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June 30, 2017

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Re: *Review of 17FSHB Initiative Application & Petition*
AGO No. JU2017200303

Dear Initiative Committee Members,

Our office represents the Lieutenant Governor and assists him in determining the proper form of applications for ballot initiatives, including the constitutionality of all proposed initiative bills. When practicable and when circumstances warrant, we work with the sponsors of ballot initiatives prior to certification, to try to fix problems with the language of the ballot measure summary or with the form or substance of ballot initiative applications.

Lindsey Bloom and Valerie Brown have called us on your behalf; you thus are probably aware that we have been diligently reviewing your 17FSHB initiative application, "An Act providing for protection of wild salmon and fish and wildlife habitat." Under AS 15.45.070, the Lieutenant Governor must decide whether to certify the measure by July 17, 2017.

We are writing as a courtesy to inform you that we intend to recommend that the Lieutenant Governor deny certification of 17FSHB, and—barring your withdrawal of the application—we will issue an Attorney General Opinion to that effect. This intention is based on our belief that 17FSHB makes an appropriation, which cannot be done by initiative according to Article XI, section 7 of the Alaska Constitution.

Our analysis of the initiative indicates that the proposed law would make an appropriation by depriving the legislature of its exclusive discretion to allocate state assets among competing needs.

17FSHB is intended to support the protection of water resources and salmon habitat.¹ To this end, 17FSHB would require a permit for an activity that may use, divert, obstruct, pollute, disturb, or otherwise alter anadromous fish habitat.² The bill specifies certain activities that may not be permitted. Among other things, the initiative prohibits a permit for an activity that will:

- necessitate water treatment, groundwater pumping, or other means of mechanical, chemical, or human intervention, maintenance or care in perpetuity;³
- dewater anadromous fish habitat for any duration sufficient to cause permanent or long-lasting adverse effects to anadromous fish habitat or fish and wildlife species;⁴
- permanently relocate a stream or river if the relocation will disrupt fish passage between, or will cause permanent or long-lasting adverse effects to, anadromous fish habitat or fish and wildlife species;⁵ or
- impair or degrade habitat; interfere with or prevent the spawning, rearing, or migration of anadromous fish at any life stage; result in conditions known to cause increased mortality of anadromous fish at any life stage; or lower the capacity of anadromous waters to maintain aquatic diversity, productivity or stability, *and* for any of these situations the habitat is not likely to recover or be restored within a reasonable period to a level that sustains the water body's natural and historic levels of anadromous fish, other fish, and wildlife.⁶

¹ Initiative, section 1.

² Initiative, section 3. The initiative would allow the Commissioner of the Alaska Department of Fish and Game to specify in regulation activities that do not require a permit because they would have only a *de minimis* effect on anadromous fish habitat.

³ Initiative, section 7.

⁴ *Id.*

⁵ *Id.*

⁶ Initiative, section 5.

You explained the purpose of the initiative in an op-ed that you authored, published in the *Alaska Dispatch News* on May 17, 2017 entitled “It’s up to us to protect Alaska Salmon now.” In that piece, you identify three projects that you suggest 17FSHB would prevent: the Pebble mine, the Susitna-Watana dam, and the Chuitna coal project. You identify these projects as a threat to salmon, and endorse the initiative as “a solution that puts everyday Alaskans in control of the state’s destiny.”

We agree that the initiative as written would likely prevent these projects, and therein lies the problem. The Alaska Constitution prohibits initiatives that make an appropriation of state assets, which include state resources such as anadromous waters.⁷ This prohibition against appropriating public assets by initiative is meant to “re[tain] control . . . of the appropriation process *in the legislative body*.”⁸ Generally speaking, an initiative is unobjectionable as long as it grants the legislature sufficient discretion in actually executing the initiative’s purpose.⁹ But an initiative that controls the use of public assets such that the voters essentially usurp the legislature’s resource allocation role runs afoul of article XI, section 7.¹⁰

The prohibition on appropriation by initiative is designed to serve “two parallel purposes.”¹¹ First, it works to prevent the passage of popular programs that would give away state resources to members of the public because such measures could lead to rash, unwise spending that would threaten the state fisc.¹² Initiative 17FSHB does not raise this concern.

⁷ Alaska Constitution, Art. XI, § 7; *Pebble Ltd. Partnership ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1074 (Alaska 2009).

⁸ *Staudenmaier v. Municipality of Anchorage*, 139 P.3d 1259, 1263 (citing *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153, 1156 (Alaska 1991)). (Emphasis in original).

⁹ *Staudenmaier*, 139 P.3d at 1263 (citing *McAlpine v. University of Alaska*, 762 P.2d 81, 91 (Alaska 1988)).

¹⁰ *Staudenmaier*, 139 P.3d at 1263 (citing *Alaska Action Ctr. v. Municipality of Anchorage*, 84 P.3d 989, 994-95 (Alaska 2004)).

¹¹ *Id.* at 1262 (citing *City of Fairbanks*, 818 P.2d at 1156).

¹² *Id.*

But more clearly applicable to 17FSHB is the second core purpose: to “preserve legislative discretion by ensuring that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs.”¹³ The “primary question” in assessing the second core objective “is whether the initiative narrows the legislature’s range of freedom to make allocation decisions in a manner sufficient to render the initiative an appropriation.”¹⁴ An initiative makes an appropriation when it allocates public assets to or away from a particular purpose, because in both instances, the law would usurp the legislature’s exclusive power to allocate assets among competing uses.¹⁵

The key question in analyzing 17FSHB is whether it limits the legislature’s ability to decide how to allocate anadromous streams among uses—that is, to keep them untouched for fish habitat or to allow them to be used for other resource development or public projects. It should not matter if the initiative deprives the legislature of this choice categorically or only in isolated cases, because either way, the initiative would restrict the legislature’s ability to allocate state resources.

For example, the ballot measure in *Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough* would have required voter approval for capital projects above a specified cost.¹⁶ The Alaska Supreme Court found the measure to effect an unconstitutional appropriation even though the measure did not appropriate assets directly; it only allowed for the possibility of a future infringement on the assembly’s ability to allocate resources among competing uses, because if the voters vetoed any particular project, the assembly could do nothing to appropriate money for that project.¹⁷ The possibility that voters might never veto a project and the fact that the assembly

¹³ *All. of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, 273 P.3d 1128, 1137 (Alaska 2012) (citing *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 423 (2006)). (Emphasis in original).

¹⁴ *All. of Concerned Taxpayers*, 273 P.3d at 1137 (citing *Pebble Ltd. P’ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1075 (Alaska 2009)).

¹⁵ *All. of Concerned Taxpayers*, 273 P.3d 1128 presented the question whether an initiative may run afoul of the core objectives underlying the initiative restrictions when it allocates public assets *away from* a particular purpose, and the Court held that it could. *Pullen v. Ulmer*, 923 P.2d 54 (Alaska 1996) reaffirmed that principle.

¹⁶ 273 P.3d 1127.

¹⁷ *Id.* at 1138.

would have that money available for other projects did not save the ballot measure.¹⁸ Granted, the court in *Alliance of Concerned Taxpayers* considered future veto of large capital projects to be likely—stating that the measure would “almost invariably result in voters ‘vetoing’ certain projects.”

This suggests that another question in the analysis of whether 17FSHB makes an appropriation is *how* likely a restriction must be on the legislature’s ability to allocate resources among competing uses when the measure does not do this directly. As part of our review, we consulted experts in the Department of Natural Resources, the Department of Environmental Conservation, the Department of Fish and Game, and/or the attorneys at the Department of Law who represent those agencies. Certain limitations seem very likely.

First, permits would be denied for some dams. Under section 7, a permit could not be issued for an activity that causes “substantial damage to anadromous fish habitat,” as a dam inevitably would.¹⁹ Second, some large-scale hard rock mines could not be developed, because they would require “perpetual” water treatment, another basis for denying a permit. Depending on the location of a large-scale hard rock mine and other variables, long-term water treatment might be required for some mines. In addition, some roadways, gaslines, and pipelines are likely to require permanent re-routing of anadromous waters, as did the Trans-Alaska Pipeline System. These probably would not be the only types of projects that the initiative would prevent, but they are the most obvious to our agency representatives.

Given your stated purpose to prevent certain projects that will damage salmon habitat and given the likelihood that the 17FSHB initiative will require denial of a permit for these and similar projects, the initiative appears to deprive the legislature of the discretion to devote state waters to these uses. It does not appear to leave sufficient discretion to the legislature to save it—as did the *Pebble Ltd. Partnership* initiative (07WTR3) that allowed the legislature to determine the amounts of specific toxic pollutants that may or may not be discharged at a mining site,²⁰ or the part of the *McAlpine* initiative that left to the legislature’s discretion the amount of assets to devote to a community college system.²¹

¹⁸ *Id.*

¹⁹ Indeed, the sponsors’ op-ed states that the Susitna dam proposal would “completely block fish passage on the state’s fourth-largest king salmon producing river.”

²⁰ *Pebble Ltd. Partnership*, 215 P.3d at 1077.

²¹ *McAlpine*, 762 P.2d at 91.

In short, 17FSHB would outright prohibit the use of anadromous waters for certain development purposes, leaving insufficient discretion to the legislature to determine how to allocate those state assets and thus appropriating them.

We are enclosing for your information correspondence our office has received from both fishing and development interests opposing 17FSHB. Please know that we reached the foregoing conclusions prior to receipt of this correspondence. Outside opinions have not influenced our analysis, which is wholly independent and based strictly on relevant statutes and case law as our office interprets them.

As noted above, should you choose to withdraw your application before the July 17, 2017 deadline, our office will not issue an Attorney General Opinion on 17FSHB. We will independently consider any subsequent initiative application that you may choose to file.

Sincerely,

JAHNA LINDEMUTH
ATTORNEY GENERAL



By:

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EMB/akb
Enclosures