

LETTER OPINION
96-L-9

February 2, 1996

Honorable Francis J. Wald
State Representative
P.O. Box 330
Dickinson, ND 58602-0330

Dear Representative Wald:

Thank you for your January 2, 1996, letter in which you ask if the use of bentonite capsules to plug seismic shot holes complies with the plugging requirements of N.D.C.C. § 38-08.1-06.1(1)(b). The plugging requirement with which you are concerned states that "a seismic hole must be preplugged with a minimum of one hundred pounds . . . of sodium bentonite for each fifty feet . . . of hole depth"

You state that five inches is the typical diameter of seismic shot holes in North Dakota. One hundred pounds of loose bentonite poured into a five-inch hole, according to your letter, will plug ten feet of the hole. A couple of five-foot bentonite capsules will also plug ten feet of hole. The capsules, however, apparently will not contain 100 pounds of bentonite. Thus, the question arises: if bentonite capsules accomplish the same result as loose bentonite -- a ten-foot plug -- does the use of bentonite capsules comply with the statute even though they do not contain 100 pounds of bentonite? According to your letter, plugging with bentonite capsules is considerably more effective than plugging by pouring loose bentonite into a hole and thus you are seeking an opinion that use of bentonite capsules to plug seismic shot holes complies with the requirements of the statute.

I am unable to render such an opinion in this matter since it would require me to make certain factual determinations about the relative efficacy of bentonite capsule technology and the comparability of such technology to the existing statutory requirements for the use of minimum quantities of loose bentonite. It has been the long-standing policy of this office in issuing opinions not to engage in the making of such factual determinations since the Attorney General is neither authorized nor equipped to do so. Normally, it is the function of

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the Legislature or other authorized body to determine whether a particular technology is superior and should be permitted or required to be used in a regulatory matter.

This appears to be a case where technological advances have outstripped the Legislature's ability to keep pace, particularly since it meets only biennially and thus is not always in a position to immediately incorporate new technological advances into the law. Apparently, bentonite capsule technology was unavailable to the industry when the plugging requirement in question was enacted in 1985. 1985 N.D. Sess. Laws ch. 405, § 2.

It should be noted that county commissioners do have the authority to regulate seismic exploration. See, e.g., N.D.C.C. §§ 38-08.1-04.1, 38-08.1-04.2, and 38-08.1-06. In addition, violations of ch. 38-08.1 are crimes. N.D.C.C. § 38-08.1-07. State's attorneys are responsible for deciding if a criminal violation has occurred and whether a violation will be prosecuted. Because state's attorneys and county commissioners play the preeminent role in regulating seismic exploration and in interpreting ch. 38-08.1, seismic companies may wish to inquire how these local officials interpret N.D.C.C. § 38-08.1-06.1(1)(b).

While I am unable to render an opinion on this matter, I do offer the following discussion which I believe would be helpful to county officials in interpreting the statute if inquiries are made of them. The "primary purpose" of statutory interpretation is "to ascertain the intent of the legislature." Adams County Record v. Greater North Dakota Ass'n, 529 N.W.2d 830, 833 (N.D. 1995). Indeed, "all rules of statutory interpretation are subservient to a determination of legislative intent." O'Fallon v. Pollard, 427 N.W.2d 809, 811 (N.D. 1988). Although "[l]egislative intent must first be sought from the language of the statute," Adams County Record, 529 N.W.2d at 833, "a statute may be stretched a little bit beyond its literal terms to effectuate its policies." Griffen v. Big Spring Independent School Dist., 706 F.2d 645, 651 (5th Cir. 1983).

Seismic holes must be plugged to prevent contamination of underground water resources. Hearing on H. 1399 Before the House Nat. Resources Comm., 49th Leg. (Feb. 8, 1985) (Testimony of Stan Pollestad, Dakota Resource Council). The statute should be construed in a way that best accomplishes the legislative objective of protecting aquifers from contamination. "[T]he manifest reason and obvious purpose of the law should not be sacrificed to a literal interpretation of [its] words.'" 2A Sutherland Stat. Const. § 46.07 (5th ed. 1992) (quoting Peirce v. Van Dusen, 78 F. 693, 696 (1897)). See also In re

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Raynolds' Estate, 18 N.W.2d 238, 241 (Minn. 1945) ("A literal construction is not to be adopted contrary to the general policy and objective of the statute"). In addition, "[s]tatutes must be construed logically so as not to produce an absurd result." Stark County Social Service Bd. v. R.S., 472 N.W.2d 222, 223 (N.D. 1991). It is reasonable to construe the plugging requirement in a way that allows the most effective plugging method to be used, rather than an inferior method in order to effectuate legislative intent.

Consequently, if the appropriate county officials were presented with the issue and if they determined to accept the factual information submitted with your letter, they could reasonably interpret N.D.C.C. § 38-08.1-06.1(1)(b) to allow the use of bentonite capsules to achieve a ten-foot plug and thus accomplish the legislative objective of plugging shot holes to prevent contamination of underground water resources.

Nevertheless, because of the present literal statutory language and the possibility that the statute might not be uniformly interpreted by the various county officials across the state, it is probably advisable to seek an amendment to the statute in the next session to either expressly permit the use of bentonite capsule technology or to make the statutory language more flexible to more readily accommodate technological advances. This office stands ready to assist you in any way possible to draft appropriate amendments.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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