SCOMM

#48:26

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: ______

REQUEST

Bill/Resolution No.: HB 695
Title: An Act relating to regulation of water quality in placer mining.

Sponsor: House Resources Committee
Requestor: ______
Date of Request: ______

FISCAL DETAIL

Agency Affected: Environmental Conservation
BRU: ______

Components: ______

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS : None

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by: Amy D. Kyle, Deputy Commissioner Phone: 465-2600
Division: Office of the Commissioner Date: 4/01/86

Approved by Commissioner: Bill Ross [signature] Date: 4/01/86
Agency: Environmental Conservation

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

10/25/85

SCSCSHB627 (Resources) poses a number of problems. According to an April 22, 1986 letter from the attorney general's office, the senate version has the following problems:

1. Effectively nullifies existing state water quality standards.

2. Would result in EPA pre-emption of state water quality standards.

3. Eliminates ability of the state to assume the federal water pollution permitting system.

4. Would prohibit the state from certifying the federal permits.

5. Would turn over management of water quality completely to the federal government.

In addition, the Senate version:

1. Does not provide relief for the placer mining industry because federal rules will prevail with no chance for moderating state influence.

2. Expands the discharge exemption to all industries.

3. Allows incremental degradation of water quality standards on streams with several placer mining operations.

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

REPLY TO:

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April 22, 1986

Honorable Arliss Sturgulewski
Alaska State Senate
P.O. Box V
Juneau, Alaska 99811

Re: **Senate Committee Substitute for Committee Substitute for House Bill No. 627 (Resources)**

Dear Senator Sturgulewski:

On April 21, 1986 the Department of Environmental Conservation ("DEC") requested the Attorney General's Office to provide you with an analysis of SCS CSHB 627 (Res.). This letter constitutes our response to DEC's request. As discussed below, SCS CSHB 627 (Res.) will have major impacts on the existing state water quality regulatory structure, particularly in the area of placer mining. Because of the limited time available for this review, our discussion focuses on the major legal impacts of the bill. Additional impacts may well exist.

Section 3, the bill's key provision, provides as follows:

> AS 46.03 is amended by adding a new section to read:
>
> Sec. 46.03.892. Regulation of appropriated water. (a) When considering the quality of appropriated water and establishing regulations for the quality of appropriated water, the commissioner may require a person who appropriates water to meet a standard that is equal to but not higher than a standard attainable through the application of best practicable and economically sustainable technology associated with the particular use.

> (b) The commissioner may not require a higher discharge quality standard for appropriated water than the quality of water received for use.

When read in context, it becomes apparent that the term "appropriated water" means "water used in placer mining." 1/ Section 3 would prohibit DEC from requiring a placer miner to meet any water quality standard more stringent than those standards "attainable through the application of best practicable and economically sustainable technology" ("BPEST").

To understand the problems associated with Sec. 3, one must recognize that the federal Clean Water Act ("CWA"), 33 U.S.C. § 1251 et seq., establishes a comprehensive scheme for the control and abatement of water pollution. Under the doctrine of supremacy, where a state law conflicts with a federal law the federal law preempts the state law and the state law becomes void. See United States Constitution, Art. VI, cl.2. SCS CSHB 627 (Res.) appears to conflict with several major provisions of the CWA.

CWA § 301(b)(2)(A) imposes an attainability requirement different from BPEST. CWA § 301(b)(2)(a) requires "application of the best available technology economically achievable [BATEA] ... which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants." By its terms, the BPEST attainability requirement appears less stringent than the federally-mandated BATEA attainability requirement. Hence, the BPEST requirement conflicts with the CWA BATEA requirement and would be preempted.

Aside from the preemption problem, adoption of SCS CSHB 627 (Res.) would assure that the state could not assume control of the CWA National Pollution Discharge Elimination System (NPDES) permit process. CWA § 402(b) authorizes states to assume, subject to EPA approval, EPA's NPDES permit issuance functions. Alaska's placer mining community has long sought state assumption of the NPDES process from EPA. However, CWA §

1/ Appropriation of water occurs through the process set forth in the Alaska Water Use Act, AS 46.15. The appropriation of state waters for placer mining purposes is commonplace and occurs via the "tri-agency application" process.

402(b) provides that EPA cannot approve state assumption of the NPDES process if the state lacks legal authority to issue permits which "insure compliance" with various provisions of the CWA. Under CWA § 402(b), before the state can assume the NPDES process, the state must possess legal authority to issue permits that insure compliance with federally-adopted BATEA limits (CWA § 301) and with federally-adopted national performance standards (CWA § 306). Under CWA § 402(b), before the state can assume the NPDES process, the state must also possess legal authority to "abate violations of the [NPDES] permit." SCS CSHB 627 (Res.) would remove the state's legal authority to "insure compliance" with or "abate violations" of any permit or water quality standard more stringent than BPEST. In the absence of adequate state legal authority, EPA could not transfer the NPDES program to the state.

SCS CSHB 627 (Res.) also constitutes a _de facto_ revision of existing state water quality standards. This legislative revision would occur because the bill effectively nullifies any existing state water quality standard which is more stringent than BPEST. Such an attempt to revise existing state water quality standards violates the CWA. The CWA establishes specific requirements for the revision of existing state water quality standards. CWA § 303(c) provides that whenever the state revises water quality standards, the state must submit the revised standards to EPA for approval. Under 40 C.F.R. Part 131, state water quality standards cannot be revised unless the water uses sought to be excluded (i) do not currently exist, and (ii) are not attainable through the imposition of BATEA-based effluent limits and national performance standards. 40 C.F.R. § 131.10. To determine the non-attainability of a use, a use attainability analysis usually must be performed. 40 C.F.R. § 131.10(j). Also, before water quality standards may be revised, the state must hold public hearings in conformity with EPA hearing requirements. 40 C.F.R. § 131.20(b).

If EPA determines that the state's attempted revision of water quality standards fails to conform to the CWA requirements, federal law requires that EPA "shall promptly prepare and promulgate such standard[s]" for the state. 40 C.F.R § 131.22(a). Thus, to the extent EPA construes SCS CSHB 627 (Res.) as an attempt to unlawfully revise state water quality standards, the bill opens the door to the imposition upon Alaska of federally-mandated water quality standards by EPA.

In addition, SCS CSHB 627 (Res.) would hamper the state's ability to certify NPDES permits. 2/ SCS CSHB 627 (Res.) would preclude the state from certifying NPDES permits which contain terms based on existing water quality standards if the standards are more stringent than BPEST. The bill could force the state to waive the state's certification opportunity, and thereby forfeit the major opportunity for the state to influence the federal permit adoption process. Waiver of certification would leave the entire NPDES permit adoption process to EPA. Since a certified NPDES permit also serves as the state discharge permit required by AS 46.03.100, waiver of certification would force the state to promulgate its own discharge permits -- a lengthy and expensive process.

SCS CSHB 627 (Res.) would also damage the state's ability to work with the federal government toward fair and reasonable enforcement of placer mining water quality violations. The EPA assistant regional administrator for Alaska, Al Ewing, informs us that, from EPA's perspective, adoption of SCS CSHB 627 (Res.) would remove the state from cooperative federal/state placer mining enforcement efforts. Such removal would cut off state input into EPA's placer mining enforcement decisions, and would eliminate the state's opportunity to incorporate Alaskan concerns into the enforcement decision process.

Other sections of SCS CSHB 627 (Res.) also impact the existing regulatory structure. Section 1 of SCS CSHB 627 (Res.) might impair the Department of Fish and Game's ability to regulate placer mining activities and to otherwise protect waters "important for the spawning, rearing, and migration of anadromous fish" under AS 16.05.870. Section 2 of SCS CSHB 627 (Res.) would, in broad terms, prohibit DNR from any regulation of appropriated waters. Such a prohibition might restrict DNR's regulatory authority under the Water Use Act, AS 46.15.

2/ CWA § 401(a) and 40 C.F.R. § 124.53(a)-(c) provide the state with an opportunity to review and certify NPDES permits prior to issuance of the final permits by EPA.

If you have any questions concerning our analysis of SCS CSHB 627 (Res.) please contact us. Thank you for your consideration.

HAROLD M. BROWN
ATTORNEY GENERAL

By:
John A. McDonagh
Assistant Attorney General

JAM/ja

cc: William Ross, Commissioner
Dept. of Environmental Conservation
Ronald Lorensen, Deputy Attorney General
Department of Law

Introduced: 3/5/86
Referred: House Special Committee on
Fisheries and Resources

1 IN THE HOUSE BY THE RESOURCES COMMITTEE

2 HOUSE BILL NO. 695

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to regulation of water quality in

7 placer mining."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 16.05.930 is amended by adding a new subsection to

10 read:

11 (g) The commissioner may not require a person engaged in placer

12 mining to discharge water used in the placer mining with a higher

13 quality than the water initially received for use in the placer min-

14 ing.

15 * Sec. 2. AS 38.95 is amended by adding a new section to read:

16 ARTICLE 5. WATER QUALITY IN PLACER MINING.

17 Sec. 38.95.180. PLACER MINING WATER QUALITY REGULATION. The

18 commissioner may not require a person engaged in placer mining to

19 discharge water used in the placer mining with a higher quality than

20 the water initially received for use in the placer mining.

21 * Sec. 3. AS 46.03 is amended by adding a new section to read:

22 Sec. 46.03.892. PLACER MINING WATER QUALITY REGULATION. The

23 commissioner may not require a person engaged in placer mining to

24 discharge water used in the placer mining with a higher quality than

25 the water initially received for use in the placer mining.

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

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April 1, 1986

The Honorable Peter Goll
Alaska State House
P.O. Box V
Juneau, AK 99811-3100

Dear Representative Goll:

HB 695 would prevent the Departments of Natural Resources (DNR), Fish and Game (DF&G), and Environmental Conservation (DEC) from requiring a person engaged in placer mining to discharge water that is of a higher quality than that person's intake water. DEC believes the bill to be counterproductive to the efforts to both responsibly regulate the impacts from placer mining and to ease the regulatory burden on the placer mining industry.

The bill appears to be aimed at assuring that enforcement efforts do not require miners to either a) make placer discharges cleaner than the stream from which the water came; or b) treat the discharges of miners upstream from them. I believe that current agency authority and practice have already taken care of these two issues.

With respect to the concern that miners might be required to make water cleaner than the natural water source, this should not be a real concern. Alaska's water quality standards make reference to the natural background condition of the receiving waters into which a miner discharges. For both settleable solids and turbidity, the two parameters of greatest interest in placer mining, the water quality standards set limits on increases above background levels. Hence, the water quality standards do not require discharges that are cleaner than existing streams.

With respect to whether miners are required to treat discharges from upstream users, there have been no instances of enforcement actions to date which have required a downstream miner to treat the discharge from an upstream miner. Passage of HB 695 could force DEC to use a "linear" enforcement process of securing injunctions against all miners downstream of any miner who was polluting in order to make sure we were not causing downstream miners to treat the effluent of upstream miners. We would then need to work with the sole remaining miner on each stream to address his or her pollutant load. Once that person was in

compliance, we could allow one additional downstream miner, get that person in compliance, and then allow one more, etc. This is obviously an awkward method at best for working with the industry to install methods to reduce pollution in discharges.

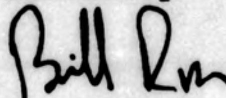
In order to understand the impact of the proposed legislation upon current enforcement efforts, it is again necessary to refer to settleable solids and turbidity. Well-sited, designed, and maintained settling ponds are necessary to remove settleable solids to acceptable levels. Such ponds are capable of reducing the settleable solids in placer discharges to 0.2 ml/l, which is the legally permitted discharge, or better. This level can be achieved no matter what the quality of the water going into the pond is. For example, sluice box effluents generally range from 50-250 ml/l, and settling ponds are capable of reducing settleable solids to the legally permitted 0.2 ml/l. DEC requires all miners to use settling ponds or other means of reducing settleable solids. The effect of the amendment could be to preclude DEC from taking enforcement action against a miner for failing to install a settling pond, if indeed an upstream miner did not also install a pond. The fact that an upstream miner fails to install a pond should not become an excuse for a downstream miner not to have one. If it were the case that two miners on the same stream did not have ponds, DEC would enforce against them simultaneously.

The treatment of turbidity is in its beginning stages in the placer mining industry. Most mine sites do not currently employ techniques to deal expressly with turbidity. Approximately a dozen mine sites were successful this summer in developing and employing techniques which greatly reduced turbidity. DEC has worked with the industry as a whole to develop these new techniques. We will continue to concentrate individual technical assistance and enforcement efforts on those areas of user conflict. It is this process that will best assist the industry in developing the tools to address turbidity. HB 695 could preclude this approach.

The legislation also could interfere with other efforts to assist the industry. DEC is interested in exploring the benefits of assuming the federal water pollution permit process for placer mining under section 402 of the federal Clean Water Act. The permit is based on the technological treatment capabilities of the industry, not on the quality of the intake water. Failure to have the capability to enforce permit limitations such as the settleable solids limit of 0.2 ml/l could provide a legal impediment to the State's assumption of the 402 permit process. All other things being equal, it could be in the State's interest to assume this permit program and reduce the paperwork burden on the industry.

It is for these major reasons that DEC must oppose this legislation. I would be glad to discuss these and other issues that the bill raises with you or members of the Legislature at your convenience.

Sincerely



Bill Ross
Commissioner