MEMORANDUM

State of Alaska

Department of Law

TO: Pat Galvin, Director
Division of Governmental
Coordination

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A.G. FILE NO: 661-02-0117

TELEPHONE: 269-5274

FROM: Craig Tillery
Assistant Attorney General

SUBJECT: Applicability of the ACMP to the aerial application of herbicides for forestry purposes

You requested our opinion on the applicability of the Alaska Coastal Management Program to the aerial application of herbicides for forestry purposes.

Background

In 2001 a corporation proposed to apply the herbicides glyphosate and imazapyr to 1,965 acres on an island it owns in Southeast Alaska. The application would be by aerial spraying from a helicopter. Timber on the land in question was harvested by the corporation in the 1980s and the timber was sold. The purpose of the herbicide application is to kill red alder trees that are impeding the growth of spruce, hemlock, red cedar, and other valuable trees.

Applicable Law

As presently proposed, this project requires the applicant to obtain three permits. First, the Department of Environmental Conservation ("DEC") requires prior approval for the aerial application of herbicides. Under AS 46.03.730 a person may not apply a pesticide in a manner that may cause damage to or endanger the health, welfare, or property of another person or in a manner likely to pollute the air, soil, or water of the state without prior authorization of the department. Pesticides include chemicals, such as those at issue here, that are intended as plant regulators, defoliants, or desiccants. AS 46.03.900(18). In implementing this statute, DEC provided in regulation that a person may not apply an herbicide by aircraft or helicopter without first obtaining a permit issued by the department. 18 AAC 90.505. The regulations spell out various requirements for obtaining the permit including the form of application, public notice, and public hearings. 18 AAC 90.515 - .520.

The Department of Natural Resources ("DNR") requires a temporary water use permit where a person intends, as here, to appropriate water from a local stream to mix with the herbicide. AS 46.15.040; 11 AAC 93.040. In addition, because the water appropriation will come from an anadromous fish stream, a Fish Habitat Permit from the Alaska Department of Fish And Game ("ADF&G") is required. AS 16.05.870(b); 5 AAC 95.010; *Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes,* Southeast Region, Resource Management Region I, as revised November 4, 1998, at 4 - 5.

Where a permit is required from more than one state resource agency, a state consistency determination must be rendered by the Division of Governmental Coordination within the state Office of Management and Budget. AS 44.19.145(a)(11); 6 AAC 50.030. There is an indication that the DNR and ADF&G permits may not be required under some project scenarios. Where the project requires a permit from only one state agency, that state agency shall coordinate the consistency review according to the requirements of the regulations adopted by the Alaska Coastal Policy Council. AS 46.40.096; 6 AAC 50.030(b). The consistency standards directly applicable to this situation are found in 6 AAC 30.80.130 – .150. Those regulations provide in relevant part that rivers, streams, lakes, and important upland habitat "must be managed so as to maintain the biological, physical, and chemical characteristics of the habitat which contribute to its capacity to support living resources." 6 AAC 80.130(b). Where uses and activities do not conform with these standards they may still be allowed so long as they meet certain criteria. 6 AAC 80.130(d). These consistency standards apply unless superceded or waived by other law.

Under the Alaska Forest Resources and Practices Act ("Forest Practices Act"), the statutory provisions found in AS 41.17.010 - .950 and regulations adopted thereunder (11 AAC 95.185 - .835) establish the forest management standards, policies, and review processes under AS 46.40, the Alaska Coastal Management Program ("ACMP"). Similarly, the ACMP implementing regulations provide that "AS 41.17, Forest Resources and Practices, and the regulations and procedures adopted under that chapter with respect to the harvest and processing of timber, are incorporated into the Alaska coastal management program and constitute the components of the coastal management program with respect to those purposes." 6 AAC 80.100. Preemption does not apply to timber harvest activities that require a state authorization under a provision of law other than the Forest Practices Act. AS 41.17.900(e).

Administrative Action

The applicant sought permits for the aerial application of an herbicide. Initially the Division of Governmental Coordination determined that the Coastal Management standards of 6 AAC 80.130 - .150 were applicable and found the proposed action to be inconsistent with those standards. This decision was elevated under the authority of AS 46.40.096. At an elevation meeting, a concern was raised as to whether the Coastal Management standards applied in the consistency determination were preempted by AS 41.17.900(e). Following a series of discussions a decision was made to seek a legal opinion on this issue. In response to that request, we have reviewed the relevant facts and law and conclude that the habitat standards found in 6 AAC 80.130 – .150 have been preempted and should not be applied.

Herbicide Application Is Not a Timber Harvest Activity

The purpose of using the herbicides in this instance is to kill red alder and thus allow the regrowth of more commercially valuable species of trees such as hemlock and spruce. This is made necessary because the land was clear cut in the 1980s, opening up the forest floor and allowing the alder to become established. Thus the application of herbicides is a part of the reforestation of the land.

As described above, the Forest Practices Act establishes the forest management standards, policies, and review processes under AS 46.40, except for "timber harvest activity" that requires a state or federal authorization. AS 41.17.900(e). Unquestionably, the proposed activity requires a state authorization. Thus, if the application of herbicides is a timber harvest activity, then the preemption provisions of AS 41.17.900(e) and 6 AAC 80.100 do not apply. We find it to be a very close question as to whether the application of herbicide for purposes of reforestation is within the scope of this term.

In interpreting statutes and regulations, one first looks to the language of the statute construed in light of its purpose. *Bullock v. State*, 19 P.3d 1209, 1214 (Alaska 2001). In this case the meaning of the phrase "timber harvest activity" is not clear. On the one hand timber harvest activities could be viewed as including only those activities that directly involve the cutting and removal of the timber. On the other, one could take a broader view that includes all activities that are a part of the harvest cycle, including reforestation.

"Timber harvest activity" is not defined in the Alaska statutes. However, there are contextual clues that point to an answer. In AS 41.17.080 the regulatory authority of the commissioner of DNR ("commissioner") is established in a list that places "timber

harvesting," "reforestation," and "vegetative management" in distinct categories. This dichotomy makes sense as reforestation may occur for any number of reasons unrelated to the harvest of timber, such as the destruction of timber through fire or insect kill. It is also consistent with the generally accepted meaning of similar phrases, such as "harvest functions" which have been defined to include activities related to timber harvest, ranging from bucking to yarding timber, but not including reforestation. *See* JULIAN and KATHERINE DUNSTER, DICTIONARY OF NATURAL RESOURCE MANAGEMENT, pp. 157 – 58 (1996). We reviewed the legislative history available to us and found little discussion that sheds light on the purpose of this phrase.

Based on the scant interpretive aids available to us, we believe that reforestation is not a timber harvest activity as that term is used in AS 41.17.900(e). Therefore, we turn to an analysis of the statutory and regulatory scheme applicable to the use of an herbicide for reforestation purposes to determine whether, if the exception does not apply, the habitat standards of 6 AAC 80.130 – .140 and 6 AAC 80.040 must be considered.

The Applicability of ACMP Habitat Standards

Development of the Coastal Habitat Standards and the Forest Practices Act

In 1977 the legislature established the Alaska Coastal Policy Council and charged the council with the responsibility to adopt guidelines and standards for the development of district and statewide coastal management programs. Ch 84, SLA 1977. That bill also provided that the program takes effect upon the adoption of a concurrent resolution by a majority of the members of each house of the legislature. *Id.* In conformance with its responsibilities, the Coastal Policy Council, on March 31, 1978, adopted a number of guidelines and standards in 6 AAC 80 and 6 AAC 85. Those standards included 6 AAC 80.100 which, at that time, included a number of provisions related directly to timber harvests, such as log storage, roads, stream crossings, and protection of stream banks. 6 AAC 80.100 (1978). The regulatory standards promulgated in 1978 also included 6 AAC 80.130 – .150, which established standards related to habitat, air, land and water quality, and historic resources. In response, the legislature passed a concurrent resolution approving the regulations adopted by the Alaska Coastal Policy Council with the exception only of 6 AAC 80.100(a), (b)(3), and (d).[1] *See* LR 41, SLA 1978. A year later, after certain changes were made to the regulations, the legislature passed a resolution approving all of the regulations. *See* LR 24, SLA 1979. In so doing, the legislature

[1] This attempt to veto certain regulations by concurrent resolution was determined by the Department of Law to be invalid. The legal analysis used by the Department was later upheld by the Alaska Supreme Court in an unrelated case. *See State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980).

specifically approved of the adoption of the habitat standards in 6 AAC 80.130 - .150. *Id*.; 1988 Inf. Op. Att'y. Gen. at 2 – 3 (Sept. 29, 1988)(discussing 1979 Senate letter of intent.)

In 1978, the Forest Practices Act was enacted and provided, at AS 41.17.010(6):

> Subject to 16 U.S.C. 1456(f) (Sec. 307(f) of the Coastal Zone Management Act of 1972, P.L. 92-583), the provisions of this chapter shall be the basis for forest management standards, policies, and guidelines developed under the Alaska Coastal Management Act.

To carry out this provision, an exception was provided to the general rule of nonpreemption established in AS 41.17.020(j) as follows:

> Notwithstanding any other provision of this chapter, the commissioner may not employ the authority vested by this chapter so as to duplicate or preempt the statutory authority of other state agencies to adopt regulations or undertake other administrative actions governing resources, values, or activities on forest land *except for (1) regulations under the Coastal Management Act . . . .* (emphasis added).[2]

Shortly thereafter, this department was asked for its opinion as to the degree to which the Forest Practices Act preempts the coastal development guidelines of the Alaska Coastal Policy Council. 1978 Inf. Op. Att'y Gen. at 1 (December 4, 1978). We expressed the opinion that to preempt a coastal management regulation, some form of administrative action by the Department of Natural Resources was required. *Id.* This interpretation was based on analysis of the language of AS 41.17.010(6) and 41.17.020(j), which together clearly contemplate action by the commissioner to preempt existing regulations. We then noted that draft DNR regulations existed, but cautioned that there would be significant questions if DNR attempted to preempt other Coastal Policy Council guidelines that may apply to forest lands but that did not constitute actual forest management performance standards. *Id.* at 2.

In 1981 we had occasion to again visit this issue. At that time this department was asked whether the forest practices regulations promulgated under the Forest Practices Act preempted 6 AAC 80.100. *See* 1981 Inf. Op. Att'y Gen. (April 20, 1981). In response we reiterated that preemption occurred through adoption of regulations governing forest

[2] In 1983 this section was reorganized and subsection (j) was renumbered as AS 41.17.900(d). *See* AS 41.17.020 (Revisor's Notes). However, the language remained the same.

practices. *Id*. at 1 – 2. We stated that the adoption of forest practices regulations by DNR in 11 AAC 95 preempted 6 AAC 80.100 in its entirety in regulating timber harvest and processing in the coastal area. However, we noted that the Coastal Policy Council had promulgated separate habitat standards in 6 AAC 80.130 - .150 that applied to important upland habitat and rivers, streams, and lakes throughout the coastal area. We concluded that these habitat standards "have not been preempted by the forest practices regulations; thus, they continue to apply to timber harvest as well as to other proposed uses and activities in the coastal area." 1981 Inf. Op. Att'y Gen. at 2 fn. 1 (April 20, 1981).

The timber harvest and processing regulations found in 6 AAC 80.100 were deleted in 1984 and a brief statement was inserted providing that, "AS 41.17, Forest Resources and Practices, and the regulations and procedures adopted under that chapter with respect to the harvest and processing of timber, are incorporated into the Alaska coastal management program and constitute the components of the coastal management program with respect to those purposes." 6 AAC 80.100.

The issue was again presented in 1985 in an opinion that analyzed the meaning of the word "project" in the context of ACMP consistency review. *See* 1985 Inf. Op. Att'y Gen. (May 6, 1985). In the course of reaching our conclusion in that opinion, we stated:

> The Alaska Forest, Resource and Practices Act, AS 41.17, and the regulations and procedures adopted under that act are *incorporated* into the ACMP, and *establish* certain best management practices for all timber harvest and processing activity in the Alaska coastal zone. 6 AAC 80.100. However, the Forest Resources and Practices Act does not preempt other applicable standards of the ACMP, e.g., water quality and habitat standards, 6 AAC 80.130 and 6 AAC 80.040, or applicable standards of a district coastal management program. (*Id.* at 1 – 2 (emphasis added).)

In 1988 the United States Forest Service argued, in spite of the consistent position of the state, that the preemption language found in the Forest Practices Act applied also to the ACMP standards under 6 AAC 80.130. We disagreed. 1988 Inf. Op. Att'y. Gen. at 1 (Sept. 29, 1988). In the course of its argument the Forest Service contended that the new language of 6 AAC 80.100 and the standards in 6 AAC 80.130 were internally inconsistent. We found no such inconsistency, noting that 6 AAC 80.100 "simply adopts the regulations in 11 AAC 95 which deal with the harvesting and processing of timber as the use and activity standards under the ACMP." We then stated:

> On the other hand, 6 AAC 80.130 identifies and prescribes standards for managing various habitats found in the coastal zone which are

> affected by particular uses and activities. . . . The Standards of 6 AAC 80.130 (Habitats) – and for that matter, 6 AAC 80.140 (Air, Land, and Water Quality) – do not conflict with, but rather provide more specificity to the uses and activity standards of the ACMP and 11 AAC 95.100 – 95.180. (1988 Inf. Op. Att'y. Gen. at 2 (Sept. 29, 1988).)

The regulations found in 11 AAC 95.100 – 95.180 included road construction and maintenance, harvesting, cleanup and stabilization, aesthetics, log transfer and storage facilities, slash, *reforestation*, and insect and disease prevention. *Compare* 1988 Inf. Op. Att'y. Gen. at 2 (Sept. 29, 1988) *with* 11 AAC 95.100 – 95.180 (repealed 6/10/93).

The Forest Service renewed the argument that the forest practices regulations promulgated under the Forest Practices Act preempted the habitat standards. In response we stated that it "is nearly 'black letter law' that a preemption must be clear and express." 1988 Inf. Op. Att'y. Gen. at 2 (Sept. 29, 1988); *cf. Acevedo v. City of North Pole*, 672 P.2d 130, 132 (Alaska 1983) (in considering whether a state law preempted a municipal ordinance the Alaska Supreme Court stated that the, "prohibition must be either by express terms or by implication such as where the statute and ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law"); *City of Kodiak v. Jackson*, 584 P.2d 1130, 1132 (Alaska 1978); *Webster v. Bechtel, Inc.*, 621 P.2d 890, 898 (Alaska 1980) *citing to Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947)(federal field preemption requires persuasive reasons either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained); *State v. F/V Baranof*, 677 P.2d 1245, 1249 (Alaska 1984)(federal pre-emption will be found only when the "clear and manifest purpose" of Congress was to occupy the field) *citing to Philadelphia v. New Jersey*, 437 U.S. 617, 621 n. 4, 98 S. Ct. 2531, 2534 n. 4(1978); *Liberati v. Bristol Bay Borough*, 584 P.2d 1115, 1122 n. 26 (Alaska 1978)(court looks to tests for federal preemption of state laws in describing test for preemptive effect of state laws).

Thus, through the end of the 1980s, the state took the consistent position that the habitat standards found in 6 AAC 80.130 – .150 were not preempted by the Forest Practices Act and remained in force.

1990 Revision to the Forest Practices Act

In 1989 the legislature again considered statutory changes to the Forest Practices Act. One of the concerns at that time was the interplay of the Forest Practices Act and the Coastal Zone Management requirements, particularly as they related to federal land. *See,*

e.g., 1989 House Journal at 1477. The bill proposed by the governor would have amended AS 41.17.010(6) as follows:

> (6) Subject to 16 U.S.C. 1456(f) (Sec. 307(f) of the Coastal Zone Management Act of 1972, P.L. 92-583), for private land, the provisions of this chapter and the regulations adopted under this chapter set out the [SHALL BE THE BASIS FOR] forest management standards, policies, and review processes for purposes of [GUIDELINES DEVELOPED UNDER] the Alaska Coastal Management Act. (*See* HB 331 introduced May 3, 1989; SB 317 introduced May 3, 1989.)

In a letter to the Chair of the Senate Resources Committee, Commissioner Gorsuch described this section as providing that the "amended forest practices act will serve as the Coastal Management Program for harvest activities on private land." Letter from Lennie Gorsuch to Bettye Fahrenkamp, May 5, 1989. The bill, introduced in the waning days of the 1989 legislative session, was not acted upon that year. The following year the House version, HB 331, became the vehicle for passage.

Ultimately the language then in AS 41.17.010(6) was deleted entirely and a new section was added to AS 41.17.900 to read:

> (e) Subject to 16 U.S.C. 1456(f) (Sec. 307(f) of the Coastal Zone Management Act of 1972, P.L. 92-583) as to private land, this chapter and the regulations adopted under this chapter establish the forest management standards, policies, and review processes under AS 46.40 (Alaska Coastal Management Act). This subsection does not apply to timber harvest activity that requires a state or federal authorization under a provision of law other than this chapter.

Staff to the House Resources Committee described this new section as establishing "that the amended forest practices act will serve as the Alaska Coastal Management Program for harvest activities on private lands." Memorandum of Johanna Munson to House Resources Committee, March 29, 1990.

The question we must consider is whether this amendment changed the long-settled interpretation that the "Forest Resources and Practices Act does not preempt other applicable standards of the ACMP, e.g., water quality and habitat standards, 6 AAC 80.130 and 6 AAC 80.040, or applicable standards of a district coastal management program." Though this is again a close question, we believe that the changes to former

AS 41.17.010(6), on their face, make the habitat standards found in 6 AAC 80.130 - .150 inapplicable to activities such as the use of herbicides for reforestation purposes.

The language in AS 41.17.900(e) is similar to that found in former AS 41.17.010(6) with several notable exceptions. First, the new language states that the preemption language does not apply to timber harvest activities that require a state or federal permit under other law. Second, the effect of the subsection is limited to private land. Third, under the old language the Forest Practices Act was the "basis" for forest management standards. Under the 1990 amendments, the Forest Practices Act is said to "establish" the forest management standards. It is this last change which is critical to our inquiry.

Prior to 1990 the applicable law stated that the provisions of the Forest Practices Act and related regulations are to be "the basis for" the forest management standards under the Coastal Management Act. By its terms, this law allows for expansion and supplementation of the Forest Practices Act through other means, so long as the forest practices provisions served as the basis for the supplemental standards. We recognized this in 1988 when we noted that the habitat standards provided more specificity to the forest practices regulations. *See* 1988 Inf. Op. Att'y. Gen. at 2 (Sept. 29, 1988). In 1990, the legislature deliberately changed this permissive language to the stricter term "establish," considering and rejecting the somewhat more ambiguous term "set out" used in the bill introduced by the governor. "Establish" means "to make secure or firm" and denotes an intent to make something, such as a law, fixed rather than uncertain. Webster's II New Riverside University Dictionary (1988). By using the term "establish," the legislature stated that standards under the forest practices act were the forest management standards, policies, and review processes, rather than simply a starting point.

It is a well-established principle of statutory construction that "any material change in the language of the original act is presumed to indicate a change in legal rights." 1A Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 22.30 (6th ed. 2002). Moreover, the language changes must be viewed against the backdrop of the then recent interpretations of the phrase at issue. The legislature is presumed to know the prior construction of terms in the original act, and an amendment substituting a new term or phrase for one previously construed indicates that a different interpretation should be given to the new phrase. *Id*. Applying these rules of statutory construction supports the conclusion that the 1990 revisions did in fact substantively change the relationship of the ACMP habitat standards to timber management standards.

This conclusion is further supported by review of the purposes of the 1990 changes to the Forest Practices Act. As described above, bill analyses provided by both the administration and the legislature described the purpose of the relevant language as

establishing "that the amended forest practices act will serve as the Alaska Coastal Management Program for harvest activities on private lands." Memorandum of Johanna Munson to House Resources Committee, March 29, 1990. Provisions of the 1990 statutory amendments that relate specifically to the relationship of the Forest Practices Act and DEC and Department of Fish and Game ("F&G") standards also use the term "establish." *See* AS 41.17.010(6) and 41.17.010(7). The sectional analysis describes the Forest Practices Act provisions as ones that will "serve as" or "provide" the DEC and F&G standards, respectively. Memorandum of Johanna Munson to House Resources Committee, March 29, 1990. The terms used in these descriptions, "will serve as" and "provide," denote that the Forest Practices Act standards substitute for the ACMP and other laws rather than simply existing as a starting point.

A purpose of the 1990 amendments was to make the terms of the Forest Practices Act and implementing regulations function as the substantive ACMP standards for review of forest management activities on forest land. This purpose is consistent with the statutory language changes made in AS 41.17.900(e). Viewing these factors, we conclude that the habitat standards found in 6 AAC 80.130 – .150 are not applicable to consideration of the proposed application of herbicide.

CJT:sz

Cc: Bruce Botelho, Attorney
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