law clearly assigns to the department a particularized duty to be implemented in a specified way, the department is bound to carry out the legislative dictates despite budgetary constraints. In the matter of E.A.O., 816 P.2d 1352, 1358 (Alaska 1991)("Whether the department is adequately funded to carry out its statutory responsibilities, or whether those responsibilities should be changed in response to budgetary realities, is a question for the legislature to answer"). But where, as here, the legislative mandate is a broad policy statement coupled with relatively open-ended delegations of authority to implement that policy, the executive agency has the discretion to develop or discard programs designed to achieve the broadly stated goal. *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 711 (D.C. Cir. 1975) ("Where there has been no violation of a statutory duty, we think the proper course is to confine ourselves to a declaration of the intent of Congress and to give the Administrator latitude to exercise his discretion in shaping the implementation of the Act"); Care and Protection of Isaac, 646 N.E.2d 1034, 1037 (Mass. 1995)(Court, asked to reinstate "inordinately expensive" governmental service that department had eliminated in its "allocation of finite resources" declined to do so, reasoning that "where the means of fulfilling [a legal] obligation is within the discretion of a public agency, the courts normally have no right to tell that

agency how to fulfill its obligation[s] . . . within the constraints of a finite annual appropriation").

A good contrast to DEC's situation is presented by *State, Dep't of Fish & Game v. Meyer*, 906 P.2d 1365, 1374 (Alaska 1995). The statutes at issue in *Meyer* mandated a certain course of conduct, terminable only for lack of substantial evidence.[4] The Alaska State Commission for Human Rights, charged with implementing those statutes, failed to follow the course of investigations because they lacked the resources to do so. The court refused to accept that excuse.

> [U]nder Alaska law a hearing is mandatory when the Commission's executive director . . . determines that substantial evidence supports a complainant's allegations . . . .

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[4] For instance, one of the statutes at issue, AS 18.80.110, prescribed:

> "The executive director . . . shall informally investigate the matters set out in a filed complaint, promptly and impartially. If the investigator determines that the allegations are supported by substantial evidence, the investigator shall immediately try to eliminate the discrimination complained of . . . ."

The obligatory nature of that provision stands in stark contrast to the permissive, enabling statutes discussed in the first part of this memorandum. This distinction between prescription and authorization determines whether an agency may or may not postpone an undertaking due to lack of resources.

> ADF&G and the commission . . . . make the following argument: . . . [t]he Commission must employ its limited resources in the most effective manner possible in order to meet [various] obligations.
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> These [arguments] . . . indicate . . . that the staff or executive director, contrary to statutory mandate, is closing cases not for lack of evidence of discrimination but to control budget and docket. We are sympathetic to the Commission's claim of lack of resources. . . . However, if the Commission wants its staff to have this discretionary authority, it must be obtained from the legislature, not the judiciary . . . .

Meyer at 1372• 1374. In the present case, DEC does have the discretionary authority. It may reprioritize subdivision plan review, putting such reviews on a slower track.

Our Supreme Court has acknowledged this, the other "side of the coin" from Meyer. Approving a statement made by a law professor, the court quoted him, saying:

> An agency entrusted with grandiosely stated responsibilities and far-reaching powers can only realize a modest measure of its potential. It must ration its limited resources of time, energy and money. It must devote them to those exigent and soluble problems which are more nearly related to its core responsibility. What problems *are* most exigent, how they can best be solved• and by implication, which problems must be put aside or left to other agencies• are questions the solution to which peculiarly demands a feeling for the whole situation.

Jaffe, "The Individual Right to Initiate Administrative Process" 25 Iowa L.Rev. 485, 528-29 (1940); *cited favorably in Vick v. Board of Electrical Examiners*, 626 P.2d 90, 94 (Alaska 1981).

In fact, courts will rarely intervene as they did in Meyer, making it unlikely that anyone will have recourse if DEC does reprioritize plan reviews. Judicial review of administrative discretion is a subject about which it is most difficult to generalize. Id. at 93. But, there is one maxim that can be gleaned from the cases. Budgetary questions are not judicial questions. In the matter of *E.A.O., supra* 816 P.2d at 1358; *see also State v. Morris*, 555 P.2d

1216, 1219 (Alaska 1976).[5] Consequently, even if an aggrieved party alleges injury by DEC's reprioritization, the probability of judicial intervention is slim.

What, if anything, prevents DEC from simply putting plan review off until another time? There are deadlines for review established in the regulations. Subsections 18 AAC 72.310(g) and (h) provide that "the department will issue its decision on subdivision plans within 30 days after receiving all applicable information . . . [or], [f]or a subdivision requiring a coordinated consistency review . . . within five days after the consistency review is completed." A reprioritization that results in a delay exceeding these deadlines is, technically, agency noncompliance with its own rules. As Mr. Chenoweth pointed out, "an agency has not acted in the manner required by law if its actions are not in compliance with its own regulations." *Trustees for Alaska v. Gorsuch*, 835 P.2d 1239, 1244 (Alaska 1992). In those rare cases where a court has meddled with administrative allocation of resources, it has done so because the administrative action is not in compliance with statutes or regulations. *E.g.*, Meyer, *supra*. The most advisable course, then, is to meet the regulatorily imposed deadlines.

Nonetheless, environmental agencies have missed deadlines before and the courts have been flexible in designing solutions. The seminal case on this point is *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975). At issue in Train were deadlines established in the Federal Clean Water Act. EPA was required to establish effluent limitations by a certain date but failed to do so for reasons unrelated to availability of resources. The court mandated action and imposed a schedule but, to assure that the schedule would be "workable," allowed the parties to draft it. *Train* at 705. Additionally, the court was willing to consider "future meritorious petitions for modifications that retain[] the essence of prompt performance." *Id*. at 705. Specifically, the court opined that such petitions might be appropriate if "budgetary commitments and manpower demands required to complete the guidelines by [the deadline] are beyond the agency's capacity or would unduly jeopardize the implementation of other essential programs." *Train* at 712.

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[5] For an excellent overview of the reasons why courts are loathe to referee these budgetary brawls, *see Beth v. Carroll*, (Memorandum Op.), 155 F.R.D. 529 (E.D.Pa. 1994)("[T]he court's inability to weigh competing claims for resources creates the possibility that the judiciary will be used by dissatisfied bureaucrats as an end-run around normal budget-making procedures, ...")

The *Train* court, lenient though it was, opined that it could have been more flexible had the agency's failure been partially due to matters beyond the agency's control:

> We think the court may forebear the issuance of an order in those cases where it is convinced by the official involved that he has in good faith employed the utmost diligence in discharging his statutory responsibilities.

Train at 712-713.[6] This dictum has been picked up by many judges, all of whom agree that such forbearance is appropriate where "it would be infeasible or impossible for [the agency], acting in good faith, to meet the deadline, . . . due to budget and manpower constraints . . . ." *Natural Resources Defense Council v. U.S. EPA*, 797 F. Supp. 194, 196-197 (E.D.N.Y. 1992). In fact, this reasoning played a role in Judge Holland's decision that the Municipality of Anchorage could be excused from its plan, incorporated by reference as a regulation of the state, to employ more buses. *Trustees for Alaska v. Fink*, Case No. A90-0215 civil (D. Alaska), Order of October 7, 1992. Consequently, while missing the regulatory deadlines is of some concern, it does not prevent DEC from reprioritizing plan review to a schedule that accommodates budget limitations. If this turns out to be "never," the law can accept that outcome.

Another consideration is whether such reprioritization will open DEC to claims of damages. A developer might claim that the delay in plan review caused him to incur financial losses and that the state is liable for such losses. We believe the state would be immune from any such claim because "decisions concerning the allocation of available funding are often immune from suit under the discretionary function exception." *Freeman v. State*, 705 P.2d 918, 920 (Alaska 1985) (*quoted in R.E. v. State*, 878 P.2d 1341, 1351 (Alaska 1994)(Matthews dissenting)). This is because such decisions are founded upon "policy" as opposed to "operations." *R.E., supra* at 1349. Furthermore, the existence or absence of liability turns on the exercise of "reasonable care" and reasonableness is fixed "within the confines of . . . budgetary constraints." *Id*. at 1349.

We doubt that the state would fare as well if any ultimate review was unduly cursory and the claim of damages arose from such abbreviated scrutiny rather than delay. Having taken on the duty of reviewing plans, liability could attach if the state fails to exercise reasonable care when carrying out that function. *Id*. at 1348[7]; *see also Adams v. State*, 555 P.2d 235, 240

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[6] In fact, the Train court went so far as to say: "It would be unreasonable and unjust to hold in contempt a defendant who demonstrated that he was powerless to comply." *Id*. at 713.

[7] An unduly abbreviated review is akin to the "operational" activity that led the *R.E.* court to

(Alaska 1976). Recalling that reasonableness is fixed "within the confines of . . . budgetary constraints," any ultimate review need not be more than DEC's budget can afford. It should not, however, be less.

We hope that this answers your questions. If you have any further concerns, please give us a call.

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rule that the state is not immune from suit when it "fails to exercise due care in carrying out its own policy, rules and regulations." *R.E. v. State*, 878 P.2d at 1348.