



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

**Department of Environmental
Conservation**

OFFICE OF THE COMMISSIONER

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Brad De Noble
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Subject: Petition for Regulations Concerning Greenhouse Gas Emissions

Dear Mr. De Noble:

I have received the petition, submitted by the Youth Petitioners and Alaska Youth for Environmental Action to the Department of Environmental Conservation (DEC) on August 28, 2017. I appreciate the efforts of the petitioners in submitting this petition and the letters I have received from other Alaskans in support of it. Although I am denying the petition under AS 44.62.230, I assure your clients that addressing the climate change needs of Alaska is a priority for this Administration.

The requested regulations would require DEC to regulate stationary and mobile sources of CO₂ emissions and the extraction of fossil fuels within the State to, among other things, ensure that Alaska reduces its total in-boundary¹ and consumption CO₂ emissions² to at least 85% below 1990 levels by 2050 and establish interim benchmarks to guide progress toward that requirement; ensure that Alaska's in-boundary CO₂ emissions are reduced by at least 8.5% per year beginning in 2018; and prepare a numerical statewide goal or carbon budget in order to meet these requirements. The petition would also require DEC to provide an annual accounting of greenhouse gas emissions, adopt a Climate Action Plan, amend the regulations two years after their effective date and every five years thereafter to assure that the State is reducing its greenhouse gas emissions in a manner that is consistent with the best climate science, and recommend that the Legislature adopt a statute to codify the regulations proposed by the petition.

¹ "In-boundary Emissions and Inventory" is defined as including "emissions produced within the state" and "emissions associated with the extraction, transportation, refinement, and combustion of fossil fuels in Alaska, whether such transportation, refinement, or combustion occurs within or outside the state." Petition 2.

² "Consumption Emissions and Inventory" is defined as including "out-of-state emissions associated with producing and transporting the products, services, and fuels consumed in Alaska" and "emissions associated with producing and transporting fuels that are used to generate electricity consumed in Alaska." Petition 2.

By proposing a regulation that would establish broad policy goals for DEC but that would not directly affect the public or be used in dealing with the public, the petition does not propose a “regulation” as defined by Alaska statutes and caselaw. According to applicable caselaw, regulations implement, interpret, or make specific statutes that are being enforced, and regulations affect the public or are used by state agencies in dealing with the public.³ In setting policy directives for DEC, but not establishing standards that directly govern public conduct (such as specific, enforceable greenhouse gas emissions standards), the petition affects the public only by DEC later drafting and adopting more specific regulations to implement those policies. Because of that, the directives and goals in the petition are not themselves suitable for adoption as “regulations.”⁴

The petition also requires actions that are inconsistent with practical and fiscal constraints on the State and DEC. For example, the petition would require that an annual carbon accounting and inventory of both in-boundary and consumption emissions be made available to the public with a lag time of no more than one year. DEC has developed a greenhouse gas emissions inventory for emissions through 2010.⁵ And DEC is in the process of completing an inventory that will update data through 2015. But given limitations on the availability of data, the time to process it, and DEC’s resources, it is not feasible for DEC to produce a carbon accounting and inventory with the short turnaround time required by the petition.

Also, in order to determine if DEC can develop the programs requested in the petition, DEC would need more time to review its fiscal impacts on the Department. If the adoption of a regulation would require increased appropriations, DEC must prepare a fiscal note.⁶ A notice of proposed regulation would also need to include a summary of that fiscal information.⁷ DEC’s current financial and staff resources would not be sufficient to undertake the multiple requests in the petition and would require additional appropriations from the Alaska Legislature. Without a clear understanding of the fiscal impacts and the interest of the Legislature in providing the needed funding, DEC also declines to undertake the expense of initiating the regulations process described in the petition.

In addition, DEC’s authority to adopt the regulation proposed by the petition is constrained by statutes. While the petition highlights the State’s policy to protect the environment and DEC’s authority to adopt regulations to further that policy,⁸ regulations must be “within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.”⁹ That is, regulations must be consistent with authority specifically conferred by statutes and be reasonably necessary to implement those statutes. Portions of the petition likely exceed DEC’s statutory authority. For example, the petition calls on DEC to regulate “the extraction of fossil fuels.”¹⁰ No statute appears to allow DEC to regulate the extraction of fossil fuels based on the emissions associated with their end use. The petition also would require DEC to “[e]nsure that Alaska reduces its . . . consumption emissions,” which includes “all emissions associated with materials and services, including electricity and fuels, consumed in Alaska, including estimates of embedded emissions associated with the life cycle of such materials and services . . . *regardless of whether [the emissions] physically originate in Alaska.*”¹¹ DEC’s statutes likely do not confer authority, as the petition would

³ AS 44.62.640(3); *State, Dep’t of Natural Resources v. Nondalton Tribal Council*, 268 P.3d 293, 301 (Alaska 2012).

⁴ See *Nondalton*, 268 P.3d at 303-04 (holding that area plan that set policies to guide Department of Natural Resources land-use decisions was not itself a regulation where the policy would only directly affect the public through later implementation by specific regulations).

⁵ <http://dec.alaska.gov/air/anpms/projects-reports/docs/GHG-Inventory-Report-2015.pdf>

⁶ AS 44.62.195.

⁷ AS 44.62.200.

⁸ AS 46.03.010; AS 46.03.020(10).

⁹ AS 44.62.020; see also AS 44.62.030 (regulations must be “consistent with the statute,” “reasonable,” and “reasonably necessary”).

¹⁰ Petition 3 (emphasis added).

¹¹ Petition 2-3 (emphasis added).

require, to “regulate stationary and mobile sources of CO₂ emissions and the extraction of fossil fuels within the State of Alaska”¹² for the purpose of reducing *out-of-state* emissions.

The restrictions on greenhouse gas emissions the petition is requesting go beyond current federal requirements. The Alaska statutes set out a specific process that must be followed for DEC to adopt regulations governing air emissions that are more stringent than federal standards. That process requires DEC to make written findings that the standard is reasonably required to protect human health and welfare or the environment, make a finding that the standard or limitation is technologically feasible, and analyze the economic feasibility of the proposal.¹³ Those findings must be supported by studies, submitted for peer review, and be made available for public inspection.¹⁴ Even assuming DEC has the statutory authority to promulgate the regulations envisioned by the petition, this process could constrain DEC’s ability to meet some of the benchmarks sought by the petition. A policy requiring DEC to adopt more stringent emissions standards would need to account for the process and determinations that DEC must follow under its statutes.

It is also important to recognize that climate change and greenhouse gas emissions are global issues. Alaska’s greenhouse gas emissions comprise about 0.59% of nationwide emissions and 0.08% of global emissions. In 2015, thirty-nine states had more emissions than Alaska. I raise this not to minimize the importance of addressing climate change in Alaska, but rather to highlight the State’s inability to achieve climate protections that are the goal of the petition even if all of the requests in the petition could be met.

Alaska’s most recent greenhouse gas emission report indicates the aviation sector produced 21.7% of gross emissions in 2010¹⁵; however, aircraft emissions are not regulated by individual states but through national and international rules.¹⁶ Without corresponding nationwide and global action to reduce greenhouse gas emissions from the aviation sector, the emissions reductions proposed in the petition would not, standing alone, do anything to protect the environment. DEC’s greenhouse gas estimates indicate that in 2010, 47.1% of gross emissions were produced by industry (including the oil and gas sector), 31% by transportation sources (including aviation), 11.7% from residential/commercial sources, and 8.1% from electric power production.¹⁷ Regulation of these emissions sources would need to be fully analyzed for statutory, technical, and economic feasibility. The extent of emission reductions proposed in the petition would have significant consequences for employment, resource development, power generation, health, culture, and other economic and social interests within the state. In sum, there are both practical and legal hurdles to DEC carrying out the petition’s requests and meeting the petition’s climate protection goals, particularly in the absence of a larger international or national effort to reduce greenhouse gas emissions.

Please also note that resource development decisions play a critical role in the State’s future and achievement of its long-term environmental and economic goals. These decisions are inherently difficult and require consideration of many conflicts and tradeoffs, and balancing the needs of many

¹² Petition 3.

¹³ AS 46.14.010(c).

¹⁴ AS 46.14.015; *see also* AS 46.14.140 (requiring specific provisions for regulations for stationary source permits, including standard permit applications, monitoring, record keeping, and reporting requirements, reasonable permit conditions including emission standards, and provisions for fees).

¹⁵ <http://dec.alaska.gov/air/anpms/projects-reports/docs/GHG-Inventory-Report-2015.pdf>

¹⁶ 42 U.S.C. § 7573.

¹⁷ <http://dec.alaska.gov/air/anpms/projects-reports/docs/GHG-Inventory-Report-2015.pdf>

constituencies. Policy questions of this nature are best addressed in partnership with the Legislature.¹⁸

While I am declining to initiate the regulations process on this petition, I appreciate you opening a dialogue with DEC on these important issues. Responding to climate change is a priority for this Administration. There are already many ongoing efforts across the state on climate change and we hope to bring greater focus on these efforts in the next couple of months. Most recently, Governor Walker has appointed Nikoosh Carlo as his senior advisor for climate and directed her to work with state agencies, tribes and stakeholders on options that best meet Alaska's needs. Toward this end, we aim to bring Alaskan communities together as we move towards a state climate initiative that will provide a flexible framework for internal and external collaboration.

One step in this process is to seek input from a diverse group of stakeholders including communities, local and tribal governments, academia, the private sector, and emerging leaders. Alaska Youth for Environmental Action has been invited to send a representative to a meeting on October 4 in Anchorage to discuss the path forward for Alaska. I understand their participation has been confirmed.

I encourage the petitioners to continue to engage with the State's executive branch, and to also reach out to the legislative branch, in seeking creative solutions to addressing climate change in Alaska.

Should you disagree with this denial, you have the right to appeal my final decision within 30 days to the Superior Court and to judicial review described in *Johns v. Commercial Fisheries Entry Comm'n*, 699 P.2d 334 (Alaska 1985).

Sincerely,



Larry Hartig, Commissioner

¹⁸ See Alaska Const. art. VII, § 4 (“The legislature shall provide for the promotion and protection of public health.”); Alaska Const. art. VIII, § 2 (“The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.”).