January 3, 2014

The Honorable Mead Treadwell
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: *Review of Initiative Application for "An Act providing for the protection and conservation of Alaska's fisheries by prohibiting shore gill nets and set nets in nonsubsistence areas."*
A.G. File No. JU2013200790

Dear Lieutenant Governor Treadwell:

You asked us to review an application for an initiative entitled "An Act providing for the protection and conservation of Alaska's fisheries by prohibiting shore gill nets and set nets in nonsubsistence areas" ("13PCAF"). We conclude that the initiative violates the constitutional and statutory prohibition on making or repealing appropriations by initiative, as that prohibition has been interpreted by the Alaska Supreme Court. Accordingly, we recommend that you decline to certify the application.

I. Summary of the Proposed Bill.

A. Brief Summary and Background.

On November 6, 2013, an initiative committee filed with your office an application to certify a ballot initiative. The law proposed by this initiative would prohibit the use of shore gill nets and set nets for fishing in nonsubsistence areas of the state for all purposes other than customary and traditional use or personal use fishing.

B. Sectional Summary.

The law proposed by this initiative consists of four sections:

- **Section 1.** This section adds a statement of findings and intent to the uncodified law. Specifically, it finds:

  - that the state permits the use of shore gill nets and set nets;
  - that within nonsubsistence areas, shore gill net and set net fishing kills or injures large numbers of non-target species;
  - that within nonsubsistence areas, shore gill net and set net fishing wastes fish because of the high mortality rate for escaped fish and high levels of by-catch of non-targeted species;
  - that shore gill nets and set nets have been banned in other states due to their indiscriminate method of take;
  - that there is significant pressure on fisheries resources in nonsubsistence areas, which are close to the state's urban population centers;
  - that fishing in nonsubsistence areas requires more protections and restrictions to minimize by-catch of non-targeted species;
  - that the use of shore gill nets and set nets in nonsubsistence areas is inconsistent with Alaska's constitutional obligation to maintain sustainable fisheries;
  - that the limited use of shore gill nets and set nets in nonsubsistence areas will help conserve and develop fisheries consistent with sustained yield; that the customary, traditional, or personal use of shore gill nets and set nets in nonsubsistence areas does not impact fisheries as much as other uses in those areas;
  - that the intent of the bill is to prohibit the use of shore gill nets and set nets in nonsubsistence areas of the state for all purposes except for customary and traditional use or personal use; and
  - that the bill does not intend to limit the Legislature's or the Board of Fisheries' discretion to allocate fish among competing users.

- **Section 2.** This section adds a statutory provision, to be designated AS 16.05.781. The proposed statute is entitled "Set gillnetting in nonsubsistence areas prohibited" and contains four subsections.

  - Subsection (a) provides that, except for customary and traditional use or personal use fishing, a person may not use a shore gill net or set net to take fish in any nonsubsistence area.
  - Subsection (b) cross-references and incorporates existing statutory definitions of "customary and traditional," "personal use fishing," "shore gill net," "set net," and "nonsubsistence area."

- Subsection (c) provides that nothing in the statute shall affect the use of shore gill nets and set nets in subsistence areas.
- Subsection (d) provides that nothing in the statute shall be construed to limit the discretion of the Legislature or the Board of Fisheries to allocate fish among competing users.

- **Section 3.** This section adds a standard severability provision to the uncodified law, providing that if a court should find any part of the law invalid, the remainder will be unaffected.

- **Section 4.** This section provides for an immediate effective date upon enactment.

II. Analysis.

Upon receiving an application for a proposed initiative, the Lieutenant Governor must review it and within sixty calendar days of receipt either "certify it or notify the initiative committee of the grounds for denial."[1] The filing date for the 13PCAF initiative application was November 6, 2013, so your deadline is January 6, 2014. You may deny certification only 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) the application includes an insufficient number of qualified sponsors."[2]

A. Form of the proposed bill.

In evaluating an initiative application, you must determine whether the application is in the "proper form."[3] 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."[4]

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1 AS 15.45.070.

2 AS 15.45.080.

3 Alaska Const. art. XI, § 2.

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

The form of a proposed initiative bill is prescribed by AS 15.45.040, which contains four requirements: (1) the bill must be confined to one subject; (2) the subject must be expressed in the title; (3) the enacting clause must state: "Be it enacted by the People of the State of Alaska"; and (4) the bill must not include prohibited subjects. The subjects prohibited in an initiative, outlined in Article XI, section 7 of the Alaska Constitution, include the making or repealing of appropriations, the enactment of local or special legislation, the dedication of revenue, and the creation of courts, the definition of their jurisdiction, or prescribing rules of court.[5]

13PCAF meets the first three requirements for an initiative in proper form. It is confined to one subject—shore gill net and set net fishing in nonsubsistence areas. The subject is expressed in the title: "An Act providing for the protection and conservation of Alaska's fisheries by prohibiting shore gill nets and set nets in nonsubsistence areas." And the required enacting clause is present.

With respect to the final requirement—that an initiative bill cannot contain a prohibited subject—the Alaska Supreme Court has adopted a "deferential attitude toward initiatives,"[6] liberally construing constitutional and statutory provisions pertaining to the use of the initiative in favor of allowing an initiative to reach the ballot.[7] At the same time, however, the court recognizes "the importance of the [subject matter] restrictions,"[8] and cautions that "courts have a duty to give careful consideration to . . . whether a constitutional or statutory limitation prohibits a particular initiative proposal on subject matter grounds."[9] In particular, "initiatives touching upon the allocation of public revenues and assets require careful consideration because the constitutional right of direct legislation is limited by the Alaska Constitution."[10]

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5 AS 15.45.010; *see* Alaska Const. art. XI, sec. 7.

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

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

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

9 *Swetzof v. Philemonoff*, 203 P.3d 471, 474-75 (Alaska 2009).

10 *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153, 1155 (Alaska 1991).

After a thorough analysis, we conclude that 13PCAF makes a prohibited appropriation under Article XI, section 7 of the Alaska Constitution. This conclusion is based primarily on the Alaska Supreme Court's 1996 decision in *Pullen v. Ulmer*,[11] a case holding that the preferential treatment of certain fisheries is an appropriation that could not be enacted by initiative.

1. The Alaska Supreme Court's Analysis in *Pullen.*

In *Pullen*, the court addressed certification of a ballot measure providing that subsistence, personal use, and sport fisheries would receive a preference to take a portion of the salmon harvest before remaining harvestable salmon could be allocated to other harvest users.[12] The measure also generally limited the amount of salmon to be allocated to personal use and sport fisheries at five percent of the total projected statewide harvest.[13] After the Lieutenant Governor certified the measure, interested parties filed suit, seeking to reverse certification. The court found for the plaintiffs and enjoined the Lieutenant Governor from placing the measure on the ballot.

The court explained why the proposed initiative makes an appropriation of state property in violation of Article XI, section 7 of the Alaska Constitution.[14] As a threshold matter, the court held that the State's interest in migrating salmon is "sufficiently strong to warrant characterizing [them] as assets of the state which may not be appropriated by initiative."[15] It then found that the bill appropriated those assets, focusing on the underlying core objectives of the prohibition.

The prohibition on appropriation by initiative has two core objectives, according to the court.[16] First, the prohibition "was meant to prevent an electoral majority from bestowing state assets on itself," and second, it "was designed to preserve to the

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11 923 P.2d 54 (Alaska 1996).

12 *Id.*

13 *Id*. at 55.

14 *Id*. at 58.

15 *Id*. at 61.

16 *Id*. at 63.

legislature the power to make decisions concerning the allocation of state assets."[17] The court found that the *Pullen* initiative violated both of these core objectives.

It violated the first objective—to prevent an electoral majority from bestowing state assets on itself—because the measure was "designed to appeal to the self-interests of sport, personal, and subsistence fishers, in that these groups are specifically targeted to receive state assets in the circumstance of harvestable shortages . . . ." This "tempts the voter to prefer his immediate financial welfare at the expense of vital government activities."[18]

The measure also violated the second objective—to preserve to the Legislature the power to make decisions concerning the allocation of state assets—because it "significantly reduce[d] the legislature's and Board of Fisheries' control of and discretion over allocation decisions, particularly in the event of stock-specific or region-specific shortages of salmon between the competing needs of users."[19] The court found that the "overriding purpose" of the bill was to "require the Board of Fisheries, after providing for the biological escapement needs of Alaska's salmon stocks, to reserve a priority for the harvest needs for each particular salmon stock of personal use, sport, and subsistence fisheries prior to allocating any portion of the harvestable surplus to commercial fisheries."[20] The measure "remove[d] the Board of Fisheries' discretion to make allocation decisions in times of shortages."[21] The initiative could not be interpreted "as simply amending a series of general legislative criteria to add more specific ones to guide the Board of Fisheries in its allocation decisions," because it clearly "call[ed] for an actual allocation in the event of a shortage of a given salmon species in a given geographical region to sport, personal use, and subsistence fisheries." It thus created "the very real possibility that the commercial fishers will be excluded from such fisheries."[22]

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17 *Id.*

18 *Id*. (internal quotations and citations omitted; emphasis added).

19 *Id*.

20 *Id*. at 63-64.

21 *Id*. at 64.

22 *Id.*

Based on *Pullen*, we believe that 13PCAF also effects an appropriation. While on its face the measure appears simply to ban two types of fishing gear, with the stated aim of conserving the salmon resource, our obligation to give "careful consideration to . . . whether a constitutional or statutory limitation prohibits a particular initiative proposal on subject matter grounds"[23] requires us to consider the actual effect of the proposed law.[24] A close analysis indicates that 13PCAF would violate both core objectives of Pullen.[25]

2. 13PCAF violates the two core objectives identified in *Pullen.*

In considering the actual effect of 13PCAF, if enacted, we must consider the impact of its provisions. Although the proposed law is written broadly to apply statewide to prohibit particular types of nets in all nonsubsistence areas, in application it is far more targeted, affecting only the set net commercial salmon fishery in Cook Inlet. Of the five

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[23] *Swetzof*, 203 P.3d at 474-75.

[24] *See, e.g., Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, 273 P.3d 1128, 1131 (Alaska 2012) (finding that "allowing voters to veto any capital improvement projects of over $1 million has the *effect* of diluting the Borough Assembly's exclusive control over the budget and is therefore an impermissible appropriation.") (emphasis added); *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 423 (Alaska 2006) (stating that in analyzing whether an initiative makes or repeals an appropriation, the court decides "whether the initiative would have that effect.")

[25] Although 13PCAF appears to violate both *Pullen* objectives, a measure need only violate one of the two objectives to constitute an appropriation. *See Alliance of Concerned Taxpayers, Inc.*, 273 P.3d at 1137 (finding an appropriation based only on the second "core objective" of the prohibition); *Pebble Ltd. Partnership ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1075 (Alaska 2009) (analyzing the two prongs of the appropriations restriction by first concluding that ballot measure 07WTR3 did not give away public assets, and then addressing whether the measure "narrows the legislature's range of freedom to make allocation decisions in a manner sufficient to render the initiative an appropriation."); *Alaska Action Center, Inc. v. Municipality of Anchorage*, 84 P.3d 989, 993-994 (Alaska 2004) (finding that an initiative would effectuate an appropriation, even though it did not allocate public assets to voters, because it "designate[d] the use" of a public asset in a manner that encroached on the legislative branch's "exclusive 'control over the allocation of state assets among competing needs'") (quoting *Pullen*, 923 P.2d at 63); *McAlpine*, 762 P.2d at 89 (same).

nonsubsistence areas in Alaska,[26] only the Anchorage-Matsu-Kenai Nonsubsistence Area has any significant set net fishing, which takes place in Cook Inlet.[27]

Commercial set net fishermen catch fish by anchoring nets to or near the shore. Of particular concern, the East Side Set Net commercial salmon fishery in Cook Inlet generally targets sockeye salmon, but catches Chinook salmon—prized by sport fishermen—in the process. The East Side Set Net fishery also competes with the personal use sockeye salmon fisheries in the Kenai and Kasilof Rivers. This has created a tension and resulting political battles between these user groups that has been on-going for many years. 13PCAF is sponsored by individuals who, in addition to their interest in salmon conservation, support sport and personal use fishing on the Kenai River.

If enacted, 13PCAF would significantly undermine the purposes of the Constitution's prohibition on appropriation by initiative. It violates the first core objective of this prohibition because it is designed to appeal to the self-interests of a majority user group by effectively transferring salmon from a much smaller minority of commercial users. There are about 740 Cook Inlet set net permits, approximately two-thirds of which are actively fished.[28] In contrast, sport fishers in Cook Inlet waters and drainages numbered about 250,000 in 2012. Kenai and Kasilof River personal use permits, each representing one household, number in the tens of thousands every year.

13PCAF also violates the second core objective of the prohibition, because—as in *Pullen*—the measure would "significantly reduce[] the legislature's and Board of Fisheries' control of and discretion over allocation decisions, particularly in the event of stock-specific or region-specific shortages of salmon between the competing needs of users." Indeed, the initiative would effectuate a stock and region-specific reallocation of

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[26] The five Nonsubsistence Areas are defined in 5 AAC 99.015(a).

[27] There is no set net fishery in all of Southeast Alaska, where salmon may only be taken by drift gill net, seine, and troll gear. Thus, the Juneau and Ketchikan non-subsistence areas will be unaffected by this bill. *See* 5 AAC 33.330. Likewise, no set net gear is permitted in the Valdez Nonsubsistence Area. While set gill net permits are authorized in the Fairbanks non-subsistence area, set net fishing there is all but non-existent: only one active permit has been operating in recent history, with no set net commercial sales reported since 2009. Permit holders there may opt to use fishwheels instead of set net gear.

[28] Fewer than twenty of these permits are typically fished outside the Nonsubsistence Area at the tip of the Kenai Peninsula in and south of Seldovia Bay.

salmon, displacing both the Board's authority to allocate and its previous allocation decisions. The constitutional restriction on the initiative power "is meant to retain the legislature's control of the 'process' of making appropriations"; therefore an initiative is unconstitutional when it causes the voters to "essentially usurp the legislature's resource allocation role."[29] And in this case, usurping the Board's authority to manage the fishery is not necessary to maintain the conservation or sustained yield of the king salmon stocks it purports to protect. The Board already has regulatory measures in place to reduce harvest and increase the escapement of king salmon as necessary, including restrictions on the commercial set net fisheries.[30]

Prohibiting shore gill nets and set nets in nonsubsistence areas effectuates an actual, measureable allocation of Chinook salmon from the East Side Set Net commercial salmon fishery in Cook Inlet[31] to the Kenai River in-river sport fishery and to the Kenai and Kasilof personal use fisheries. Historical harvest data indicates that during a typical opening of the East Side Set Net fishery, an average of 200-300 Chinook salmon are harvested. A reliable percentage of those salmon are bound for the Kenai River. So the elimination of the East Side Set Net fishery under 13PCAF would inevitably result in a predictable number of Chinook salmon entering the Kenai River and becoming available for harvest in the sport fishery there. An increased number of sockeye salmon would also become available to the in-river sport fisheries and the personal use fisheries at the mouths of the Kenai and Kasilof Rivers.[32]

And 13PCAF would eliminate an entire user group with no alternatives. Set net permits, like other limited entry fishery permits, cannot be converted to other types of commercial permits or transferred to other areas. *See* AS 16.43.150(a). Under the bill, there would be no legal area to set net fish in Cook Inlet—the area to which these permits are limited—because practically the entire commercial set net fishery is within the

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29 *Alliance of Concerned Taxpayers, Inc.*, 273 P.3d at 1137 (quoting *Staudenmaier v. Municipality of Anchorage*, 139 P.3d 1259, 1263 (Alaska 2006)).

30 *See* 5 AAC 21.359; 5 AAC 21.360.

31 The East Side Set Net fishery is also referred to as the Upper Subdistrict set gillnet fishery. *See* 5 AAC 21.360.

32 In addition to dipnets, there is also a set gillnet personal use fishery at the mouth of the Kasilof River that would benefit from the commercial set net closure. 5 AAC 77.540.

nonsubsistence area.[33] And "under. . . *Pullen*, an initiative may make an impermissible appropriation not only when it designates public assets for some particular use, but also when it allocates those assets *away from* a particular group or purpose."[34]

13PCAF would also effectuate another allocation, in that many of the sockeye salmon that the East Side Set Net fishery would otherwise harvest would become available to the commercial drift net fishery, which by statute constitutes a different fishery for allocation purposes.[35]

Yet another re-allocation would occur in the Northern District, where the only legal commercial gear is set gill net, and there is a directed Chinook salmon set net fishery, as well as a small historical harvest of Chinook taken during the fishery season targeting other salmon. The most recent ten-year average for the Chinook harvest is 2,542 fish per year, of which 2,313 are directed harvest. This initiative would remove that number of Chinook salmon from the commercial fishery, allowing them to directly enter the rivers of Northern Cook Inlet where they could be harvested by sport fishers.

In addition to Chinook, the initiative would re-allocate a large number of sockeye salmon to these in-river sport fisheries. No commercial fishery would benefit from the Northern District set net closure, because the Northern District set net fishery is the only commercial fishery allowed there. Thus, salmon would be re-allocated directly from the commercial to sport fisheries, which displaces the Board's authority to manage and allocate the fisheries.

In sum, 13PCAF would reallocate salmon from the East Side Set Net and Northern District commercial fisheries to non-commercial in-river fisheries. It would effectively eliminate a major user group while appealing to the self-interests of sport and personal fisheries. It would eliminate the Board's current allocation to the set net fishery and its ability to allocate to that fishery in the future, thus impinging on the ability of the Board

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[33] There is a very small area of Cook Inlet outside the Nonsubsistence Area where a small number of local permits are fished. That area, located at the southern tip of the Kenai Peninsula from Seldovia Bay south, could not support an influx of even a small portion of the remaining Cook Inlet set net permit holders. *See supra* note 28.

[34] *Alliance of Concerned Taxpayers, Inc.*, 273 P.3d 1128 at 1138 (emphasis in original).

[35] "Allocation" is among fisheries. *See* AS 16.05.251(e). "Fishery" is defined as "a specific administrative area in which a specific fishery resource is taken with a specific type of gear…." *See* AS 16.05.940(17).

and the Legislature to make allocation decisions among competing users. Were this type of initiative permissible, voters could continue to reallocate stocks to any fishery simply by eliminating specific gear or particular means and methods of catching fish—for example, the next initiative might propose to eliminate purse seining, trawling, dipnetting, or catch-and-release sport fishing in particular areas to increase harvest opportunity for other types of users. This would "prevent . . . real regulation and careful administration" of Alaska's salmon stocks,[36] contrary to the purpose of the prohibition on initiative by appropriation.

B. Form of the application.

The form of an initiative application is prescribed in AS 15.45.030, which provides as follows:

> The application must include the
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> (1) proposed bill;
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> (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
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> (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 not fewer than 100 qualified voters.

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[36] *McAlpine*, 762 P.2d at 89 n.11 (quoting *Slama v. Attorney General*, 428 N.E.2d 134, 139 (Mass. 1981)).

C. Number of qualified sponsors.

As noted above, we understand that the Division of Elections has determined that the application contains the signatures and addresses of not fewer than 100 qualified voters.

IV. Conclusion.

For the foregoing reasons, we find that the proposed bill is not in the proper form. Accordingly, we recommend that you deny certification of the application. If you do so, you should advise the initiative sponsors of their right to judicial review under Article XI, section 2 of the Alaska Constitution and AS 15.45.240.

Please contact us if we can be of further assistance in this matter.

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By:

Elizabeth M. Bakalar
Assistant Attorney General

EMB/tjd