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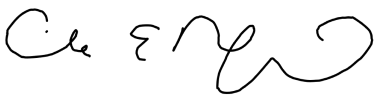
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 25, 2022

SUBJECT: PFAS (CSHB 171(RES); Work Order No. 32-LS0788\I)

TO: Representative Josiah Patkotak
Chair of the House Resources Committee
Attn: Grace Ervine

FROM: Claire E. Radford
Legislative Counsel 

The committee substitute you requested, relating to perfluoroalkyl and polyfluoroalkyl substances (PFAS), is attached. Please note that the committee substitute raises the following legal issues and drafting notes.

Equal protection. The committee substitute allows people engaged in the oil or gas business to use a firefighting substance containing PFAS until the state fire marshal determines an alternative firefighting substance is available. For people not engaged in the oil or gas business, the draft prohibits use of a firefighting substance containing PFAS unless the use is required by federal law. This may trigger an equal protection concern under the state and federal constitutions.

The Alaska Constitution provides that all persons are "entitled to equal rights, opportunities, and protection under the law."¹ The state constitution's equal protection clause affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment.² "The common question in equal protection cases is whether two groups of people who are treated differently are similarly situated and thus entitled to equal treatment."³ In order for disparate treatment to be valid under the state's equal protection test, it must be reasonable, not arbitrary, and must bear a fair relationship to a legitimate governmental objective.⁴ To survive judicial scrutiny, at a minimum, a

¹ Art. I, sec. 1, Constitution of the State of Alaska.

² *Malabed v. North Slope Borough*, 70 P.3d 416, 421 (Alaska 2003).

³ *Anderson v. State ex rel. Cent. Bering Sea Fishermen's Ass'n*, 78 P.3d 710, 718 (Alaska 2003).

⁴ *Wilson v. Municipality of Anchorage*, 669 P.2d 569, 572 (Alaska 1983).

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legitimate governmental purpose must be served. I recommend that you provide clear evidence in the legislative record of both the governmental purpose in the disparate treatment of people not engaged in the oil or gas business, and how the difference fairly relates to the purpose.

Retroactivity. The committee substitute provides that a person who causes a fire resulting in a release of a firefighting substance containing PFAS is liable for the costs of providing drinking water and drinking water testing, even if the release occurred prior to the effective date of the committee substitute.

This retroactive application may raise a constitutional due process issue because it imposes liability for conduct that occurred prior to the effective date of the committee substitute. For a law to violate substantive due process, it must have "no reasonable relationship to a legitimate governmental purpose."⁵ Imposing retroactive liability appears to bear a reasonable relationship to the legitimate governmental purpose of protecting human health and safety and the environment.

However, it is difficult to predict how a court would view a liability provision that reaches past conduct when the conduct was not subject to the liability at the time it occurred. Because the conduct may have occurred many decades ago, a court could find that constitutional fairness requirements prohibit retroactive liability. Additionally, enforcement may be impractical and have other consequences.

Please let me know if I may be of further assistance.

CER:lme

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Attachment

⁵ *Pfeifer v. State, Dept. of Health & Social Services, Div. of Public Assistance*, 260 P.3d 1072, 1083 (Alaska 2011).