June 28, 1999

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

Re: CCS HB 50 -- Relating to the State Operating Budget
A.G. file no: 883-99-0062

Dear Governor Knowles:

At the request of your legislative director, Pat Pourchot, we have reviewed CCS HB 50. This is the operating budget bill for fiscal year 2000. It also includes one repeal/reappropriation section.

This is a relatively "clean" budget bill: it is not overly laden with statements of legislative intent, and there are only two instances where an appropriation is made contingent upon some event occurring. (Those two instances are discussed below.) By contrast, you will recall, last year's operating budget bill (ch. 137, SLA 1998) was replete with "mission" statements and proposed "performance measures" (all of which you vetoed). However, this bill does present one major issue, concerning unallocated reductions, which will be discussed below.

Because this is a budget bill, we will not attempt to do a section-by-section analysis of this bill. (Most of the beginning sections of the bill are similar to those in last year's bill, except of course for the numbers.) Instead we will discuss the unallocated reductions issue, make our usual observation on expressions of legislative intent, and then discuss a few specific sections and items.

As it has for many years, the legislature has again included negative allocation items in certain appropriations, items that are called "unallocated reductions."[1] We have in past years

[1] Our research indicates that the first negative allocation appeared in the FY 1992 operating budget, as part of the appropriation to the University of Alaska. In the FY 1993 operating budget the legislature for the first time used negative allocations widely, inserting them in many of the appropriations to the agencies. (The term "unallocated reduction" first appeared in this budget as well.) They have appeared in every operating budget since then, although until this year there have never been more than six or eight of them in each budget.

expressed the view that the use of these allocations would probably survive legal challenge.[2] However, the legislature is using unallocated reductions this year in a different manner than it has in past operating budgets, and that different manner presents serious new questions.

In the past it was clear that an unallocated reduction was to be confined to the appropriation in which it appeared; i.e., it was not the intent of the legislature that an unallocated reduction in one appropriation be applied to reduce another appropriation. That is not the case this year. The unallocated reductions this year are generally included in the appropriation for each department that includes the allocation for the department's commissioner's office. But the legislature has made it clear that its intent, in placing these reductions where they are, is to allow the departments to take the reductions anywhere in the departmental budget. See the language at the beginning of sec. 43 (the main part of the budget), which refers (at page 17, line 5) to "department-wide unallocated reductions."[3]

The serious new legal questions arise because each department's budget, as well as the court system's and the legislature's, consist of more than one appropriation.[4] However, we are not recommending any vetoes based on these questions, since it is not entirely clear to us that the legislature's new approach violates the Alaska Constitution or would require you, in administering the budget, to violate any such provision or any statute. Moreover, the consequences of such vetoes would be highly problematic.

The first question raised by the legislature's new approach is whether it has given you unconstitutionally broad discretion in making these reductions. The Alaska Supreme Court has ruled that the legislature cannot legally give the executive unfettered discretion to reduce appropriations after the bill making those appropriations has been enacted into law. *See State v. Fairbanks North Star Borough*, 736 P.2d 1140 (Alaska 1987) (holding unconstitutional AS 37.07.080(g)(2), which

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[2] Our most thorough discussion of unallocated reductions and the legal questions they raise appears in our bill review letter for the FY 1993 operating budget, CCS HB 405, the budget that most extensively utilized them. *See* 1992 Inf. Op. Att'y Gen. (June 30; 883-92-0142). (This opinion apparently is not included in the bound volumes.) We wrote then that the use of unallocated reductions would probably survive a legal challenge in light of AS 37.07.080(e), which allows the executive to transfer funds between allocations without the need for action by the legislature. We have repeated that opinion in subsequent operating budget bill review letters.

[3] For the court system and the legislature the unallocated reductions are made their own negative appropriations. Page 50, line 6; page 50, line 18. It is not clear why these two entities were treated differently, especially since in several previous operating budgets, including the FY 1999 budget, the court system's unallocated reduction was placed in an appropriation, instead of being its own appropriation. (The previous operating budgets, except for the FY 1993 budget, have not included an unallocated reduction for the legislature.)

[4] Only the operating budget for the University of Alaska consists of only one appropriation.

allowed the governor to withhold or reduce appropriations if the governor determined that estimated revenue would be insufficient to provide for all appropriations, because the governor is provided no policy guidance as to how to distribute cuts). This bill may present similar problems, because CCS HB 50 on its face provides no policy guidance to the agencies as to how to cut their budgets, and the legislative history of the bill with regard to this question is sparse. We cannot, however, give you a definitive answer as to whether the legislature's new approach is constitutional.[5]

The second question raised is whether the legislature's approach would require you to violate AS 37.07.080(e). That statute prohibits transfers between appropriations. But it is the legislature's intent, as noted above, that you do precisely that: that you take the unallocated reductions that appear in the appropriations for each commissioner's office and spread those reductions across the entire budget for each department. The budgets for every executive branch department, the court system, and the legislature consist of multiple appropriations. Only the budget for the University of Alaska (page 48, line 21 - page 49, line 32) consists of just one appropriation.

It can be argued that you would not be violating AS 37.07.080(e) in following the legislative intent to spread these unallocated reductions over the whole department. One possible argument is that this bill, with its clear expression of legislative intent, is the equivalent of an "act making transfers between appropriations" within the meaning of that statute.[6] Another possible argument is that a negative appropriation is not an appropriation within the meaning of the statute. As noted above, we do not know whether the courts would accept these arguments. But, as also noted above, we believe that the answer to the question is sufficiently unclear that we are not recommending vetoes of these allocations for unallocated reductions.[7]

As to the expressions of legislative intent included in the bill, we note, as we always do, that such expressions are not binding; you may choose to follow them or to ignore them. In the past, you and your predecessors in office have routinely vetoed these expressions, whether or not you agreed with them. It is not entirely clear that such vetoes would be constitutional -- a major case on

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[5] We note that the *Fairbanks North Star Borough* case involved the governor's impoundment of funds that had previously been appropriated by the legislature, whereas the question we are addressing here concerns direction by the legislature that allocations that add up to more than the total appropriated be reduced by the governor so as to match that total. The courts might find that this difference is constitutionally significant, so that the holding of the *Fairbanks North Star Borough* case would not be applicable to this situation.

[6] AS 37.07.080(e) provides in relevant part, "Transfers may not be made between appropriations . . . except as provided in an act making the transfers between appropriations."

[7] Because you may not raise the amount of an appropriation by vetoing a negative allocation item, the effect of vetoing the negative allocation items for unallocated reductions would be to prevent you from applying the reductions department-wide. The reductions would have to come totally out of the appropriation in which the negative item appears.

the scope of the item veto in appropriations bills is currently pending before the Alaska Supreme Court. (*Alaska Legislative Council v. Knowles*, Supreme Ct. Nos. S-8842, S-8851). We, though, anticipate no legal challenge of any vetoes of these statements.

Let us turn to the specific sections. Section 3 of this bill is proposed to be amended by sec. 60 of the capital budget bill, HCS CSSB 32(FIN) am H. This does not present any legal problems; we are just noting this for your information.

The first of the two contingencies is found in sec. 30 of the bill, which appropriates $5,239,700 from the oil and hazardous substance release prevention account to the storage tank assistance fund, but purports to make that appropriation contingent upon the enactment of a version of SB 128, relating to the storage tank assistance fund. The second is found in sec. 43, page 28, lines 17-20; it purports to make a small portion of a large appropriation to the Department of Fish and Game for commercial fisheries "contingent, on a dollar-for-dollar basis, upon the deposit of fees collected from the sale of commercial fishing licenses." These contingencies present two legal questions -- one, whether you may veto them without vetoing the appropriations to which they are appended and, two, whether the contingencies in themselves are legal.

Before addressing these questions we would note, with regard to the sec. 30 contingency, that you have signed HCS CSSB 128(FIN); it is now ch. 70, SLA 1999. Thus, since the contingent event is one that occurred with your agreement, you may want to let the section stand in its entirety without consideration of the legal questions. Similarly, because we do not understand that any agency objects to the language on page 28 of sec. 43 of the bill, you may also want to let that language stand. Because, however, you have in the past vetoed language that you did not object to, on the grounds that the legislature exceeded its powers in enacting such language, we will address the legal questions.

As we noted above, there is a case currently pending in the Alaska Supreme Court on the scope of the item veto in appropriations bills. Thus we cannot give you a definitive answer as to whether a veto of the contingency language would be legal. It does appear likely, though, that a veto would draw another legal challenge by the legislature. Thus, because the contingency language in both instances is apparently unobjectionable and because the legal issue that a veto would raise is already before the courts, we would not recommend a veto of this language.

The case before the Alaska Supreme Court also raises the issue of whether contingencies such as these violate the confinement clause of art. II, sec. 13 of the Alaska Constitution ("Bills for appropriations shall be confined to appropriations."). We are inclined to believe that both of these contingencies would be legal. Essentially a contingency is legal if it is closely related to the appropriation, as opposed to being legislation about an agency that is just tacked on to an agency's appropriation. Here the appropriation in sec. 30 of the bill, at least 80 percent of which will be for loans and grants, is made contingent upon SB 128's reduction of the maximum grant amount, placement of limits on who can receive grants, and enactment of provisions making those no longer eligible for grants eligible for loans instead. The contingency with regard to the commercial fisheries appropriation provides that money appropriated from the fish and game

fund may not be spent until an equivalent amount is collected from the sale of licenses and deposited into the fund. We believe that both of these contingencies constitute a legitimate qualification to the appropriation.[8]

Section 35(b) of the bill authorizes spending from the constitutional budget reserve fund (Alaska const., art. IX, sec. 17) if the unrestricted state revenue available for appropriation in FY 2000 is insufficient to cover general fund appropriations, but caps the amount that may be spent from the budget reserve fund at $1,010,000,000. This in itself presents no legal questions. The question is presented by the fact that the legislature enacted similar language in the capital budget bill, but with a cap there of $1,007,000,000.[9] Sec. 21(b) of HCS CSSB 32(FIN) am H. The two provisions are obviously inconsistent. Since only one of these two provisions will be operative, you could choose to veto either.

Section 36 of the bill is the reappropriation noted above. Our only comment on this section is to repeat what we have noted in previous years: that you have the power to veto the reappropriations while leaving the implicit repeal of the prior appropriation (a very small part of the FY 1999 appropriation to the Department of Education for K-12 support) intact. Here, a specific indication that you are leaving the implicit repeal intact would probably not be necessary, since the funds being reappropriated lapse on June 30, 1999.

At page 27, lines 9-10, of the bill, part of the budget of the Department of Environmental Conservation is an appropriation of $1,715,400 in other funds (federal funds, in this case) for non-point source pollution control. A section in the capital budget (sec. 16 of HCS CSSB 32(FIN) am H(reengrossed)) would reappropriate $566,000 of this sum. Section 16 is discussed in our review letter on the capital budget bill.

Page 46, lines 15-20 contain "intent of the legislature" language that goes beyond the usual making of suggestions. This language says, "It is the intent of the legislature that $500,000 of the amount appropriated from federal receipts for Central Region Highways and Aviation is for contracted maintenance and operation of Mitchell Field at Adak and is contingent upon receipt of federal receipts for maintenance and operation of Mitchell Field and the execution of a long-term

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[8] By contrast, *see* sec. 2(b), ch. 2, SLA 1999 (the supplemental budget bill for FY 1999), which made an appropriation of over $13,000,000 to the disaster relief fund contingent upon the enactment into law of a version of a bill that would amend the definition of "disaster." In our letter to you on CCS HB 100, the bill that became ch. 2, SLA 1999, we expressed strong concerns about the constitutionality of subsection (b). *See* 1999 Inf. Op. Att'y Gen (March 17; 883-99-0003), at 2.

[9] It is our understanding that the legislature had intended only one budget reserve fund authorization, that one in the capital budget bill. Through quirks in the legislative process, a second authorization was added to this bill.

agreement between the Department of Transportation & Public Facilities and either the Adak Reuse Corporation or the City of Adak regarding the maintenance and operation of Mitchell Field. Provision of these services may not be made using general funds." We believe that this contingency language is not binding upon the executive branch, because it is phrased as intent language. If the legislature had intended this to be a true contingency, it would have used pure contingency language, or have made the $500,000 a separate appropriation item. Similarly, we believe that the alleged prohibition on use of general funds for maintenance and operation of the field is also not binding, but again is only a nonbinding expression of intent.[10]

We find no other constitutional or legal problems with the bill. However, if you decide to exercise your item veto with regard to this bill, we would refer you to the advice we rendered last year about the constitutionally required statement of reasons for vetoes. 1998 Inf. Op. Att'y Gen. (June 17; 883-98-0127).

Sincerely,

Bruce M. Botelho
Attorney General

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[10] Our discussion here is equally applicable to the language found on page 17, lines 16-25. Although paragraph (3) uses the term "shall," this language is not binding. Moreover, if the language in (3) were construed as binding, its inclusion in this bill would violate the confinement clause, that part of art. II, sec. 13 of the Alaska Constitution that provides that "[b]ills for appropriations shall be confined to appropriations." Obviously a provision relating to confidentiality of records held by a state agency has nothing to do with appropriations.