MEMORANDUM

State of Alaska
Department of Law

To: The Honorable Sean R. Parnell
Lieutenant Governor

Date: September 27, 2007

File No.: 663-07-0179

Tel. No.: 465-3600

From: Michael A. Barnhill
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Re: Review of 07WTR2 Initiative Application

I. INTRODUCTION

You have asked us to review an application for an initiative entitled "An Act to protect Alaska's clean water" ("07WTR2"). The bill proposed by this initiative is similar to the one proposed by 07WATR, which we concluded did not comply with the constitutional and statutory provisions governing the use of the initiative. *See* 2007 Op. Att'y Gen. (June 21; 663-07-0179). In 07WTR2, the sponsors have made some changes to the bill in response to our opinion on 07WATR. While these changes make significant steps towards transforming the bill from impermissible appropriation to permissible regulation, there remains one provision that is substantively unchanged, and thus remains an impermissible appropriation. Accordingly, we find that the application does not comply with the constitutional and statutory provisions governing the use of the initiative. Under these circumstances we recommend that you do not certify the application.

As discussed in further detail below, the differences between 07WTR2 and 07WATR highlight the line between impermissible appropriation and permissible regulation. We conclude that in this context, provisions that prohibit all discharges to land and water, regardless of harm or magnitude, are provisions that prohibit use of land and water, and thus are prohibited allocations of such land and water. On the other hand, provisions that prohibit discharges that cause adverse effects to land and water are permissible regulation.

II. SUMMARY OF THE PROPOSED BILL

The bill is comprised of several sections. Section 1 sets out that the purpose of the bill is to protect water quality from adverse impacts caused by large scale metallic

mineral mining operations. New language has been added to this section that provides that the purpose of the bill is implemented by "establishing management standards and other regulatory prescriptions" to protect water in Alaska.

Section 2 has been reconfigured in certain respects. Section 2 in 07WATR set out five broad prohibitions related to large scale metallic mineral mining. Section 2 in 07WTR2 is styled instead as "[r]egulatory standards effecting streams and waters" and contains three standards. Where section 2 in 07WATR directly prohibited five categories of activity or use of land or water, section 2 in 07WTR2 does not directly prohibit certain activities, but instead prohibits the issuance of "approvals, authorizations, licenses and permits" to a "prospective large scale metallic operation"[1] that allows activity that violates any of the three regulatory standards.

The definition of "[l]arge scale metallic mineral mining operation" is identical to that in 07WATR. It is an extractive metallic mineral mining operation that utilizes or disturbs more than 640 acres of land and waters.[2] The term encompasses all aspects of a mining project, including facilities, roads, pipelines, treatment plants, and tunnels. *See* section 5.

The first standard prohibits the issuance of authorizations that allow a large scale metallic mineral mining operation to release a toxic pollutant "in a measurable amount that will effect human health or welfare or any stage of the life cycle of salmon" into any surface or subsurface water. Toxic pollutant is defined broadly (in section 5) 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. The definition includes a list of substances identified as toxic pollutants in 33 U.S.C. § 1317(a).

The second standard prohibits the issuance of authorizations that allow a large scale metallic mineral mining operation to release or discharge within a watershed that is used by humans for drinking water, or by salmon for spawning, rearing, migration or propagation, any of the following substances: cyanide, sulfuric acid, compounds of cyanide or sulphuric acid, or toxic agents "found to be harmful, directly, indirectly or

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[1] We assume this means "prospective large scale metallic mineral mining operation."

[2] The 640 acre threshold does not require that activities and disturbed lands be on adjoining lands. The threshold covers activities and disturbances "either alone or in combination with adjoining, related or concurrent mining activities or operations." Section 5(a).

cumulatively, to human health or to the spawning, rearing, migration, or propagation of salmon."

The third 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, and "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.

Section 2(b) provides that this measure is intended to only regulate large scale metallic mineral mining operations to prevent the release of toxic pollutants into water. It further provides that this measure is not intended to appropriate land or water and that use of land and water by mining operations is not prohibited but is subject to regulation.

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

Section 4 contains a severability clause similar in substance to AS 01.10.030. Section 4 also provides "[u]pon enactment, the state shall take all actions necessary to ensure the maximum enforceability of this act."

Section 5 sets forth the definitions of "large scale metallic mineral mining operation" and "toxic pollutant" described above.

In our review of 07WATR, we observed that the bill could have impact on proposed as well as existing projects. *See* 2007 Op. Att'y Gen. at 3 (June 21; 663-07-0179). We reiterate that observation with respect to the proposed Pebble and Donlin Creek projects. We also reiterate that observation with respect to existing mines, to the extent that they seek to expand their operations beyond their existing facilities.

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 the first three of these requirements. It is confined to one subject: protection of water from large scale metallic mineral mining operations. The subject of the bill is expressed in the title, though the title ("to protect Alaska's clean water") is considerably broader than the actual subject of the bill. The enacting clause is set out correctly.

With respect to prohibited subjects, however, the bill is suspect. While the question is not definitively answered through existing case law, it is our view that the bill, in part, makes an appropriation of state assets by designating the uses of public land and water in certain mining operations. Accordingly, the bill is not in proper form. We shall discuss this issue in some detail next.

First, we discuss the constitutional prohibition against the use of an initiative to make an appropriation. Second, we discuss the constitutional requirement that state resources be allocated to permit concurrent use where possible. Finally, we apply these bodies of law to the 07WTR2 Initiative.

1. An Initiative May Not Make an Appropriation[3]

The Alaska Supreme Court is very protective of the people's right to enact law through the initiative process. The Court attempts to "construe voter initiatives broadly so as to preserve them whenever possible." *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 422 (Alaska 2006). But, "initiatives touching upon the allocation of public revenues and assets require careful consideration because the constitutional right of direct legislation is limited by the Alaska Constitution." *Id.* Such allocations of public revenues and assets could potentially constitute an

[3] This section is taken verbatim from our opinion in 07WATR. *See* 2007 Op. Att'y Gen. at 4-9 (June 21; 663-07-0179).

appropriation, which is a prohibited subject for initiatives under art. XI, sec. 7 of the Alaska Constitution.[4]

Consistent with the Court's directive, we recommend that all initiatives be construed broadly so as to preserve them wherever possible. Nevertheless, we also recommend careful consideration of those initiatives that touch upon the allocation of public revenues and assets. As discussed in greater detail below, the need for careful consideration is heightened because the Court has expansively interpreted what constitutes an appropriation subject to the constitutional prohibition against appropriations in initiatives.

The test for determining whether an initiative constitutes an appropriation has evolved over time, but the Court appears to have settled on the following articulation of the test:

> We use a two-part inquiry to determine whether a particular initiative makes an appropriation. First, we determine whether the initiative deals with a public asset. In a series of cases, we have determined that public revenue, land, a municipally-owned utility, and wild salmon are all public assets that cannot be appropriated by initiative. Second, we determine whether the initiative would appropriate that asset. In deciding whether the initiative would have that effect, we have looked to the two "core objectives" of the limitation on the use of the initiative power to make appropriations. One objective is preventing "give-away" programs that appeal to the self-interest of voters and endanger the state treasury. The constitutional delegates were concerned that "[i]nitiatives for the purpose of requiring appropriations [would] pose a special danger of 'rash, discriminatory, and irresponsible acts.'" The other objective is preserving legislative discretion by "ensur[ing] that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs."

Anchorage Citizens for Taxi Reform, 151 P.3d at 422-23 (citations omitted, emphasis in the original). In some of the cases, the Court has also inquired whether the initiative "would set aside a certain specified amount of money or property for a specific purpose or object in a manner that is executable, mandatory

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[4] "The initiative shall not be used to dedicate revenues, make or repeal appropriations . . . ."

and reasonably definite with no further legislative action." *See, e.g., Staudenmaier v. Municipality of Anchorage,* 139 P.3d 1259 (Alaska 2006).[5]

Because the 07WATR Initiative appears to touch on the allocation of public resources and assets, we must examine the facts and holdings of the relevant cases. As described above, the first part of the test is to determine whether the "initiative deals with a public asset." *Anchorage Citizens for Taxi Reform*, 151 P.3d at 422. As the Court noted, it has held a broad spectrum of items to be public assets. *Id.* The first case in which it did so was *Thomas v. Bailey,* 595 P.2d 1 (Alaska 1979). In that case, an initiative proposed to distribute 30 million acres of state land to the residents of Alaska as homestead grants. The Court held:

> In Alaska, land is a primary asset of the state treasury. No other state government owns as much land. We cannot imagine the [constitutional convention] delegates' concern over initiatives which depleted, for example, the Colorado treasury of its prime asset, public monies, coexisting with approval of an initiative which depletes Alaska's treasury of its prime asset, public land.

Id. at 8. Thus, state assets subject to appropriation include more than just money, they also include state land. *See also Alaska Action Center, Inc. v. Municipality of Anchorage,* 84 P.3d 989 (Alaska 2004) (designation of land to prohibit golf course is impermissible appropriation).[6]

In subsequent cases, the Court expanded the scope of assets to include municipal utilities (*Alaska Conservative Political Action Committee v. Municipality of Anchorage,* 745 P.2d 936 (Alaska 1987); *Staudenmaier v. Municipality of Anchorage,* 139 P.3d 1259

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[5] It is unclear the extent to which this inquiry is a standard for determining when an initiative is an appropriation. In the Court's most recent case, *Anchorage Citizens for Taxi Reform,* it did not mention this inquiry at all. In *Staudenmaier,* the Court stated that the inquiry could be relevant to the second objective of the second prong of the two-part test (*i.e.*, whether the initiative allocates public resources): "Initiatives implicate this rationale when they 'would set aside a certain specified amount of money or property for a specific purpose or object in a manner that is executable, mandatory and reasonably definite with no further legislative action.'" *Id.* at 1262. In *Alaska Action Center,* the Court set forth this inquiry at the outset of its discussion. *Alaska Action Center,* 84 P.3d at 993. In *Pullen*, however, the Court stated that it did not need to "disavow" this language to reach the result it did. *Pullen v. Ulmer,* 923 P.2d 54, 64 n. 15 (Alaska 1996).

[6] Presumably, a public asset would also include an interest in state land that is less than a fee interest.

(Alaska 2006)), personal property (*McAlpine v. University of Alaska,* 762 P.2d 81 (Alaska 1988)), and wild salmon (*Pullen v. Ulmer,* 923 P.2d 54 (Alaska 1996)), as public assets not subject to appropriation.[7] More recently, however, the Court concluded that a municipal taxicab permit is not a public asset. *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage,* 151 P.3d 418 (Alaska 2006).[8]

For the second part of the appropriation test, the Court developed the two "core objectives" in the *Thomas* and *McAlpine* cases. In *Thomas*, the initiative sought to give away 30 million acres of land. The *Thomas* court struck it down as an impermissible appropriation because it was a "give-away" of a public asset. Accordingly, the first core objective prohibits give-aways of public assets. In *McAlpine*, the initiative sought to transfer a certain amount of real and personal property from the University of Alaska to the Community College system. The problem was not that the initiative proposed to give away state assets, but that it designated a use for the public assets:

> Outside the context of give-away programs, the more typical appropriation involves committing certain public assets to a particular purpose. The reason for prohibiting appropriations by initiative is to ensure that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs. This rationale applies as much or nearly as much to allocations of physical property as to allocations of money. To whatever extent it is desirable for the legislature to have sole responsibility for allocating the use of state money, it is also desirable for the legislature to have the same responsibility for allocating property other than money. Otherwise, the prohibition against appropriations by initiative could be circumvented by initiatives changing the function of assets the State already owns. We conclude that the constitutional prohibition against appropriations by initiative applies to appropriations of state assets, regardless of whether the initiative would enact a give-away program or simply designate the use of the assets.

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[7] In reliance on this line of cases, the Department of Law has recently opined that wolves and grizzly bears are also public assets. 2007 Inf. Op. Att'y Gen. at 5 (Jan. 26; 663-06-0050).

[8] Notably, Justice Carpeneti dissented in that case on grounds that taxicab permits were public assets under the Court's precedents. *Anchorage Citizens for Taxi Reform*, 151 P.3d at 426-28.

Id. at 88-89 (emphasis in original). Accordingly, the second core objective prohibits the allocation or designation of use of public assets.

For our purposes here, the manner in which the Court has applied this two-part test in the *Pullen* and *Alaska Action Center* cases is worthy of a closer look. In *Pullen*, the Court concluded that an initiative that required the Board of Fisheries to reserve a five percent salmon harvest priority for personal use and sport fisheries was an impermissible appropriation under art. XI, sec. 7 of the Alaska Constitution.

After holding that wild salmon was a public asset, the Court examined the salmon harvest priority initiative and concluded that it violated both the *Thomas* and *McAlpine* core objectives. The initiative violated the *Thomas* objective because it was designed to appeal to the self-interest of personal and sport fishers and thus resembled a give-away of public assets. *Id.* at 63. The initiative also violated the *McAlpine* objective primarily because it reduced the discretion of the legislature to make allocation decisions among competing fishery demands. The Court rejected the argument that the initiative was mere guidance to the management of fisheries:

> We cannot interpret the proposed initiative as simply amending "a series of general legislative criteria to add more specific ones to guide the Board of Fisheries in its future allocation decisions" as F.I.S.H. contends. We think it is clear that the proposed initiative calls for an actual allocation, in the event of a shortage of a given salmon species in a given geographical region, to sport, personal use, and subsistence fisheries. In such circumstances there exists the very real possibility that the commercial fishers will be excluded from such fisheries. Thus, the initiative cannot be viewed as merely protecting the relative positions of sport, personal use, and subsistence fisheries as against commercial fisheries. Nor can this initiative be construed as not impinging upon the legislature's and Board of Fisheries' discretion to make allocation decisions among the competing needs of users.

Id. at 64. We note that the Court found significant that the initiative would exclude a constituency (commercial fishers) from use of the public asset. This exclusion prevented the legislature from retaining a "broad freedom to make allocation decisions." *Id.* at 64 n. 15. Thus, it was an impermissible appropriation.

In *Alaska Action Center, Inc. v. Municipality of Anchorage,* 84 P.3d 989 (Alaska 2004), an initiative sought to dedicate a certain piece of land in Girdwood as parkland in order to prevent the Municipality of Anchorage from using it to develop as a golf course. Since land was at issue, the first part of the test was plainly satisfied. Next,

the Court evaluated the initiative under the *Thomas* and *McAlpine* core objectives. It first concluded that there was nothing in the initiative that constituted a give-away. *Id.* at 994. Thus, in that respect the initiative did not resemble an appropriation. But, the initiative did allocate a resource among competing demands—it took land away from the developers and allocated it for parkland. As the Court held previously in *Pullen*, voters are not permitted to make such decisions through the initiative.

Finally, we have recently drawn a distinction between permissible regulation and impermissible allocation in our opinion on the aerial shooting initiative. *See* 2007 Inf. Op. Att'y Gen. at 5 (Jan. 26; 663-06-0050) (authorizing the Department of Fish and Game to engage in predator control if there is a biological emergency). There we opined that the aerial shooting initiative fell into the realm of permissible regulation because it merely managed the public assets (wolves and grizzly bears), and the legislature retained full discretion to allocate the public assets among competing uses (*i.e.*, tourism v. hunting) for such assets. *Id.* at 5-6.

In summary, the constitution prohibits the use of an initiative to make an appropriation of public assets. The definition of public asset is broad: money, real property, personal property, utilities, and natural resources such as fish, wolves or grizzly bears. A prohibited appropriation may take two forms: a give-away of public assets or an allocation or designation of use of public assets. Management of a public asset, as opposed to allocation of an asset, however, is permissible. We next turn to the constitutional allocation of public natural resources under the concurrent use doctrine.

2. The Alaska Constitution Requires that Water and Land Resources be Allocated to Permit Concurrent Use Where Possible [9]

We next consider the allocation of natural resources as set forth in the Alaska Constitution and implemented in statute. The Constitution explicitly encourages the development of resources "by making them available for maximum use consistent with the public interest." Art. VIII, sec. 1. In this regard the Constitution requires the legislature to provide for the issuance of mineral leases. Art. VIII, sec. 12. The legislature may prescribe that such leases be given "exclusive" rights of exploration for specific periods and areas. *Id.* The issuance of any lease, however, is subject to "reasonable concurrent uses." Art. VIII, sec. 8.

The reasonable concurrent use principle is interwoven throughout Article VIII of the Alaska Constitution. The framers intended that Alaska's natural resources not be

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[9] This section is taken verbatim from our opinion in 07WATR. *See* 2007 Op. Att'y Gen. at 9-11 (June 21; 663-07-0179).

monopolized by one particular use, but be available for multiple use where possible. Delegate Riley introduced this concept as he was explaining the first draft of the Natural Resources article:

> [Section 15][10] has to do with the concept of beneficial use and also with concurrent use of lands. In short, we seek to authorize one piece of property as being available for more than one purpose, if that may be done consistent with the primary use, and that is a point where a scale must be set up indicating orders of preference in beneficial use. Normally the highest beneficial use in water, for example, is considered to be domestic and industrial consumption. Others are irrigation, fisheries, and hydroelectric.

Convention Minutes at 1107-08. Delegate Riley reiterated the importance of concurrent use during the later discussion of Committee Proposal 8/a, which ultimately became Article VIII: "Throughout we have held to the concept of concurrent use wherever practicable – that is concurrent use if it should under the circumstances be possible is what we have sought to achieve.…" *Id*. at 2524. Delegate White echoed these comments: "The intent of the Committee [on Resources] was that concurrent uses applied where applicable to all resources and to all lands." *Id*. at 2607.

Thus, in addition to its application to leases, including mineral leases, the framers explicitly applied the concurrent use principle to mineral exploration (art. VIII, sec. 12), and water use (art. VIII, sec. 13). Moreover, the concurrent use principle appears implied in other sections of Article VIII. *See, e.g.,* sections 1-4, 14-15. It would be fair to say that the framers insisted that no constituency would be granted a monopoly over state resources. All uses must co-exist to the extent possible.[11]

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[10] The language Delegate Riley was describing read as follows: "The legislature shall provide for determination of the order of preference of the beneficial uses of the waters of the state and of the state public domain in order to realize the highest public purpose in terms of potentialities of each locality." Section 15, Committee Proposal 8.

[11] As evidenced by the following exchange, the framers intended that mining would be required to co-exist with other uses:

> TAYLOR: And that last sentence [in paragraph 1 of section 14 of the commentary to Committee Proposal 8/a] as to fish and wildlife, that you cannot contaminate the waters such as to kill off the fish or ducks or any other wild animal?
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> RILEY: That was our thinking.

In the mining context, the legislature has implemented the concurrent use principle in statute:

> Surface uses of land or water included within a mining property by the owners, lessees, or operators shall be limited to those necessary for the prospecting for, extraction of, or basic processing of minerals and shall be subject to reasonable concurrent uses.

AS 38.05.255(a); *see also* AS 38.04.065(b)(1) ("multiple use" principle shall be used in land classification). Thus, in the mining context, the legislature has allocated amongst competing uses for land and water by requiring mining entities to limit their uses of land and water and to permit reasonable concurrent use. Moreover, with respect to the classification of land, the legislature has enacted the following:

> If the area involved contains more than 640 contiguous acres, state land, water, or land and water area may not, except by act of the state legislature, (1) be closed to multiple purpose use, or (2) be otherwise classified by the commissioner so that mining, mineral entry or location, mineral prospecting, or mineral leasing is precluded or is designated an incompatible use, except when the classification is necessary for land disposal or exchange or is for the development of utility or transportation corridors or projects or similar projects or infrastructure, or except as allowed under (c) of this section.

AS 38.05.300(a). Thus, the legislature has explicitly reserved to itself the power to designate use on large tracts of land and water so as to prevent mining.

In summary, both the Alaska Constitution and Alaska Statute require concurrent use of state land and waters where possible. Accordingly, the constitution and the legislature have already made an appropriation of state lands and waters as the word "appropriation" is understood in the initiative context—they have designated a use for public lands and waters that requires concurrent use where possible.

3. The 07WTR2 Initiative, In Part, Impermissibly Allocates Public Assets

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Id. at 2477. The corollary to that of course, is that other uses would have to co-exist with mining.

We now consider the 07WTR2 Initiative under the law described above. Under the two-part test the Court applies to initiatives that "touch on" the allocation of public assets, the first issue to consider is whether there are any public assets that may be impacted by this initiative. The answer is yes. The initiative impacts state land, held to be a public asset under *Thomas. Thomas*, 595 P.2d at 8.[12] The initiative also impacts water. While the Alaska Supreme Court has not considered whether water is a public asset that may not be appropriated by initiative, there is little question that it is.[13]

The second part of the test considers whether the initiative violates either of the two "core objectives" set forth in *Thomas* and *McAlpine.* With respect to the *Thomas* "give-away" objective, the facts here appear somewhat analogous to those in *Alaska Action Center* where the initiative sponsors sought to protect certain land from development as a golf course. *Alaska Action Center*, 84 P.3d at 994. There, the Court did not believe the initiative sought to give away public assets. In similar fashion, the 07WTR2 Initiative seeks to protect certain land and water from certain uses by certain mining operations. Accordingly, we doubt that this initiative seeks to give away the public land and water impacted by the initiative. Thus, we do not think the initiative violates the *Thomas* core objective.

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[12] We recognize that as drafted the initiative applies to all land in the state, and would therefore cover federal land (including Native land held in trust), Native lands already conveyed, and private land, in addition to land owned by the state. The following discussion is necessarily confined to the impact the initiative has on land and water owned by the state. Federal and private lands are not public assets subject to the prohibition against appropriation by initiative. That being said, with respect to its potential application on federal lands, the initiative certainly raises issues regarding the extent to which state law may regulate the use of federal lands under the Supremacy Clause of the U.S. Constitution. We must, however, defer consideration of that and other issues until later because they are not identified as prohibited subjects in art. XI, sec. 7 of the Alaska Constitution. *Alaskans for Efficient Government, Inc. v. State*, 153 P.3d 296, 298 (Alaska 2007) (constitutional issues not identified as prohibited subjects may only be considered after initiative becomes law).

[13] In the commentary to the Natural Resources article, the Constitutional Convention Committee on Resources stated, "The ownership of water is generally recognized as vesting in the state. Private rights can be acquired only to the use of water." Section 4, Commentary on Committee Proposal 8/a. *See also State, Dep't of Natural Resources v. Greenpeace, Inc.*, 96 P.3d 1056, 1062 (Alaska 2004) ("Water is a key natural resource, listed in article VIII, sections 2 and 13 of the Alaska Constitution.").

We next turn to whether the initiative violates the *McAlpine* core objective by allocating or designating a use for the land and water resources. As noted above, we have recently opined that management or regulation of a public asset, as opposed to allocation of a public asset, is permissible. *See* 2007 Inf. Op. Att'y Gen. 5-6 (Jan. 26; 663-06-0050). This initiative poses a similar question—does it merely regulate or manage a public resource or does it impermissibly allocate a public resource?

In 07WATR, we concluded that the five prohibitions each prohibited use of land or water necessary for the operations of large scale mineral mines. Accordingly, the prohibition of use of land and water was an allocation of public assets away from mining companies, and thus a prohibited appropriation. As discussed next, the revisions in 07WTR2 cause us to change our conclusion, in part. We think the first and third of the three standards in 07WTR2 are permissible regulation. The second of the three standards in 07WTR2, however, goes beyond regulation and amounts to an impermissible allocation of public assets.

As we stated in our previous opinion, under the principle of concurrent use, some release of toxic pollutants onto land and into water may be tolerable to humans and salmon when properly regulated. Federal and state environmental regulations incorporate the notion that certain minimal levels of pollution are acceptable and the goal is to reduce discharges to such levels.[14] The over-arching objective of environmental regulation is to prevent harm, while still permitting use of land and water for industrial purposes.

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[14] For instance, state and federal regulation limits cyanide in drinking water to .2 parts per million. *See* 18 AAC 80.300(b)(1)(B); 40 C.F.R. § 141.51(b); 40 C.F.R. § 141.62(b)(13); *see also* 21 C.F.R. 165.110(b)(4)(iii)(A) (same standard for bottled drinking water). Note also, according to the Environmental Protection Agency that "[c]yanides are generally not persistent when released to water or soil, and are not likely to accumulate in aquatic life. They rapidly evaporate and are broken down by microbes." U.S. E.P.A., Consumer Factsheet on: Cyanide.

While sulfuric acid is not specifically regulated, state regulation does govern the acidity of waters designated for drinking (not less than a pH of 6.0) and for the protection of aquatic life (not less than a pH of 6.5). *See* 18 AAC 70.020(b)(6)(A) and (C); *see also* 40 C.F.R. § 143.3 (federal pH goals for drinking water quality).

For a comprehensive summary of the state and federal regulatory processes applicable to large mining projects in Alaska, see Alaska Department of Natural Resources, Office of Project Management and Permitting, "Permitting Large Mine Projects in Alaska" (2006); *see also* U.S. E.P.A., "EPA and Hardrock Mining: A Source Book for Industry in the Northwest and Alaska (2003)."

Large mining operations need to use land and water for their operations. In so doing, toxic substances as defined by the bill will be released. The complete prohibition against all discharges, regardless of harm or magnitude of discharge, is therefore a prohibition of use of land and water. Accordingly, we conclude that in this context that provisions which prohibit all discharges of toxic pollutants,[15] regardless of harm or magnitude, are provisions that prohibit use of land and water, and thus are prohibited allocations of such land and water. On the other hand, provisions that prohibit discharges that cause adverse effects to land and water are permissible regulation. With this "harm v. use" standard in mind, we consider the three standards of the bill.[16]

The first standard prohibits the issuance of authorizations that allow a large scale metallic mineral mining operation to release a toxic pollutant "in a measurable amount

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[15] It is important to note that for many of the substances identified as toxic in the bill, their toxicity is only a product of magnitude of concentration. Thus, for instance, in low quantities several of these substances are actually necessary for human life: copper, zinc, selenium and chromium. Each of these elements is a common ingredient in multi-vitamins.

Other substances on list commonly occur in water in its natural state. For instance, ammonia (NH_3) is a by-product of both human and fish metabolism, and is discharged into water when humans wash sweat from their hands, and by fish when they respire through their gills. Some of the substances on the list—arsenic, copper, selenium, silver, and zinc—are naturally present in water in various areas of the state. For instance, in Juneau the drinking water system has naturally occurring arsenic, but at levels below the regulatory standard.

Unquestionably, at certain levels all of these substances can be toxic. The point of environmental regulation is to identify the level at which such substances become toxic, and prohibit discharges over that level. *See* 33 U.S.C. 1317(a) (authorizing effluent limitations for the substances identified as "toxic pollutants" in this bill).

[16] As noted, section 2 of 07WTR2 has been revised. Rather than impose direct prohibitions on certain activities and uses of land and water, section 2 prescribes three standards. Section 2 prohibits the issuance of permits and authorizations to large metallic mineral mining operations to allow activity described in the three standards. We think it doubtful that this structural change in section 2 creates a distinction that makes a difference to the analysis. Whether the initiative imposes the prohibition directly or indirectly through the prohibition against issuances of permits to allow such activity is immaterial to the issue of whether the initiative allocates public assets amongst competing uses.

that will effect human health or welfare or any stage of the life cycle of salmon" into any surface or subsurface water. This is a significant revision of the language used in 07WATR, where the first prohibition barred the release of any amount of toxic pollutant (as defined by the bill) into water, thus prohibiting the use of water by such mining operators. As rewritten, this standard does not prohibit use of the water by mining operators. Instead, it merely prevents harm[17] of the water resource by mining operators while still permitting use by them. This is consistent with the concurrent use doctrine, and thus does not amount to an allocation of public water resources amongst competing uses. Accordingly, we think this standard is permissible regulation and appropriate content for an initiative.

The second standard prohibits the issuance of authorizations that allow a large scale metallic mineral mining operation to discharge certain chemical compounds (cyanide, sulfuric acid and other toxic agents) within any watershed used for drinking water or water used by salmon. The substance of this standard is identical to the second prohibition in 07WATR. Accordingly, we think the result should be the same. As we explained in our opinion in 07WATR, large mining operations need to use water in order to mine. These operations release some level of toxic substances into watersheds in Alaska (including process waters and stormwaters). Such releases are closely regulated by the Alaska Department of Environmental Conservation under AS 46.03 and by the Environmental Protection Agency under 33 U.S.C. § 1342. Without the use of these waters, the mines cannot operate. Accordingly, this second standard impermissibly interferes with the legislature's power to allocate watershed resources amongst competing uses.

As noted above, the legislature has implemented the constitutional concurrent use principle in statute. *See* AS 38.05.255(a); AS 38.05.300(a). In so doing, the legislature has allocated the use of surface water amongst the competing uses for water. The use of

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[17] While the sponsors' use of the word "effect" could be construed to include any effect on humans and salmon, whether harmful or not, we think the word is used to mean "adversely effect," which is consistent with the stated purpose of the initiative to "assure no adverse effects" on the state's water. In this regard, the regulatory goal of this standard is similar to that specified in AS 46.03.070 (authorizing the adoption of harm-based water quality standards). Were we to construe it to mean "any effect," we would have to find this standard an impermissible appropriation. The discharge of one molecule of a substance into another substance does have an effect on such substance because it changes its overall composition. Interpreted in this way, this standard would prohibit any release, and therefore would prohibit use and thus be an impermissible appropriation. Because we construe initiatives broadly, we decline to construe it in a manner that would make it unconstitutional.

water by mining operations is permitted, but such uses must permit concurrent use. Nonetheless, the initiative's second standard allocates the use of water so that it may not be used by mining operations for the release of toxic substances, even if such releases could be regulated so as to be consistent with concurrent use. Therefore, it impermissibly interferes with the legislature's power to allocate water resources amongst competing uses.

With respect to this second standard, this case is similar to that in *Alaska Action Center*. There, the initiative sought to prohibit the development of certain land. In so doing, it designated that the use of the land would not be for a golf course. In like manner, this standard prohibits the use of water by large scale metallic mineral mining operations—even if such use could be consistent with concurrent use.

The third standard prohibits the issuance of authorizations that allow a large scale metallic mineral mining operation to store or dispose of mining wastes, overburden or tailings that could release sulfuric acid, dissolved metals or chemicals that will effect water used by humans and salmon. Similar to the first standard, this revision is significant. Again, construing the word "effect" consistent with the bill's express purpose to mean "adverse effect," this standard does not prohibit all releases. Rather, it prohibits releases that will have a harmful effect on such water. This is consistent with the concurrent use doctrine, and thus does not amount to an allocation of public water resources amongst competing uses. The substance of the standard is transformed and is now regulatory in nature and therefore permissible.

In summary, we conclude that the first and third standards are permissible regulation and appropriate for an initiative. The second standard, however, poses the same allocation issues we reviewed and discussed in 07WATR. Accordingly, we recommend that you not certify the application.

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;
>
> (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

(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.

See AS 15.45.030. The application meets the first and third requirements. With respect to 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. CONCLUSION

For the above reasons, we find that the proposed bill is not in the proper form, and therefore recommend that you do not certify this initiative application.

If you decide to reject the initiative, we suggest that you give notice to all interested persons and groups who may be aggrieved by your decision. AS 15.45.240. This notice will trigger the 30-day appeal period during which these persons must contest your action or be forever barred from doing so. *McAlpine*, 762 P.2d at 86.

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

MAB/ajh

cc: Whitney Brewster, Director of Division of Elections