IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STEPHEN VANEK, et al., Plaintiffs, v. STATE OF ALASKA, DEPARTMENT OF FISH AND GAME, BOARD OF FISHERIES, Defendants.	)	Case No. 3AN-11-9043 CI

STATE'S MOTION FOR RECONSIDERATION OF ORDER ON PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER (CIVIL RULE 77(k))

In its Order on Plaintiffs' Motion for Temporary Restraining Order, the Court not only granted the motion for a temporary restraining order and preliminary injunction, but it also ruled on the merits of plaintiffs' claims:

> The Court, having determined that the facts recited in the Board's "Finding of Emergency" do not constitute an emergency as a matter of law, the emergency regulations promulgated by the Board on June 30, 2011 and set to expire on October 27, 2011 are hereby declared invalid.

This had the effect of consolidating the hearing on a TRO with a trial of the merits on the case. Under Civil Rule 77(k)(1), the Court should reconsider the order ruling on the merits of the case because it overlooked or misapplied the law on consolidation.

No party moved or requested a decision on the merits. No party filed a dispositive motion. The state had not even filed an answer in the case. The Court did not announce any intention to treat the TRO hearing as a trial on the merits either before or during the TRO hearing. The state had no opportunity to fully brief the case: rather,

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given only one business day to file an opposition to the motion for TRO, its briefing necessarily concentrated more on the TRO standards than the merits of the case.

Notions of due process require that the state be given a reasonable opportunity to address the issues raised in the claim in a deliberate fashion and present evidence to support its position, such as arguments and evidence on the "unforeseen, unexpected event" standard in 5 AAC 96.630 and on the "necessary for the immediate preservation of the general welfare" standard in AS 44.62.250.

The Alaska Supreme Court addressed the power of a superior court to consolidate a hearing on a preliminary injunction with a trial on the merits in *Haggblom v. City of Dillingham*, 191 P.3d 991, 999-1000 (Alaska 2008):

> We have not addressed Rule 65(a)(2) directly, but the United States Supreme Court has held that "the parties should normally receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases."
> ...
> When a court orders consolidation during the course of a preliminary injunction hearing, a "party contesting the entry of a final judgment at the preliminary injunction stage ... must demonstrate prejudice as well as surprise." In addition, "if it is clear that consolidation did not detrimentally affect the litigants, as, for example, when the parties in fact presented their entire cases and no evidence of significance would be forthcoming at trial, then the trial court's consolidation will not be considered to have been improper."
> ...
> Courts will uphold consolidation of proceedings when the preliminary injunction hearing was sufficiently thorough to remove any risk of prejudice. The sufficiency ... is determined on a case by case basis.

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In *Hoggblom*, the Court ruled that the party contesting the consolidation had not demonstrated prejudice. But there, the contestant had several hearings and opportunities to present her case.[1] Haggblom's dog was declared vicious by municipal officers. She appealed the decision to a hearing officer. At a hearing, the declaration of viciousness was upheld and she was informed that her dog must either be euthanized or banished from city limits. She was also informed that she could appeal the hearing officer's decision. She sued in superior court, seeking a TRO and preliminary injunction. After granting a TRO, the court held a hearing more than three weeks after the initial incident, and six days later denied the preliminary injunction and held that to the extent the case was an administrative appeal, substantial evidence supported the city's decision. The city then moved for entry of final judgment, which Hoggblom opposed, and the court entered judgment for the city. Thus, Hoggblom had meaningful and reasonable opportunities to present her case.

Here, the state received a copy of the complaint and motion for TRO at about 4:20 p.m. on Friday, July 8, 2011. A hearing was set for the following Tuesday, July 12, at 10:00 a.m. The state had the weekend and one business day to prepare its opposition, which it filed late in the day on Monday, July 11. Because the opposition was to a TRO, much of the opposition concentrated on TRO standards. The state had no reasonable opportunity to compile and present additional evidence on the relative infrequency of such substantive errors (in comparison to technical errors such as in

[1] The description of the proceedings in the *Hoggblom* case are found at 191 P.3d at 994-95.

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geographic coordinates) and develop its arguments on the appropriate standards. The state also had no reasonable opportunity to explain and distinguish the application and limitations of the Board delegation to the department to correct errors in regulations, the relevance of that document being first raised at the hearing. One business day is simply not fair or reasonable to the state (or to the intervenor) and results in serious prejudice from the consolidation.

This Court should also reconsider this case because it overlooked or misconceived a material fact, namely that the record contained no evidence that the regulatory language error in this case was foreseen. The Board's regulatory standard for an emergency, which is more conservative and narrow than the language in AS 44.62.250, is an "unforeseen, unexpected event." 5 AAC 96.625(f). To overcome the presumption of validity, plaintiffs must show that the Board foresaw and expected such a regulatory error. "Unforeseen" and "unexpected" are not the same as "unforeseeable," which means not capable of being foreseen. No evidence supported the proposition that the board foresaw or expected this particular error. In fact, the record indicates the Board would not have foreseen or expected this particular error because (1) the language of RC 200, the proposal it passed, is contrary to the codified language, and (2) the Board, in March, unanimously adopted a written finding stating its intent, Exhibit 6, which mirrors RC 200.

Whether the conservation concerns for the northern salmon stocks were foreseen or unexpected is not independent of, or material to the sufficiency of the emergency finding here. Of course, the Board knew that the stocks were threatened; that

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is the reason the Board adopted restrictive measures to protect those stocks. Which is why the regulatory error created an emergency situation: because the consequences of the error would result in harm to those stocks if emergency regulatory action were not taken.[2]

This case should not be decided at least before summary judgment motion practice. And unless and until there is evidence in the record showing that the codification error was foreseen or expected, the Court should not substitute its judgment for the Board's and rule that the error did not constitute an emergency.

DATED at Anchorage, Alaska this 25th day of July, 2011.

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[2] Under this Court's ruling, tragic consequences could ensue. If the Department of Environmental Conservation (DEC) adopted a regulation that said "a person may not dump harmful materials in an area," but mistakenly codified language without the "not," then DEC would have no emergency regulation authority to immediately prevent dumping, but would have to wait more than 60 days to adopt the permanent regulation they intended to adopt the first time around. To the extent it is argued that these situations are not identical, that is simply an argument advocating substituting the Court's judgment for that of the Board in evaluating the potential harm to Alaska fishery stocks.

CERTIFICATE OF SERVICE

I hereby certify that I am employed in the Office of the Attorney General, Anchorage, Alaska and that on July 25, 2011, I caused to be mailed a true and correct copy of the foregoing to:

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