THE STATE of ALASKA
GOVERNOR BILL WALKER

Department of Law
CIVIL DIVISION

P.O. Box 110300
Juneau, Alaska 99811
Main: 907.465.3600
Fax: 907.465.2520

September 6, 2017

The Honorable Byron Mallott
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: *17FSH2 Ballot Measure Application Review*
AGO No. JU2017200457

Dear Lieutenant Governor Mallott:

You asked us to review an application for an initiative entitled: "An Act providing for protection of wild salmon and fish and wildlife habitat" (17FSH2). Because the application does not comply with the specific constitutional and statutory provisions governing the initiative process, we recommend that you decline to certify the application.

I. The proposed initiative bill.

The bill proposed by this initiative would amend, repeal, and reenact various provisions of AS 16.05 to protect water quality in anadromous fish habitat from the adverse effects of development and human activity. The bill is fourteen sections long, and provides as follows:

Section 1 would add a statement of fish habitat policy to the uncodified law. The statement provides that because wild salmon are critically important to Alaska's communities, it is state policy to: ensure sustainable fisheries and fish and wildlife habitat; protect water resources and anadromous fish habitat; ensure that development in these habitats meets enforceable standards; and ensure the State meets its constitutional obligation to protect Alaska's fisheries.

Section 2 would create new fish and wildlife habitat-protection standards under AS 16.05 and require the Commissioner of the Department of Fish and Game (Commissioner) to ensure the proper protection of fish and wildlife, including protecting anadromous fish habitat from significant adverse effects. To that end, this section would require the Commissioner to maintain certain standards when issuing permits for development in anadromous fish habitat with respect to: water quality and temperature;

stream flow; species passage; habitat-dependent connections; habitat bank and bed stability; aquatic diversity; and adjacent riparian areas. This section would also allow the Commissioner to adopt regulations to implement these standards.

Section 3 would repeal and reenact existing AS 16.05.871. This section would require a person to get an anadromous fish habitat permit "before initiating any activity that may use, divert, obstruct, pollute, disturb or otherwise alter anadromous fish habitat." The section would further allow the Commissioner to specify in regulation activities that do not require an anadromous fish habitat permit, provided the activity has only a *de minimis* effect on such habitat. This section contains a presumption and definition of what constitutes "anadromous fish habitat," but allows the Commissioner to specify it further in regulation, and make site-specific exemptions to the presumption.

Section 4 would create a new application process for anadromous-fish-habitat permits under AS 16.05. The Commissioner would create the application form and collect from applicants all information necessary to assess a proposed activity's effects on anadromous fish habitat, and, in consultation with the applicant, determine whether the proposed activity has the potential to cause significant adverse effects on anadromous fish habitat, and issue a permit accordingly with public notice of his decision.

Section 5 adds a new section to AS 16.05 requiring the Commissioner to "find the potential for significant adverse effects" where the activity may, alone or along with other factors: impair or degrade protected habitat characteristics; interfere with spawning, rearing, or migration of anadromous fish; increase mortality of anadromous fish; reduce aquatic diversity, productivity, or stability; or impair other criteria set in regulation. Under this section, the Commissioner must find that the proposed activity will cause substantial damage to anadromous fish and wildlife species if the habitat "will be adversely affected such that it will not likely recover or be restored within a reasonable period to a level that sustains the water body's, or portion of the water body's" fish and wildlife species. In making that determination, the Commissioner must account for various factors that impact the adversely affected species and habitat.

Section 6 adds new sections to AS 16.05 that describe timeframes, public notice and bonding requirements, and detailed criteria that the Commissioner must consider when issuing, amending, or rescinding: (1) minor individual anadromous fish habitat permits; (2) general permits for minor activities; and (3) major anadromous fish habitat permits.

Section 7 adds a new section to AS 16.05 that would require the Commissioner to "prevent or minimize significant adverse effects to anadromous fish habitat" by requiring certain permit conditions and mitigation measures. Under this section, the Commissioner may not permit an activity that would: cause substantial damage to anadromous fish habitat; fail to ensure the proper protection of fish and wildlife; store or dispose of mining waste or tailings in a way that could result in the discharge of certain acids, metals, pollutants, or other compounds "that will adversely affect, directly or indirectly, anadromous fish habitat, fish, or wildlife species that depend on anadromous fish habitat"; replace or supplement a wild fish population with a hatchery-dependent fish population; "withdraw water from anadromous fish habitat in an amount that will adversely affect anadromous fish habitat, fish, or wildlife species"; or "dewater and relocate a stream or river if the relocation does not provide for fish passage or will adversely affect anadromous fish habitat, fish, or wildlife species." The Commissioner would require permittees to take steps to mitigate such adverse effects. The Commissioner could adopt regulations to implement this section.

Section 8 would create a new process in AS 16.05 for reconsidering and appealing permit determinations. The section sets forth the timeframes and procedures through which "any interested person" could file a written request asking the Commissioner to reconsider a permit determination, and a process through which such persons could appeal the Commissioner's final determination to superior court under the judicial review provisions of the Administrative Procedure Act.

Section 9 would add a new process to AS 16.05 through which the Commissioner would notify a person in violation of statute, regulation, or permit and seek to have the permittee rectify any violation.

Sections 10 and 11 would amend existing provisions of AS 16.05.901 making certain statutory violations of AS 16.05 a Class A misdemeanor. The section would penalize as Class A misdemeanors criminally negligent violations of AS 16.05.687-901, a regulation adopted under that statutory scheme, or a permit condition, order, or mitigation measure issued pursuant to those statutes and regulations. These sections would also allow the Commissioner to impose civil penalties on persons or entities that cause material damage to anadromous fish and wildlife habitat.

Section 12 would define the scope of the Act. It would make the Act inapplicable "to existing activities, operations, or facilities that have received all required federal, state, and local permits, authorizations, licenses, and approvals for activities adversely affecting anadromous fish habitat, on or before the effective date" of the Act, until the permit, license, authorization or approval expires.

Section 13 would repeal AS 16.05.851 and AS 16.05.896.

Section 14 would add a severability clause to the uncodified law.

II. Analysis.

Under AS 15.45.070, the lieutenant governor must review an application for a proposed initiative bill within sixty calendar days of receipt and either "certify it or notify the initiative committee of the grounds for denial." The application for the 17FSH2 initiative was filed on July 14, 2017. The sixtieth calendar day after the filing date is September 12, 2017. Under AS 15.45.080, certification shall only be denied if: "(1) the proposed bill to be initiated is not confined to one subject or is otherwise 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."

A. Form of the proposed initiative bill.

In evaluating an application for an initiative bill, you must determine whether the application is in the "proper form."[1] Specifically, you must decide whether the application complies with "the legal procedures for placing an initiative on the ballot, and whether the initiative contains statutorily or constitutionally prohibited subjects which should not reach the ballot."[2]

The form of an initiative bill is prescribed by AS 15.45.040, which requires four things: (1) that the bill be confined to one subject; (2) that the subject be expressed in the title; (3) that the bill contain an enacting clause stating: "Be it enacted by the People of the State of Alaska"; and (4) that the bill not include prohibited subjects. An initiative includes a prohibited subject when it makes or repeals appropriations; enacts local or special legislation; dedicates revenue; or creates courts, defines their jurisdiction, or prescribes their rules.[3]

This initiative bill meets the first three requirements of AS 15.45.040. It is confined to one subject—protection of wild salmon and fish and wildlife habitat. The subject is expressed in the title and the bill has the required enacting clause.

---

1 Alaska Const. art. XI, § 2.

2 *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 87 n.7 (Alaska 1988).

3 AS 15.45.010; *see also* Alaska Const. art. XI, § 7 (prohibiting dedicating revenue, creating courts, defining court jurisdiction or prescribing court rules).

With respect to the final requirement, in determining whether an initiative bill contains a prohibited subject, the Alaska Supreme Court has adopted a "deferential attitude toward initiatives"[4] and has consistently recognized that the constitutional and statutory provisions pertaining to the use of the initiative should be liberally construed in favor of allowing an initiative to reach the ballot.[5] Indeed, the court has "sought to preserve the people's right to be heard through the initiative process wherever possible."[6] With respect to concerns "grounded in general contentions that the provisions of an initiative are unconstitutional," you may deny certification only if "controlling authority leaves no room for argument about its unconstitutionality."[7]

But even though liberal access to the initiative process is required, the constitutional restrictions on that process are nevertheless important conditions that require strict compliance.[8] For the following reasons, we conclude that the bill violates the appropriations restriction by depriving the legislature of its exclusive discretion to allocate state assets among competing needs.

In our letter of June 30, 2017 to the sponsors, we expressed our concerns with a prior version of this initiative bill designated by the Division of Elections as 17FSHB. In response to this letter, the sponsors withdrew the 17FSHB initiative bill and filed this one, which the Division subsequently designated as 17FSH2.

While 17FSH2 has several changes to the bill's language, we believe that 17FSH2 still violates Article XI, section 7 of the Alaska Constitution for the same reasons we cited previously.

---

4 *Yute Air Alaska, Inc. v. McAlpine,* 698 P.2d 1173, 1181 (Alaska 1985).

5 *McAlpine,* 762 P.2d at 91; *Yute Air,* 698 P.2d at 1181.

6 *Hughes v. Treadwell,* 341 P.3d 1121, 1125 (Alaska 2015); *Pebble Ltd. P'ship ex rel. Pebble Mines Corp. v. Parnell,* 215 P.3d 1064, 1076 (Alaska 2009).

7 *Id*. (internal citations and quotations omitted).

8 *Citizens for Tort Reform v. McAlpine,* 810 P.2d 162, 168 n.14 (Alaska 1991).

As we noted earlier, the Alaska Constitution prohibits initiatives that make an appropriation of state assets, which include state resources such as anadromous waters.[9] This prohibition against appropriating public assets by initiative is meant to "re[tain] control . . . of the appropriation process *in the legislative body*."[10] An initiative is unobjectionable as long as it grants the legislature sufficient discretion in executing the initiative's purpose.[11] But an initiative that controls the use of public assets such that it essentially usurps the legislature's resource allocation role runs afoul of article XI, section 7.[12]

17FSH2 clearly limits the legislature's ability to decide how to allocate anadromous streams among competing uses. The initiative contains restrictions and directives that would require the Commissioner to reject permits for resource development or public projects in favor of fish habitat. Although 17FSH2 alters the language of 17FHSB slightly, the overarching concerns regarding legislative infringement that we noted in our letter of June 30, 2017 remain.

Specifically, despite the altered language, we remain concerned that 17FSH2 would, theoretically and/or in practice, categorically prohibit certain mines, dams, roadways, gaslines, and/or pipelines. In doing so, the measure would effectively set state waters aside for the specific purpose of protecting anadromous fish and wildlife habitat "in such a manner that is executable, mandatory, and reasonably definite with no further legislative action,"[13] while leaving insufficient discretion to the legislature or its delegated executives to use that resource in another way.

Among other things, the initiative's provisions on disposal and storing of mining waste, stream dewatering and relocation, and adverse effects to anadromous fish habitat

---

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

[10] *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).

[11] *Staudenmaier*, 139 P.3d at 1263 (citing *McAlpine*, 762 P.2d 81 at 91).

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

[13] *City of Fairbanks*, 818 P.2d at 1157.

would effectively preclude some uses altogether. It should not matter if the initiative deprives the legislature of such choices categorically or only in isolated cases, because, either way, the initiative would unconstitutionally restrict the legislature's ability to allocate state resources.[14]

In short, like 17FSHB, 17FSH2 would prohibit the use of anadromous waters for certain development purposes, leaving insufficient discretion to the legislature to determine how to allocate those state assets. We express no opinion whether 17FSH2 is good or bad policy. We simply find it to be inconsistent with what the people, by initiative, may do under the Alaska Constitution.

B. Form of the application.

The form of an initiative application is prescribed by AS 15.45.030, which provides that 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.

The application on its face meets the first and third requirements, as well as the latter portion of the second requirement regarding the statement on the signature page. With respect to the first clause of the second requirement, we understand that the Division of Elections has determined that the application contains the signatures and addresses of 158 qualified voters.

C. Number of qualified sponsors.

[14] 17FSH2 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. *See Pebble Ltd. Partnership*, 215 P.3d at 1077.

As noted above, AS 15.45.030(2) requires an initiative application to contain the signatures and addresses of not fewer than 100 qualified voters who sponsor the initiative. We understand that the Division of Elections has determined that 17FSH2 meets that requirement.

III. Conclusion.

The line between permissible regulation and unconstitutional appropriation by initiative—particularly in the area of natural resource management—is not always clear. That line is periodically refined by emerging caselaw from the Alaska Supreme Court. Our duty is to advise you to act in a manner that upholds the Alaska Constitution and adheres to existing Alaska Supreme Court precedent interpreting its provisions.[15] We do not believe that 17FSH2 meets constitutional mandates under existing precedent. For that reason, we find that the proposed bill is not in the proper form, and therefore recommend that you decline to certify 17FSH2.

If you decide to reject the initiative, we suggest that you give notice to all interested parties and groups who may be aggrieved by your decision.[16] This notice will trigger the 30-day appeal period during which these persons must contest your action.[17]

Please let us know if we can be of further assistance to you on this matter.

Sincerely,

JAHNA LINDEMUTH
ATTORNEY GENERAL

By:

Elizabeth M. Bakalar
Assistant Attorney General

EMB/akb
Enclosure

---

15 *See* AS 44.23.020.

16 AS 15.45.240

17 AS 15.25.240; *McAlpine,* 762 P.2d at 86.