

LEGAL SERVICES

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MEMORANDUM

June 3, 2008

SUBJECT: Ballot Initiative 07WTR3: Initiative's effect on existing statutory and regulatory standards affecting water (Work Order No. 25-LS1697)

TO: Representative Paul Seaton
Attn: Louie Flora

FROM: Alpheus Bullard
Legislative Counsel

You have asked what effects the 07WTR3 ("An Act to Protect Alaska's Clean Water") ballot initiative would have on existing Alaska statutes and regulations. Below, please find a brief analysis of how the initiative relates to existing Alaska law.

Affected parties

This initiative applies to "[prospective]¹ large scale metallic mineral mining operation[s]" ("mining operation[s]"). The form of mining operation is defined as "a mining operation that extracts metallic minerals or deposits [] utiliz[ing] or disturb[ing] in excess of 640 acres of land or water[s] [in the state], either alone or in combination with adjoining, related or concurrent mining activities or operations" (see initiative sec. 5(a)). The term "operation" encompasses all aspects of a mining project, including facilities, roads, pipelines, treatment plants, tunnels, etc.

What the initiative provides

The mining initiative prohibits the issuance of authorizations to a [prospective] mining operation that will (1) release toxic pollutants in amounts affecting human health and welfare or "any stage of the life cycle of salmon" into any surface or subsurface water, or (2) store or dispose of metallic mineral mining wastes and tailings that could result in a release of sulfuric acid or "other acids, dissolved metals, toxic pollutants, or other compounds thereof that will effect [sic], directly or indirectly, surface or subsurface water or tributaries thereto" that are used for human consumption or by salmon.

¹ Section 3 of the initiative provides that existing fully permitted large scale metallic mineral mining operations are not subject to the initiative, including future operations of existing facilities at those sites.

Ambiguity, interpretation, and drafting issues

The mining initiative is not a model of drafting clarity. The initiative's use of language, i.e. ". . . *pollutants, in a measurable amount that will effect [sic] human health . . .*", create questions as to the scope and applicability of the initiative's provisions. How "*measurable amount*" is understood and whether "*effect*" is interpreted as "*adversely affect*" would significantly affect the impact of the initiative if it is approved by the electorate. The initiative's definition and treatment of toxic pollutants, the other term for which a definition is supplied in the initiative, and "*other compounds thereof*" present similar interpretive issues.

The initiative's section 3 provides that the initiative's prohibitions do not apply to existing mining operations that have received all required permits and "*future operations of existing facilities at those sites.*" "[*F*]acility" and "*site*" are not defined in the initiative, so it is unclear to what extent existing mining operations would be impacted in their future operations. Existing operations might not be able to expand or build new facilities without becoming subject to the initiative's provisions.

Analysis

No existing statute or regulation is directly amended or repealed by the initiative. The initiative could change how the existing state statutes and regulations may apply to large scale mining operations. The application of Alaska's current statutes and regulations to all other persons and entities would be unaffected by the initiative.

The initiative prohibits the issuance to "*prospective large scale metallic operation[s]*" of "*approvals, authorizations, licenses and permits*" that allow activity that violates either of two regulatory standards.

The first standard prohibits the issuance of authorizations that allow a large scale mining operation to release a toxic pollutant "*in a measurable amount that will effect [sic] human health or welfare or any stage of the life cycle of salmon*" into any surface or subsurface water. Toxic pollutant is defined broadly (see initiative sec. 5(b)) to include any substance that will cause "*death, disease, malignancy, behavioral abnormalities, abnormalities, or malfunctions in growth, development, behavior, or reproduction, cancer, genetic mutations, physiological malfunctions or physical or physiological abnormalities in humans, fish, or other wildlife organisms.*"²

The second standard prohibits the issuance of authorizations that allow a large scale metallic mineral mining operation to store or dispose of metallic mineral mining wastes and tailings that could release sulfuric acid or "*other acids, dissolved metals, toxic pollutants, or other compounds thereof that will effect, directly or indirectly, surface or subsurface water or tributaries thereto*" used by humans or salmon.

² The definition includes a list of substances identified as toxic pollutants in 33 U.S.C. § 1317(a).

Given the ambiguity of the initiative's language, the degree to which these two additional regulatory standards will be interpreted so as to modify the standards that large scale mining operations must comply with under current law is not clear.³ The phrase "*releases or discharges a toxic pollutant or pollutants, in a measurable amount that will effect [sic] human health or welfare or any stage of the life cycle of salmon*" lends itself to a range of possible interpretation. If "*measurable amount*" is understood to mean "any measurable amount" of a pollutant and "*effect*," is understood as "any effect" then the initiative would operate to prohibit prospective large scale mineral mining operations (as an earlier ballot initiative, ballot measure 07WATR, does). The Department of Law and a superior court judge have rejected this interpretation.⁴ They have interpreted the phrase to mean ". . . will adversely affect human health or . . ." Under this interpretation, the initiative regulates the discharge of pollutants without prohibiting new mining operations. If this is what the initiative, if approved, is held to mean, existing water standards for large scale mining operations may not dramatically change. Current state regulations set standards for the discharge of metals and chemicals to protect human health, salmon, and other uses of water.⁵ If the existing state standards are drafted to prevent adverse effects, then a prospective large scale mine that complies with existing state standards might also be held to be in compliance with 07WTR3's standards for large mineral mining operations. The state's proposed ballot summary reflects this understanding. It summarizes the cost of 07WTR3 as follows:

This initiative appears to propose language that does not differ significantly from existing water quality standards. Therefore, the department does not foresee any significant impact on the department or on activities on state-owned land. As a result, there will not be significant fiscal impact--either revenues or costs--as a result of this initiative.⁶

³ For a list of state permits that the initiative might prohibit issuing to prospective large scale mining operations, see Alaska Department of Natural Resources, Office of Project Management and Permitting, "Permitting Large Mine Projects in Alaska" (2006). Available at http://www.dnr.state.ak.us/mlw/mining/largemine/lmpt_process.pdf

⁴ See A.G file no. 663-07-0179 (October 17, 2007) (Under AS 15.45.070 the lieutenant governor is required to review a proposed initiative) and Council of Alaska Producers et al. v. Parnell et al., 4FA-07-2696 CI, Memorandum of Decision and Order (Sup. Ct. Feb. 29, 2008) (A pre-election review of the validity of ballot measures 07WATR and 07WTR3).

⁵ See 11 AAC 70.015. Antidegradation policy. (a) It is the state's antidegradation policy that (1) existing water uses and the level of water quality necessary to protect existing uses must be maintained and protected.

⁶ See Council of Alaska Producers et al. v. Parnell et al., 4FA-07-2696 CI, Memorandum of Decision and Order (Sup. Ct. Feb. 29, 2008).

If the initiative is passed by the electorate, the regulations drafted to implement it will fall between these two interpretations, a de facto prohibition on future large scale mining operations or the continuation of the state's existing water use regulations.

Normally the natural and ordinary meaning of an initiative's words would be given effect. In this instance due to the ambiguity of the language, the ballot summary, arguments, and analysis presented to the electorate (in the electorate's role as the "body" enacting the initiative) in conjunction with the language of the ballot measure may guide how the initiative is understood by the electorate and consequently what a court may hold is the legal effect of the initiative on the state's regulation of water quality.

The Alaska Supreme Court has characterized ballot initiatives as "act[s] of direct democracy guaranteed by [state] constitution," Yute Air Alaska, Inc. v. McAlpine, 698 P.2d 1173, 1179 (Alaska 1985). It is my opinion that an Alaska court will attempt to interpret and apply a ballot initiative in a manner consistent with the probable intent of the body enacting it: the voters of the State.⁷

In this case, the initiative's language is ambiguous and is susceptible to disparate interpretations. It seems natural that the ambiguous language will be interpreted by the voters through the statements in support of and in opposition to the initiative and the neutral ballot summary provided to the voters. If the initiative is approved, it may be approved in a context which includes a "neutral" ballot summary that provides "[t]his initiative appears to propose language that does not differ significantly from existing water quality standards."⁸

Interestingly, in representing what the initiative will do, the neutral summary may increase the chances of the initiative's legal effect being interpreted by a court in a manner consistent with the summary's interpretation, yielding a result that might be

⁷ In Alaska, there are no decisions reporting on the perspective from which an initiative should be interpreted. In contrast, in California, there are a number of key decisions that could influence Alaska's courts. When the language of an initiative measure does not point to a definitive resolution of a question of interpretation, "it is appropriate to consider indicia of the voters' intent other than the language of the provision itself." Kennedy Wholesale, Inc. v. State Board of Equalization, 806 P.2d 1360, 1363 (Cal. 1991). These indicia include the "summary and arguments and analysis presented to the electorate in connection with a particular measure[, which] may be helpful in determining the probable meaning of uncertain language." Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1315 (Cal. 1978). See also Hill v. National Collegiate Athletic Assn., 865 P.2d 633 (Cal. 1994); Legislature v. Eu, 816 P.2d 1309 (Cal. 1991); and People v. Birkett, 980 P.2d 912 (Cal. 1999).

⁸ See Council of Alaska Producers et al. v. Parnell et al., 4FA-07-2696 CI, Memorandum of Decision and Order (Sup. Ct. Feb. 29, 2008).

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different from either what an interpretation of the initiative's text in isolation might have provided or what the measure's original sponsors might desire. While it may be the intention of the sponsors of the initiative to require more stringent water quality standards than those that currently exist, it is my opinion that it is how the measure is understood by the voters and the voters' intent in enacting the initiative that a court will employ in interpreting how the initiative should be implemented. Because the ballot pamphlet has not yet been printed, it is not now possible to know what arguments for and against the initiative will be presented, how the initiative will be characterized by its supporters and opponents, or how the initiative will be summarized. Because of the ambiguity of the initiative's language, the complexity of federal and state water quality regulation, and the potential financial and social impact of the measure, litigation concerning its meaning is likely. In my opinion, these contextual elements are likely to prove important in any such future legal action.

If you have any questions, or if I can be of further assistance, please do not hesitate to contact me.

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