

June 24, 2015

The Honorable Bill Walker
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: CCS HB 2001: Fiscal Year 2016
Operating Budget
Our file: JU2015200430

Dear Governor Walker:

At the request of your legislative director, we have reviewed CCS HB 2001, making appropriations for the operating and loan program expenses of state government and for certain programs; making appropriations for the operating expenses of the state's integrated mental health program; capitalizing funds and repealing appropriations; and making appropriations from the budget reserve fund under art. IX, sec. 17(c) of the Alaska Constitution.

While this looks like a typical operating budget for the upcoming fiscal year, it is actually the second operating budget passed by the legislature this year. An operating budget, CCS HB 72(brf sup maj fld H) (ch. 23, SLA 2015), was passed in the First Regular Session of the Twenty-Ninth Alaska State Legislature and is now law, but was underfunded by approximately \$3,000,000,000. To account for the funding shortfall, you made vetoes and reductions to HB 72 to ensure continued operation of critical state functions and vetoed or reduced less critical appropriations to maintain services. The bill before you, CCS HB 2001, restores most of your line item vetoes and reductions, adds additional appropriations not in the prior operating budget bill, includes an executive branch-wide unallocated reduction of approximately \$30,000,000, and contains provisions authorizing a withdrawal of revenue from the budget reserve fund.

We review the highlights of the bill below, but first note that you are receiving this bill somewhat later in the year than usual since this bill was passed June 11, 2015, and transmitted to you June 23, 2015. We bring to your attention our general concern over delays in transmitting bills to you for review. Once a bill has passed both houses, transmittal to you for consideration is a mandatory ministerial function. (1981 Inf. Op. Att'y Gen. (July 6; File no. J-66-005-82). We adhere to our earlier opinion that the substantial delay or failure of the legislature to transmit a bill that has passed both houses presents several potentially serious constitutional questions. (1988 Alaska Op. Att'y Gen.; June 16; File. no. 883-88-0176). We are available for further consultation on this issue should the situation arise again.

Most provisions of the bill are to be effective July 1, 2015 (sec. 21), others take effect immediately (sec. 20) or June 30, 2015 (sec. 19). If this bill is signed by you before July 1, 2015, it will take effect July 1, 2015. See, AS 01.10.070(d). If you sign this bill on or after July 1, 2015, it will take effect at 12:01 a.m. the day after it is signed. *Id.*

I. Introduction.

This budget, as well as the budgets for the last few years, sets out the following introductory language in sec. 1 of the bill: "[a] department-wide, agency-wide, or branch-wide unallocated reduction set out in this section may be allocated among the appropriations made in this section to that department, agency, or branch." Section 1, p. 2, lines 4 - 6. The bill includes an executive branch-wide unallocated reduction which is discussed below.

II. General intent language.

As in prior years, the bill contains numerous expressions of legislative intent accompanying certain appropriation items. And, as we have opined in the past, the expressions of legislative intent in the operating budget may violate the confinement clause of the Alaska Constitution ("[b]ills for appropriations shall be confined to appropriations." art. II, sec. 13). In *Alaska State Legislature v. Hammond*, Judge Carpeneti adopted a five-factor test to determine whether the language violates the confinement clause:

[T]he qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not extend beyond the life of the appropriation. Finally, the language must be germane, that is, appropriate, to an appropriations bill.

Memorandum of Decision at 44 - 45, No. 1JU-80-1163 (Alaska Super., May 25, 1983).

We discuss the legality of general intent language in our May 13, 2015, review of HB 72 and refer you to that opinion for more detail.

III. Department of Administration.

In various places in sec. 1 of the bill, the legislature provides several expressions of legislative intent regarding the Department of Administration (DOA) that are the same as the intent language HB 72.¹ Our advice here is the same as in our May 13, 2015, bill review for HB 72—generally reporting requirements are set out in statute, (2007 Op. Att'y Gen. 2 (June 6; 883-07-0070)), but to the extent that this reporting requirement is not otherwise set out in statute, DOA may wish to comply as a matter of comity.

III. Department of Commerce, Community, and Economic Development.

The legislature did not include any intent language in these appropriations and there are no apparent legal concerns with this section. Section 1, p. 4, line 33, through p. 6, line 3.

IV. Department of Education and Early Development.

The legislature did not include any intent language in these appropriations and there are no apparent legal concerns with this section. Section 1, p. 6, line 5, through p. 7, line 10.

V. Department of Environmental Conservation.

Here the legislature included two expressions of legislative intent related to plans to reduce the cost of the oil spill response drills and exercises and report its findings to the finance committees and requesting that DEC develop a plan to increase cost recovery efforts for spill prevention and response and report its findings related to that plan to the finance committees. Section 1, p. 8, lines 11 - 16. As set out above, DEC may wish to comply as a matter of comity.

¹ Section 1, p. 2, lines 12 - 16, (intent language that DOA document cost drivers of services provided to other departments); sec. 1, p. 2, line 26, through p. 3, line 5, (Intent language that DOA implement a plan to consolidate statewide information technology services), and sec. 1, p. 4, lines 27 - 29 (intent language related to fee structure for candidates; this intent language appears to be based on an inaccurate premise, as candidate filing fees are not collected or set by the Department of Administration or APOC. Instead, the division of elections collects candidate filing fees. *See* AS 15.10.105).

VI. Department of Fish and Game.

The legislature included several expressions of legislative intent regarding the Department of Fish and Game (DFG), including statements that DFG focus its research and management of fishery systems on stocks of concern in order to manage sustained yield, and not reduce personnel or appropriations to any program or project that is directly linked to stocks of concern. In addition, the DFG is requested to submit annual reports to the legislature addressing stocks of concern and revenues subject to AS 16.05.130. Last, the legislature expressed its intent that DFG establish certain baselines regarding smolt outmigration at specified locations and that that DFG's comments, science data, and technical reports that are provided to the Board of Fish or the Board of Game be filed with each board and be available for public review at least 60 days before a board meeting. Section 1, p. 8, lines 27 - 33 through p. 9, lines 5 - 15. As set out above, to the extent that these reporting requirements are not otherwise set out in statute, DFG may wish to comply as a matter of comity.

VII. Office of the Governor.

The legislature did not include any intent language in these appropriations and there are no apparent legal concerns with this section. Section 1, p. 10, line 19, through p. 11, line 6.

IX. Department of Health and Social Services.

The legislature included several expressions of legislative intent regarding the appropriations to the Department of Health and Social Services (DHSS). These expressions of intent mirror those made in HB 72. First, the legislature expressed its intent that reductions to the Juneau Pioneer Home should be taken from the contractual line and not the personal services line so that staffing levels for direct care would be sufficient. Section 1, p. 11, lines 11 - 13. Second, the legislature expressed its intent that DHSS draft regulations to obtain maximum collection from participants of the cost of the 24/7 program. Section 1, p. 11, lines 25 - 26. Third, the legislature expressed its intent that the division of health care services seek authority from the federal government to deny Medicaid travel if services can be provided in local communities. Section 1, p. 12, lines 20 - 21. Fourth, the legislature expressed its intent that the division of public health evaluate and implement strategies that would result in maximizing collections for billable services. Section 1, p. 14, lines 3 - 4. We do not think these statements of legislative intent are enforceable under the *Hammond* standard discussed above, but DHSS may comply as a matter of comity.

There are two provisions under the appropriations for Medicaid services which require review.

First, the legislature included the following intent language regarding abortion funding:

No money appropriated in this appropriation may be expended for an abortion that is not a mandatory service required under AS 47.07.030(a). The money appropriated for Health and Social Services may be expended only for mandatory services required under Title XIX of the Social Security Act and for optional services offered by the state under the state plan for medical assistance that has been approved by the United States Department of Health and Human Services.

Section 1, p. 15, lines 19 - 24. As we have opined previously, this language is intended to prevent expenditures from these appropriations for therapeutic or medically necessary abortions. However, DHSS is under a superior court order to operate its Medicaid program in a constitutional manner by providing payment for therapeutic or medically necessary abortions. That superior court order has been upheld by the Alaska Supreme Court, which specifically rejected an argument that the separation-of-powers doctrine precluded the superior court from ordering the state to pay. *State, Dept. of Health & Social Services v. Planned Parenthood of Alaska*, 28 P.3d 904 (Alaska 2001). Thus, DHSS is faced with a ruling from the state's highest court that the limit on payment for abortion services results in the operation of the Medicaid program in an unconstitutional manner, while DHSS is ostensibly without the money available to pay for services to operate the program legally. A veto of this provision is not available as described in our analysis of *Knowles II*.

Ten years ago, the plaintiffs in the Planned Parenthood case asked the superior court to clarify how similar budget restrictions impacted its judgment. Three days after the Alaska Supreme Court affirmed the judgment, the superior court issued an opinion ordering DHSS not to comply with the restrictions. Therefore, to date, DHSS has obeyed the superior court's order and we must advise DHSS to continue to obey the superior court's order; i.e., to continue to pay for these medically necessary abortions, until such time as a court reverses the order that is now in effect.

Second, the legislature included the following intent language regarding Medicaid:

No money appropriated in this appropriation may be expended for services to persons who are eligible pursuant to 42 United States Code section 1396a(a)(10)(A)(i)(VIII) and whose household modified adjusted gross income is less than or equal to one hundred thirty-three percent of the federal poverty guidelines.

Section 1, p. 15, lines 25 - 28. This same language was included in HB 72 passed earlier this year. As we stated in our review of that bill, this language may violate the confinement clause because it arguably amends substantive law. In particular, AS 47.07.036 that governs how Medicaid funds must be allocated and AS 47.07.020(a) that establishes eligibility for Alaska Medicaid according to the categories of people and services that are required under federal law. Under *Legislative Council v. Knowles*, 21 P.3d at 367, 377-380 (Alaska 2001), an appropriations bill cannot be used to amend existing law because that would violate the confinement clause. We are available to provide further assistance and analysis regarding this provision.

X. Department of Labor and Workforce Development.

A number of Department of Labor and Workforce Development (DLWD) programs receive federal funds. The bill continues the practice of including any federal receipts from prior fiscal years that have not been spent or obligated in the amounts allocated for management services. Section 1, p. 16, lines 17 - 20. We see no legal concerns with these appropriations.

A number of DLWD programs receive nonpublic funds, either for services provided or as contributions from taxpayers. The bill would continue the practice of including any amounts received in prior fiscal years that have not been spent or obligated in the amounts allocated for the Alaska Vocational Technical Center, which receives fees for services or contributions by individual or certain organizational taxpayers. Section 1, p. 17, lines 24 - 27.

The bill includes a statement of intent that DLWD implement a plan to annually supplant \$600,000 of general funds with private or federal funds until, after five years, the construction academy training program requires no general funds. Section 1, p. 17, lines 14 - 16. We do not believe the statements of legislative intent are enforceable but DLWD may comply as a matter of comity.

XI. Department of Law.

The legislature did not include any intent language in these appropriations and there are no apparent legal concerns with the section. Section 1, p. 17, line 29, through p. 19, line 6.

XII. Department of Military and Veterans' Affairs.

The legislature did not include any intent language in these appropriations and there are no apparent legal concerns with the section. Section 1, p. 19, lines 8 - 27.

XIII. Department of Natural Resources.

Here the legislature included three statements of legislative intent. First, the legislature expressed its intent that the Department of Natural Resources (DNR), office of project management and permitting, work with the United States Army Corps of Engineers to develop a wetlands mitigation bank and in-lieu fee program. Section 1, p. 20, lines 4 - 9. Second, the legislature expressed its intent that a reimbursable services agreement should be developed by DNR for state agencies that use the services of DNR, division of geological survey. Section 1, p. 21, lines 3 - 5. It is noted that the correct name for the division is the "division of geological and geophysical surveys." Third, the legislature expressed its intent that DNR enter into partnerships with state and federal agencies and organizations in order to fund the operation of the Wildland Fire Academy in McGrath. Section 1, p. 21, lines 8 - 10. We do not think these statements of legislative intent are enforceable under the *Hammond* standard discussed above, but DNR may comply as a matter of comity.

XIV. Department of Revenue.

The legislature did not include any intent language in these appropriations and there are no apparent legal concerns with the section. Section 1, p. 21, line 26, through p. 22, line 8.

XV. Department of Transportation and Public Facilities.

The legislature included two expressions of legislative intent regarding the appropriations to the Department of Transportation and Public Facilities (DOTPF), both of which concern the Alaska marine highway system. First, the legislature expressed its intent that the marine highway system continue its existing service levels during the peak summer months and that if any reduction in service levels is to take place, the reductions should take place in the nonpeak months. Section 1, p. 24, lines 9 - 11. Second, the legislature expressed its intent that the DOTPF explore options for providing ferry service to communities at the lowest expense and report to the legislature not later than February 1, 2016. Section 1, p. 24, lines 12 - 14. We believe this language strays into the administration of DOTPF's program. But, DOTPF may comply as a matter of comity.

Additionally, as we have noted in previous years, there is a special lapse provision in the DOTPF budget: "The general funds allocated for highways and aviation shall lapse on August 31, 2016." Section 1, p. 23, line 26. This special lapse provision makes the appropriations available for expenditure until they lapse into the general fund on August 31, 2016.

XVI. University of Alaska.

The legislature did not include any intent language in these appropriations and there are no apparent legal concerns with the section. Section 1, p. 24, line 20, through p. 25, line 23.

XVII. Executive Branch-Wide Unallocated Appropriations.

In sec. 1 of the bill, the legislature provided for an unallocated executive branch wide negative appropriation of \$29,800,000. The legislature included two expressions of legislative intent regarding the unallocated reduction. First, the legislature expressed its intent that the reduction be implemented in a manner that causes the minimum number of state employee layoffs and that it be directed toward finding internal agency and department efficiencies. Section 1, p. 25, lines 29 - 31. Second, the legislature expressed its intent that no supplemental funding be requested during the next regular session to cover the unallocated reduction. Section 1, p. 25, lines 31 - 33.

We previously discussed in some detail the issue of unallocated reductions that purport to affect more than one appropriation in an operating budget. 1999 Inf. Op. Att'y Gen. 167 (June 28; 883-99-0070). We noted that this approach may raise constitutional questions, but did not recommend any vetoes because of these possible questions. We adhere to our prior discussion and advice. We are available to provide further assistance and analysis regarding this provision.

XIII. Funding source.

Section 2 of the bill sets out the funding by agency for the appropriations made in sec. 1 of the bill. Section 3 of the bill sets out the statewide funding for the appropriations made in sec. 1 of the bill.

XIX. Salary Increases.

Section 4 of the bill sets out appropriation items for operating expenditures from the general fund and other funds to the agencies to pay for salary increases for covered and noncovered employees for the fiscal year ending June 30, 2016.

This section includes several expressions of legislative intent regarding the payment of salary increases. First, the legislature expressed its intent that the appropriations be one-time increments to the operating budget. Section 4, page 30, lines 5 - 6. Second, the legislature expressed its intent that there be no cost-of-living pay increases beginning with the collective bargaining agreements negotiated in 2015. Section 4, p. 30, lines 7 - 8. Third, the legislature expressed its intent that each of the

collective bargaining agreements negotiated should permit the reopening of an agreement if the oil price of Alaska North Slope West Coast reaches \$95.00 or greater for a period of 60-consecutive days or falls below \$45.00 for a period of 60-consecutive days. Section 4, p. 30, lines 9 - 17. As set out above, expressions of legislative intent are generally not binding on the executive branch although they may be considered and applied as a matter of comity. Regarding the negotiation of collective bargaining agreements, the executive branch has certain obligations concerning bargaining with unions that are set out in the Public Employment Relations Act, AS 23.40.070 - 23.40.260. We are available to provide further assistance and analysis regarding these provisions.

Section 11(a) of the bill provides that the appropriations made in sec. 4 of the bill include funds for salary costs and benefit adjustments for public officials, officers, and employees in the executive branch, court system, the legislature, and for legislators. Section 11(a), p. 65, lines 10 - 13. Section 11(a) also appropriates funds to implement state collective bargaining agreements covering nine collective bargaining units. Section 11(a), p. 65, lines 13 - 27.

Section 11(b) provides that the appropriations made to the University of Alaska in sec. 4 of the bill include amounts for salary and benefit adjustments for the fiscal year for university employees who are not members of bargaining units and to implement the monetary terms of employees covered by collective bargaining agreements for employees in the following bargaining units: Fairbanks Firefighters Union, IAFF Local 1324; United Academics - American Association of University Professors, American Federation of Teachers; United Academics - Adjuncts-American Association of University Professors, American Federation of Teachers; Alaska Higher Education Crafts and Trades Employees, Local 6070; and University of Alaska Federation of Teachers (UAFT). Section 11(b), p. 65, line 28, through p. 66, line 8.

Section 11(c) of the bill provides that the appropriations for employees covered by collective bargaining agreements described in sec. 11(a) of the bill would suffer a corresponding reduction if a collective bargaining agreement is not ratified by the membership of the collective bargaining unit. Section 11(c), p. 66, lines 9 - 13. The contingent language is a proper condition on the appropriation.

Section 11(d) of the bill provides that the appropriations for employees covered by collective bargaining agreements described in sec. 11(b) of the bill would suffer a corresponding reduction if a collective bargaining agreement is not ratified by the membership of the collective bargaining unit and approved by the Board of Regents of the University of Alaska. Section 11(d), p. 66, lines 14 - 19. The contingent language is a proper condition on the appropriation.

Section 11(e) of the bill provides that the appropriations in sec. 4 of the bill for salary and benefit adjustments as set out in secs. 11(a) and (b) include the state's integrated comprehensive mental health program. Section 11(e), p. 66, lines 20 - 22.

XX. Language sections.

Section 7 of the bill provides for an appropriation not to exceed \$875,000 from the general fund to the Department of Commerce, Community, and Economic Development, tourism marketing, for the purpose of matching each dollar in excess of the \$2,700,000 appropriated in sec. 1, ch. 23, SLA 2015, as contributions from the tourism industry.

Section 8 of the bill would provide for capitalization of various funds, including the disaster relief fund and the oil and gas tax credit fund. We see no legal concerns with these appropriations.

Section 9(a) of the bill would appropriate \$157,000,000 from the in-state natural gas pipeline fund (AS 31.25.100) to the public education fund (AS 14.17.300). Section 9, p. 64, lines 15 - 16.

Section 9(b) would make an appropriation from the general fund to the public education fund (AS 14.17.300) of an amount necessary after other specified appropriations to fund the total amount for the 2016 fiscal year of state aid calculated under the public school funding formula under AS 14.17.410(b), estimated to be \$967,027,900. The appropriations made in sec. 9(a) referred to above, and the appropriations made in sec. 31, ch. 23, SLA 2015, when added to the balance of the public education fund (AS 14.17.300) on June 30, 2015. Section 9, p. 64, lines 17 - 22.

Section 9(c) provides that if the amount appropriated in sec. 9(a) described above is less than \$157,000,000, the appropriation in sec. 9(b) described above is reduced on a dollar-to-dollar basis so that the reduction is equal to the reduction in sec. 9(a). Section 9(d) would make an appropriation of \$38,789,000 from the general fund to the regional education attendance area and small municipal school district school fund (AS 14.11.030(a)). Section 9, p. 64, lines 26 - 28. We are available to provide further assistance and analysis regarding these provisions.

Section 10(a) of the bill would make an appropriation of \$126,520,764 from the general fund to the Department of Administration for deposit in the defined benefit plan account of the public employees' retirement system as an additional contribution under AS 39.35.280. Section 10(b) provides for an appropriation of \$130,108,327 from the general fund to the Department of Administration for deposit in the defined benefit plan

account in the teachers' retirement system as an additional contribution under AS 14.25.085. Section 10(c) makes an appropriation of \$5,890,788 to the Department of Administration for the purpose of funding the judicial retirement system under AS 22.25.046. We see no legal concerns with these appropriations.

Section 11 of the bill regarding salary increases is discussed above in the section on Salary Increases.

Section 12 of the bill concerns the budget reserve fund established as a separate fund in art. IX, sec. 17 of the Alaska Constitution. Section 12(a) provides that if the unrestricted state revenue for appropriation in 2015 is insufficient to cover the general fund appropriations for the 2015 fiscal year, the sum necessary to balance revenue and appropriations is appropriated from the budget reserve fund to the general fund. Section 12, p. 66, lines 23 - 27.

Section 12(b) provides for appropriation from the budget reserve fund for fiscal year 2016 if the unrestricted state revenue available for appropriation is insufficient to cover the appropriations that are made in this bill and the prior appropriations bills passed by the legislature in the first regular session.² Section 12(b), p. 66, line 28, through p. 67, line 9.

Section 12(c) provides that if the appropriation in sec. 12(b) is insufficient to cover the general fund appropriations in fiscal year 2016, the amount necessary to balance revenue and general fund appropriations, not to exceed \$500,000,000 is appropriated to the general fund from the budget reserve fund. Section 12(c), p. 67, lines 10 - 14.

Section 12(d) provides that the appropriations in sec. 12(a) - (c) are made under art. IX, sec. 17(c) of the Alaska Constitution. These appropriations received the required three-fourths vote of the membership of each house and thus are valid under this constitutional provision.

Section 13 of the bill is a contingent appropriation to be effective only upon the occurrence of two events: if the appropriation in sec. 12(a) from the budget reserve fund did not pass with a three-fourths vote of the membership of each house, and the unrestricted state revenue available for fiscal year 2015 appropriation is insufficient to cover the general fund appropriations that take effect in fiscal year 2015. Because the appropriation in sec. 12(a) from the budget reserve fund received the necessary three-fourths vote, this provision is not effective.

² Enacted respectively as ch. 23, SLA 2015, ch. 24, SLA 2015, and HCS CSSB 26(FIN) am H.

Section 14 of the bill provides that certain appropriations in the bill are for capitalization of funds and do not lapse.

Section 15 of the bill repeals secs. 33 and 36, ch. 23, SLA 2015, the first operating budget bill passed this year (HB 72). Specifically, the provisions from that bill that have been repealed are the appropriations from the higher education investment fund that were contingent on the failure to obtain a three-fourths vote for a draw from the budget reserve fund.

Section 16 of the bill repeals sections 26(d) and 26(e) making appropriations from the general fund to the public education fund in HB 72 (ch. 23, SLA 2015). The appropriations to the public education fund are provided in this bill at sec. 9.

Section 16 also repeals sec. 28 of HB 72 (ch. 23, SLA 2015) and sec. 9 of HB 73 (ch. 24, SLA 15) (the appropriations bill for the comprehensive mental health program). The sections repealed concerned the rejection of the monetary terms of collective bargaining agreements. The appropriations and the funding for the monetary terms of collective bargaining agreements has been provided in this bill at secs. 4, 5, 6, and 11.

Section 17(a) of the bill provides for retroactive effect to June 30, 2015, for certain appropriations made in sec. 1 of the bill while section 17(b) of the bill addresses a contingency which is not effective because the appropriation in sec. 12(a) did receive a three-fourths vote of the members of each house. Section 17(b), p. 68, lines 3 - 6. Section 17(c) provides that if the appropriation in sec. 12(a) passes by an affirmative vote of three-fourths of the members of each house and if sec. 12(a) takes effect after June 30, 2015, then sec. 12(a) is retroactive to June 30, 2015. As set out above, sec. 12(a) did receive a three-fourths vote of the members of each house. Section 17(c), p. 68, lines 7 - 10. Finally, Section 17(d) provides that if secs. 15 and 16 of the bill take effect after June 30, 2015, these sections are retroactive to June 30, 2015. Section 17(d), p. 68, lines 11 - 12.

Section 18(a) provides that the appropriation from the Alaska higher education investment fund in sec. 13 is contingent on the failure of the appropriation in sec. 12(a) from the budget reserve fund to receive a three-fourths vote of the membership of each house. As set out above, the appropriation in sec. 12(a) did receive the necessary vote and thus the appropriation from the Alaska higher education investment fund is not effective. Section 18(b) provided that secs. 1 - 11 and 16 of the bill are contingent on the passage of the appropriation in secs. 12(b) and (c) of the bill by a three-fourths vote of the members of each house. As set out above, that condition has been met.

Sections 19, 20, and 21 set out the effective dates of the various sections of the bill.

XXI. Conclusion.

Although we have identified no other constitutional or legal issues in the bill, please be advised that it is not always possible to identify or comment on all legal issues in a bill of this complexity. However, we will assist the agencies throughout the year in interpreting and applying the provisions of the bill, as well as related legislation, to make certain that appropriations are implemented in a manner that is consistent with enabling statutes and valid legislative intent.

Sincerely,

Craig W. Richards
Attorney General

CWR:WEM:rjc