BEFORE THE ALASKA PUBLIC OFFICES COMMISSION

ALASKA PUBLIC OFFICE COMMISSION	)	
	)	
v.	)	
	)	
RENEWABLE RESOURCES COALITION, INC.	)	OAH No. 09-0231-APO
ALASKANS FOR CLEAN WATER INC.,	)	Agency Nos. 09-01-CD
ROBERT GILLAM, AMERICANS FOR JOB	)	09-04-CD
SECURITY, ARTHUR HACKNEY, MICHAEL	)	09-05-CD
DUBKE, and RICHARD JAMESON	)	09-06-CD

COMMISSION'S RULING ON "GILLAM AND AFCW'S MOTION *IN LIMINE* TO LIMIT ALLEGATIONS TO CAMPAIGN PERIOD"

Respondents Robert Gillam and Alaskans for Clean Water, Inc. (AFCW) have moved that evidence of activities in advance of various dates—they propose several, between March 11, 2008 and July 3, 2008—be excluded from the hearing. The premises of the motion are, first, that Alaska Public Offices Commission (APOC) jurisdiction is confined to "an actual campaign period"[1] and, second, that an APOC regulation imposing a one-year limitations period must be applied. Respondents Arthur Hackney, Richard Jameson, and Renewable Resources Coalition, Inc. (RRC) have joined the motion. The APOC staff has opposed the motion as to all five of these respondents.

I. This Is a Dispositive Motion, Not a True Motion In Limine

Statutes of limitation and jurisdictional limitations are not evidentiary rules. In a case such as this one, they limit the timing or type of conduct that can give rise to liability. They do not preclude evidence of a broader range of matters that may be needed to provide context.[2] Thus, for example, one implication that can be drawn from Part IV below is that the Commission may only impose a fine for violations occurring after January 1, 2008; nonetheless, if evidence of relationships or preparatory conduct from before that date is needed to understand allegedly wrongful conduct after that date, the limitations period does not prevent that evidence from coming in. The respondents do not explicitly argue otherwise.

What the respondents seek in this motion is a ruling that conduct that might otherwise be prohibited cannot, if it occurred before a certain date, give rise to liability in this case. This is

[1] Motion at 1.
[2] *See, e.g., Kalia v. St. Cloud Univ.,* 539 N.W.2d 828, 833 (Minn. App. 1995).

indistinguishable from a motion for partial summary adjudication based on limitations or jurisdictional boundaries, and it will be addressed as such.[3]

II. The Motion is Effectively Moot as to Most Respondents

The motion is moot with respect to Arthur Hackney, as to whom all claims have been dismissed (subject to Commission ratification). It is also effectively moot as to Richard Jameson, who will benefit, in a ruling to be issued shortly, from a dismissal on the same grounds as Mssrs. Dubke and Hackney.

Except for the insubstantial argument that July 3, 2008 should be the earliest date from which evidence can be accepted (disposed of in section III-A below), the motion is moot as to respondents Gillam and AFCW. This is because the next earliest date the movants advocate for a cutoff of evidence is April 28, 2008. All surviving claims against Gillam and AFCW are triggered by alleged violations occurring after April 28, 2008.[4]

The date of the alleged misconduct pertaining to RRC is difficult to pinpoint, but there may be allegations dating back to February 25, 2008 that are not subject to a pending motion for summary adjudication. This pre-dates the earlier cutoff dates advocated in the motion, so that a ruling on all issues is necessary.

III. The Commission's Jurisdiction Is Not Limited to the Dates the Respondents Propose

The movants contend that "APOC can only regulate activity during an actual campaign period."[5] They propose three dates on which they contend the "actual campaign period" for Ballot Measure 4 began. The latest, July 3, 2008, is their primary position; two earlier dates, April 28 and March 11, are fallback positions should the first be rejected.

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[3] Because the motion is dispositive, the administrative law judge has denied the movants' request (at footnote 1 of their reply) that the complainants' opposition to it be stricken.

[4] The surviving claims against Gillam are: (1) using the names of others to make unreported contributions to AFCW (earliest alleged activity in late May, 2008); (2) making anonymous expenditures by paying vendors directly for obligations incurred by AFCW (earliest payment May 29, 2008); and (3) for contributions to AFCW late in the campaign, failing to make a report of contributions that was due September 15, 2008. A fourth allegation ("that Gillam made undisclosed lobbying expenditures by using Alaska Wild Salmon Protection Inc.") was withdrawn at the oral argument held November 2, 2009. The claims against AFCW are: (a) receiving the contributions in Gillam item (1) above; (b) failing to report the payments to vendors in Gillam item (2) above; and (c) failing to report the in-kind donation of an e-mail list, which seems to have occurred a little before May 21, 2008.

[5] Motion at 1.

A. July 3, 2008

Lieutenant Governor Parnell approved Ballot Measure 4 on March 11, 2008, directing the Division of Elections to "place the ballot title and proposition on the election ballot for the August 26, 2008 Primary Election, except as provided in AS 15.45.210."[6] On April 28, 2008, a project coordinator in the Division of Elections sent out a letter noting that the proposition would appear in the voter guide for the August 26 primary and inviting the sponsor to submit a statement in support for inclusion in the guide.[7]

There remained some uncertainty that the measure would indeed appear on the ballot, because litigation was pending to enjoin its appearance. On July 3, 2008, the Alaska Supreme Court rejected the court challenge.[8]

The movants contend that the "actual campaign period" could not begin until the Supreme Court ruled, and that APOC therefore cannot require reporting or otherwise oversee activities before that date. Putting aside to Part III-C the question whether APOC's jurisdiction is limited to an "actual campaign period" in the first place, the claim that July 3 could be the commencement of such a period cannot be taken seriously. If parties could prevent a "campaign" from starting for regulatory purposes simply by filing a court challenge to the election, they could immunize themselves from APOC oversight merely by filing such challenges, however insubstantial or unlikely to succeed. Moreover, the movants, drawing on the applicability section at the beginning of AS 15.13, define a "campaign" as the period during which expenditures are made to "influence the outcome of a ballot proposition or question."[9] Their argument is that expenditures to "influence the outcome" cannot occur—and a campaign cannot exist—until a ballot proposition exists. They ask the Commission to hold that a ballot proposition does not exist until all court challenges are exhausted. The argument is untenable. The Commission is bound by the statutory status of a proposition, not by its speculative status according to the claims in a lawsuit that has not yet been fully adjudicated. By statute, the ballot proposition exists when the Lieutenant Governor places it on the ballot under AS 15.45.190. That step occurred on March 11, 2008, not July 3, 2008.

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6 Notice of Proper Filing (March 11, 2008) (Ex. A to motion).

7 Letter from Weimer to Hackney, April 28, 2008 (Ex. B to motion).

8 *See Pebble Limited Partnership v. Parnell,* No. S-13059, "Order Affirming Superior Court Order (Alaska, July 3, 2008). The order is reprinted at Appendix A to the Supreme Court's Sept. 18, 2009 final opinion in the same case.

9 AS 15.13.101(b).

In this case, allegations not contested in the motion in limine show that, for months in advance of July 3, the participants expected the election to proceed. There is uncontroverted evidence the AFCW had raised nearly $1 million by that date, and had spent just under $1 million as well, primarily on advertising.[10] This was not spending associated with the gathering of signatures, a task that had been completed by January 14, 2008. It is also implausible that such a volume of television and print advertising could have been part of the proponents' litigation effort. Instead, one may infer that the campaign for the August 26 election was underway.

B. April 28, 2008

Respondents Gillam and AFCW represent in their motion that the April 28, 2008 letter was "from [the] Lieutenant Governor"[11] and that it was on this date that he "determine[d] at which election [the measure] would appear [and] . . . notified the sponsors."[12] They posit this as the date "the Lieutenant Governor concluded his review."[13] They contend that the campaign period could not have begun until the April 28 determination occurred.

Disappointingly, the statements quoted in the preceding paragraph appear to misrepresent the evidence. Rather than a letter from the Lieutenant Governor, the April 28 letter was a seemingly routine communication from the "HAVA Project Coordinator" to give Mr. Hackney an opportunity to send in his 500-word statement for the voter guide.[14] There is no indication that it constituted a determination by the Lieutenant Governor of any kind. Instead, Lt. Gov. Parnell had "determine[d] at which election [the measure] would appear" in his formal notice of March 11, 2008, which said:

> In accordance with AS 15.45.190, the Director of the Division of Elections shall place the ballot title and proposition on the election ballot for the August 26, 2008 Primary Election, except as provided by AS 15.45.210.[15]

Accordingly, there is no basis for making April 28, 2008 a date of any significance in delineating the duration of the campaign or the scope of the Commission's jurisdiction.

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[10] *See, e.g.,* AFCW 11-12 (at Tab 1 to Attachment References to 1st Staff Report).
[11] Motion at 18 n.39.
[12] *Id.* at 20.
[13] *Id.*
[14] Letter from Weimer to Hackney, April 28, 2008 (Ex. B to motion).
[15] Notice of Proper Filing (March 11, 2008) (Ex. A to motion). AS 15.45.210 is the provision that requires the Lieutenant Governor to void the petition if the legislature enacts "substantially the same" law.

C. March 11, 2008

The movants contend that, in any event, the Commission may not require the reporting of contributions or otherwise oversee conduct prior to March 11, 2008, the date on which the Lieutenant Governor approved Ballot Measure 4. Again, the reasoning is that AS 15.13.010 makes the requirements of AS 15.13 applicable "to contributions, expenditures and communications made . . . for the purpose of influencing the outcome of a ballot proposition;"[16] the movants contend that until such a proposition exists, contributions, expenditures, and communications cannot be "for the purpose of influencing" its outcome. The primary support offered for this position is a 1985 APOC advisory letter containing the truism: "there is no election to influence unless the group is successful in obtaining the necessary number of signatures and meeting any other requirements."[17]

The short answer to this argument is that contributions, expenditures, and communications can be for the purpose of influencing an election that is proposed, even if it has not yet been approved. For example, if a sponsor starts advertising before certification, its expenditures fall within AS 15.13.010's applicability provisions.

In official opinions, APOC has consistently interpreted the statutes in this way. The 1985 letter, for example, emphasized that AS 15.13 is inapplicable only to pre-approval donations and expenditures "<u>solely</u> for gathering signatures." It carefully observed that if the sponsoring group "has a surplus when its application for recall is certified, the surplus may not be expended to campaign for recall without disclosure of all the sources." It also pointed out that "[c]ampaigning for the measure at the same time" as the group was gathering signatures "would jeopardize the validity of Zero Reports."[18] Likewise, in 2000 Assistant Director Ebenal opined on behalf of the Commission that efforts "for the sole purpose" of supporting a legal challenge to a ballot initiative, whether pursued before or after certification, fall outside the scope of AS 15.13. Nothing in the opinion suggested that contributions or expenditures *not* for that sole purpose could be left unreported, and indeed the opinion's careful use of words like "solely" and "sole" strongly suggests the contrary.[19]

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16 AS 15.13.010(b).

17 Letter from Theda Pittman, APOC Executive Director, to Barbara Lacher, Aug. 7, 1985 (Ex. E to motion).

18 *Id.*

19 Advisory Opinion AO00-02-CD (Sept. 28, 2000) (Ex. D to motion). APOC's draft "2008 Group Guide" (Ex. F to motion), though not an official pronouncement of the Commission's interpretation of its statutes, is in generally the same vein. At page 7, it reminds sponsors that if they have a surplus after their petition drive and wish to use it for the campaign, "<u>the names of previous contributors must be reported</u>" [emphasis in original]. It goes on

Because contributions and expenditures prior to approval of the ballot measure on March 11, 2008 *could* be reportable depending on their purpose and use, evidence of such activities cannot *a priori* be excluded from the hearing.

IV. No Pending Claims Are Barred by Limitations

In 2008 the legislature amended AS 15.13.380(b), extending the statutory period in which an APOC complaint could be made from one year after the date of the alleged violation to five years and vesting in "a person" the right to file an administrative complaint within the five year window.[20] When it made this change, the legislature provided for a delayed effective date of January 1, 2009, but also made the extended limitation applicable to actions that occurred within one year prior to the effective date, such that an alleged violation occurring within the specified time frame would be subject to the five year limitation on actions as well.[21] The practical effect of this amendment, its delayed effective date, and the applicability provision is that complaints for violations alleged to have occurred after January 1, 2008 need only be filed within five years of the alleged violation. For violations alleged to have occurred prior to January 1, 2008 to be timely, a complaint must have been filed within one year of the alleged violation.

The Commission's regulation at 2 AAC 50.452(a)(4), promulgated under the prior one-year version of AS 15.13.380(b), provides that the staff "shall reject" a complaint "for filing" if "more than one year has elapsed since the date of the alleged violation." This regulation has not been amended to reflect the new five-year limitation on actions.[22] Therefore, if the regulation is followed, proceedings on the original complaint before the Commission are limited to alleged violations occurring after March 20, 2008, one year before the complainants filed their complaint.[23] If the statute is followed, both complaints before the Commission are limited to alleged violations occurring on or after January 1, 2008.

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to state that if a group raises "future campaign funds" while its signature drive is underway, and yet files zero reports, those reports "may be called into question" [emphasis in original].

[20] Prior to the 2008 amendment, the statute provided that a member of the Commission, its executive director or a person could file an administrative complaint. When it amended AS 15.13.380(b), the legislature deleted the express references to a member of the Commission or its executive director. §3, ch 95 SLA 2008.

[21] Sections 13(b) and 16, ch 95 SLA 2008.

[22] The legislature appears to have envisioned that the regulations would be amended; it provided that the Commission "may immediately adopt regulations as are necessary to implement the changes…." §§ 14, 15, ch 95 SLA 2008.

[23] Proceedings with respect to respondents Hackney, Dubke, and Jameson (if those respondents were not dismissed on the merits) would be limited by the regulation to violations occurring after June 4, 2008.

The movants advocate the March 20 cutoff, arguing that an agency must follow its own regulations and that an ALJ or the Commission lacks authority to declare a regulation invalid.[24] Relatedly, they contend that the statute and regulation can be read in harmony because AS 15.13.380 sets the "outer bounds of APOC's authority to consider violations" and does not require staff consider violations older than one year, but rather provides the option should the Commission desire to do so.[25]

On the latter point, the movants are mistaken. The statute and regulation are not reconcilable. The legislature bestowed upon "a person" the right to file a complaint before the Commission within five years of an alleged violation. The regulation would countermand part of that right because it provides that a complaint tendered more than one year after the alleged violation will be rejected "for filing." Indeed, the sponsor statement of the new law shows that the legislation's proponents viewed one year as an unreasonable limitation and expressly set out to change it.[26] Likewise, the Alaska Public Offices Commission and the Department of Law understood from the outset that the bill would necessarily "expand the statute of limitations for filing complaints," and they requested substantial additional funding as a result.[27] Nothing in the history of the legislation supports the notion that the expansion of the limitations period would be optional. Under these circumstances, where a later enacted statute cannot be reconciled or read in harmony with a pre-existing regulation, the statute implicitly repeals the regulation.

There is no question that in Alaska the legislature may—provided it acts as a body in the manner set out in Article II of the Alaska Constitution—expressly repeal an agency's regulation.[28] Insofar as the matter has been addressed, it has generally been assumed that it may also repeal regulations by implication,[29] and this view is supported by the essentially universal view of courts in other jurisdictions.[30] While most jurisdictions observe a rebutable presumption against implied repealer, Alaska has rejected this presumption in the context of implied repeals

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[24] *Reply in Support of Motion In Limine to Limit Allegations to Campaign Period* at 9 (alluding to a position previously espoused by staff in its Report at 27).

[25] *Id.* at 10.

[26] HB 281 Sponsor Statement, Jan. 23, 2008.

[27] Fiscal Notes on HB 281, Jan. 22, 2008 (Administration), April 4, 2008 (Law).

[28] *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 778 (Alaska 1980) ("the power to void agency regulations could be exercised by . . . the legislature . . . while acting as a legislature").

[29] *See Michael v. State*, 583 P.2d 852, 853 (Alaska 1978) (regulation was not repealed by implication where there was no irreconcilable conflict between administrative regulation and statute).

[30] *See, e.g.,Ward v. Goldberg,* 1994 WL 86363 (Conn. Super. 1994); *Oglesby v. Toledo,* 635 N.E.2d 1319, 1325 (Ohio App. 1993). Some courts might refer to implied repealer in this context as preemption. *See Lily Lake Rd. Defenders v. County of McHenry,* 619 N.E.2d 137, 140 (Ill. 1993).

of statutes, instead taking its guidance from legislative intent without any extra weight on the scale for or against repeal.[31] "[A]n implied repeal is possible when a statute completely occupies the field of a previous statute . . . . '[I]f the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate . . . as a repeal of the earlier act.'"[32] That is what has occurred here.[33]

Since the legislature has already repealed 2 AAC 50.452(a)(4), the question of whether the Commission or the ALJ may "invalidate" it does not arise. The regulation is already void.

Applying the new law as explained above, the statute of limitations for this case bars only violations that pre-date January 1, 2008. There are no alleged violations earlier than that date still pending in this case.

V. Order

The motion is denied.

DATED this 18th day of November, 2009.

BY DIRECTION OF THE COMMISSION

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Certificate of Service: The undersigned certifies that on the 18th day of November, 2009, a true and correct copy of this document was emailed or faxed to: Scott Kendall and Timothy McKeever, counsel for respondents Alaskans for Clean Water, Inc. and Robert Gillam; Matthew Singer and Charles Dunnagan, counsel for complainants Pebble Limited Partnership and Renewable Resources Coalition; Douglas Pope and Jonathon Katcher, counsel for Arthur Hackney; Jeffrey Feldman, counsel for Michael Dubke; Peter Maasen, counsel for Richard Jameson and Renewable Resources Coalition, Inc.; and Thomas Dosik, Assistant Attorney General, counsel for the APOC staff. Copies of this document were provided by the same means to Holly Hill, Executive Director, of the Alaska Public Offices Commission, and Elizabeth Hickerson, Chair; and to William Milks, AAG.

By: *Signed*
Linda Schwass/Kimberly DeMoss

[This document has been modified to conform to technical standards for publication.]

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31 *Progressive Ins. Co. v. Simmons,* 953 P.2d 510, 516 (Alaska 1998).

32 *Allen v. Alaska Oil and Gas Conservation Commission*, 147 P.3d 664, 668 (Alaska 2006) (citations omitted).

33 The movants also argue that failure to follow the regulation as written deprives them of due process by depriving them of notice of what activities might be prosecuted, citing *APOC v. Stevens,* 205 P.3d 321 (Alaska 2009). The "ambiguity" in *Stevens* was substantive, regarding whether deferred income was required to be disclosed. Here, the conflict is between periods of limitations, not standards of substantive behavior. The movants have not explained how providing an extended limitation on actions would translate into respondents having taken a different course of conduct during the campaign.