November 8, 2007

The Honorable Sean R. Parnell
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: Review of 07WIFI Initiative Application
A.G. file no: 663-08-0036

Dear Lieutenant Governor Parnell:

I. INTRODUCTION

You have asked us to review an application for an initiative entitled "An Act to provide for cleaner waters in Alaska by prohibiting pollution mixing zones in wild salmon and other fisheries spawning waters."

We find no legal problems with the bill and so we recommend that you certify the application.

II. SUMMARY OF THE PROPOSED BILL

The bill is comprised of three sections. Section 1 of the bill states that the purpose of the bill is to protect water quality in the state by prohibiting mixing zones in water used by salmon and resident fish.

Section 2 of the bill amends AS 46.03 to add a new statute, AS 43.06.065,[1] providing for the prohibition of mixing zones in spawning waters. We first note that the definition in this section of "spawning" includes not only spawning, but also rearing and migration. Given this broad definition, the scope of this bill could potentially include most of the waters in which fish are present in the state.

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[1] The drafter probably intended the bill to create a new statute numbered AS 43.03.065.

Subsection (a) of proposed AS 46.03.065 prohibits the Department of Environmental Conservation from permitting mixing zones in an area of anadromous or resident fish spawning. Resident fish is defined to include arctic char (Dolly Varden), arctic grayling, brook trout, burbot, cutthroat char, lake trout, landlocked coho, king, and sockeye salmon, northern pike, rainbow trout, sheefish and whitefish.

Subsection (b) of proposed AS 46.03.065 provides an exception to the mixing zone prohibition for turbidity for a suction dredge or mechanical placer mine so long as the mixing zone is authorized by DEC, it does not extend more than 500 feet downstream of the point of discharge, the closest other mixing zone is more than 500 feet away, and if required by law discharge is restricted during periods of spawning and DEC finds that the mixing zone will not adversely affect the area for spawning.

Subsection (c) of proposed AS 46.03.065 provides an exception to the mixing zone prohibition for operators of shore-based seafood processors.

Subsection (d) of proposed AS 46.03.065 provides an exception to the mixing zone prohibition for operators of publicly owned sewage treatment plants that discharge less than one million gallons per day.

Subsection (c)[2] of proposed AS 46.03.065 sets forth the definitions in the provision.

Section 3 of the bill contains a severability clause similar in substance to AS 01.10.030. Section 3 also provides "[u]pon enactment, the state shall take all actions necessary to ensure the maximum enforceability of this act."

Before we turn to our analysis of this bill, we think it would be useful to provide some background regarding mixing zones. State regulation defines "mixing zone" as "a volume of water, adjacent to a discharge, in which wastes discharged mix with the receiving water." 18 AAC 70.990(38). Mixing zones are a limited area at the outlet of a discharge point in which a liquid waste discharge may be further diluted by water. On a case-by-case basis, DEC may allow within such mixing zones certain water quality criteria to be exceeded. 18 AAC 70.240. The point of such mixing zones is to provide a limited area in which a liquid waste discharge stream may be further diluted so that once the discharge stream exits the mixing zone, it will satisfy applicable water quality standards.

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2 The drafter probably intended to label this subsection (e).

There are similarities and differences in the scope of the current regulation and the bill. The Alaska mixing zone regulation prohibits mixing zones in spawning areas for both anadromous fish as well as resident fish. 18 AAC 70.240(e) and (f). Thus, the biological scope of current regulation and the bill is the same. The geographical scope of the bill, however, is much broader than existing regulation because in current regulation "spawning" means spawning, and in the bill "spawning" means spawning, rearing and migration.

There are also similarities and differences in the exceptions set forth in the current regulation and the bill. Current regulation contains an exception to the prohibition against mixing zones in spawning areas for resident fish only, conditioned on the applicant demonstrating that the mixing zone will not cause harm to the spawning area. 18 AAC 70.240(g). The bill provides for certain industry category exceptions to the prohibition against mixing zones, *i.e.*, for certain placer mines, shore-based seafood processors, and certain public sewage treatment works, that do not exist in the current mixing zone regulation. It is possible, however, for such entities to apply for an exception in a resident fish spawning area under 18 AAC 70.240(g). The important difference to note, however, is that the current regulatory exception does not extend to anadromous fish, whereas the bill's exceptions do.

We note the possibility that were this initiative to be enacted it could be interpreted to provide less protection for anadromous fish with respect to the identified industry category exceptions. We further note that the federal Environmental Protection Agency approves state mixing zone regulations before they may be implemented. 40 C.F.R. § 131.13. It is therefore possible that the EPA will decline to approve the mixing zone exceptions in this initiative because they potentially provide less protection for anadromous fish than existing regulation.

III. ANALYSIS

Under AS 15.45.070, the lieutenant governor is required to review an application for a proposed initiative and either "certify it or notify the initiative committee of the grounds for denial" within 60 days of receipt. The grounds for denial of an application are that (1) the proposed bill is not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors. AS 15.45.080. We discuss these next.

A. FORM OF THE PROPOSED BILL

The form of a proposed initiative bill is prescribed by AS 15.45.040, which requires that (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the enacting clause state, "Be it enacted by the People of the State of Alaska"; and (4) the bill not include prohibited subjects. The prohibited subjects – dedication of revenue, appropriations, the creation of courts or the definition of their jurisdiction, rules of court, and local or special legislation – are listed in AS 15.45.010 and in art. XI, sec. 7, of the Alaska Constitution.

The bill satisfies each of these four requirements. It is confined to one subject, the prohibition of mixing zones in spawning waters. The subject of the bill is expressed in the title ("to provide for cleaner waters in Alaska by prohibiting pollution mixing zones in wild salmon and other fisheries spawning waters"). The enacting clause is set out correctly. The bill does not contain any of the prohibited subjects.

We have previously expressed our view that an initiative may not prohibit the use of public assets such as land or water in a manner that amounts to an appropriation of such public assets. 2007 Op. Att'y Gen. (June 21; 663-07-0179). This initiative prohibits the use of most waters of the state for mixing zones. We think it would be useful to explain why we do not think this bill amounts to an appropriation under our previous opinion.

Mixing zones are essentially an exemption to the regulatory water quality scheme. The permitting agency allows the permittee within a narrow circumscribed area to exceed certain applicable water quality regulatory limitations. For instance, an industrial user may discharge a waste stream that contains 2 parts per billion more of a substance than is permitted by water quality regulations. A mixing zone of 500 feet from the discharge point will allow the waste stream to further dilute to the point where the water quality level at the exit point of the mixing zone is within the applicable water quality regulations.

This bill does not prohibit the use of water. It instead prohibits the granting of a regulatory exemption. Enactment of this bill would mean that the water quality level at all discharge points must be within the applicable regulatory limits. The state's water may still be used for discharges, therefore the bill does not appropriate the use of water.

B. THE FORM OF THE APPLICATION

The form of an initiative application is prescribed in AS 15.45.030, which provides:

> The application must include the
>
> (1) proposed bill;
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> (2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached; and
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> (3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

AS 15.45.030. The application meets the first and third requirements as well as the latter portion of the second requirement regarding the statement on the signature page. With respect to the first clause of the second requirement, the Division of Elections within your office determines whether the application contains the signatures and addresses of not less than 100 qualified voters.

C. NUMBER OF QUALIFIED SPONSORS

The Division of Elections within your office will determine whether there are a sufficient number of qualified sponsors.

IV. PROPOSED BALLOT AND PETITION SUMMARY

We have prepared the following ballot-ready petition summary and title for your consideration:

BILL PROHIBITING MIXING ZONES IN WATER USED BY FISH FOR SPAWNING, REARING AND MIGRATION

> This bill would prohibit mixing zones in water used by salmon and resident fish for spawning, rearing and migration. A mixing zone is an area in water into which liquid wastes may be discharged and exceed water quality criteria. The purpose of a mixing zone is to allow wastes to be diluted so that they meet water quality criteria when they exit the mixing zone. The bill provides exceptions to the prohibition against mixing zones for certain users including some kinds of placer mines, shore-based seafood processors and public water works that process less than 1 million gallons of water a day.
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> Should this initiative become law?

This summary has a Flesch test score of 44.9. We believe that the summary meets the readability standards of AS 15.60.005.

V. CONCLUSION

For the above reasons, we find that the proposed bill is in the proper form, and therefore recommend that you certify this initiative application.

Please contact me if we can be of further assistance to you on this matter.

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By:
Michael A. Barnhill
Senior Assistant Attorney General

MAB/ajh

cc: Whitney Brewster, Director of Division of Elections