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Via Email and Facsimile: governor@alaska.gov; (907) 465-3532
Governor Parnell
Alaska State Capitol Building
Third Floor
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Parnell:

We write to express our opposition to legislation introduced by you and some legislators that is currently making its way through House and Senate committees: HB 77/SB 26; HB 47; SB 32; and HB 78/SB 27. The bills HB 77/SB26 and HB 47 roll back protections for fish and game habitat as well as restrict the democratic process of public notice and comment on administrative decisions and to redress grievances in court regarding legally questionable decisions. Senate Bill 32 designates a hydroelectric site at Chikuminuk Lake as not being an incompatible use in Wood-Tikchik State Park. The bill HB 78/SB 27 appears to be an expensive way to fix a problem that does not exist.

Nunamta Aulukestai ("Nunamta") comprises directors appointed by eleven Native Corporations and nine tribes, including Ekwok Natives Limited, Koliganek Natives Limited, Saguyak Inc., Aleknagik Natives Limited, Choggiung Limited, Stuyahok Limited, Manakotak Natives Limited, Togiak Natives Limited, Levelock Natives Limited, Bristol Bay Native Corporation, Twin Hills Native Corporation, Ekwok Village Council, New Koliganek Village Council, Clarks Point Village Council, Aleknagik Traditional Council, Curyung Tribal Council, New Stuyahok Traditional Council, Manakotak Village Council, Togiak Traditional Council, Levelock Village Council. Nunamta represents Alaska residents in the Bristol Bay region who rely on the land, fish, wildlife, cultural resources and waters of the region for subsistence and their cultural way of life. Since its founding in 2006, Nunamta has actively advocated to protect the natural resources of Bristol Bay from the threats to those resources, namely offshore oil and gas development in Bristol Bay and the proposed Pebble Mine. That advocacy has involved active participation in the public notice and comment periods for state-issued permits — to the extent such notice is provided — as well as subsequent litigation. In fact, the pending legislation appears to be, in part, a reaction to Nunamta's activities to protect the resources that are so vital to tens of thousands of Alaskans by taking measures to legally curtail such activities.

Regardless of whether and how nonrenewable resources are ultimately developed in our region, we urge you to desist from stripping from law the processes that help provide for more transparent government, airing of grievances and hopefully resolutions of some of our differences in a way that protects fish, wildlife, the land and our way of life that depends on it.

Nunamta strongly opposes the following legislation for the reasons provided:

SB 26/HB 77

The bill makes many significant, unrelated changes to the statutes that govern DNR: (1) the creation of a general permitting system for any activity "unlikely to result in significant and irreparable harm"; (2) changes the law on notice and comment for preliminary best interest findings; (3) liberalizes the number of temporary water use permits that can be issued to a single project; (4) changes the law that governs exchanges of state land; (5) severely limits who can participate in the administrative process before DNR; and (6) eliminates an entire class of in-stream flow applicants and rejects 30 years worth of pending applications. This bill contains so many significant changes that it is difficult to articulate all the issues with it in just one letter.

A. Takes away individuals' and NGOs' ability to obtain in-stream water rights.

In-stream water rights exist to protect recreation and fish and wildlife habitat. DNR reports that it currently has 438 applications that are pending; 37 of those would be impacted by these changes and were filed by approximately 10 different groups, including one of our member organizations. The bill directs DNR to reject those pending applications for in-stream water rights and eliminates the opportunity for groups to apply for in-stream water rights in the future. Most of the pending applications are from Alaska Department of Fish and Game ("ADF&G"), U.S. Fish and Wildlife Service ("USFWS"), and the Bureau of Land Management ("BLM"). The rejected applications would be sent to agencies to review and possibly refile, but the applications have already been under review by the agency for years. If the bill passes and the applications are rejected, applicants would lose their priority date. First in time, first in right is fundamental to the water rights appropriation system in Alaska and protection of in-stream flow for fish and wildlife habitat.

Further, temporary water use permits, issued for resource exploration and extraction projects, require no public notice and comment and are generally issued in a matter of days or weeks. (And this legislation would ratify the continued renewal and use of temporary water use permits, no matter the size or length of a project). ADF&G also issues Title 16 fish habitat permits with no notice and comment; again, on a very short timeframe. In-stream flow applications are therefore the only vehicle for concerned citizens to request that DNR review and protect important fish habitat.

There is no valid reason to deprive the public of the ability to ask DNR to protect these important water resources. Nunamta opposes the enactment of this law.

B. Makes the Notice and Comment Process for Preliminary Best Interest Findings No Longer Mandatory and Raises the Bar for Standing before the Agency

DNR stated in the legislative hearings and in its sectional analysis that Section 3 "clarifies" that the director may provide a Preliminary Best Interest Finding for public comment under AS 38.05.035(e)(6). In the House Resources Committee hearing on February 1, 2013, a DNR representative indicated that this change increases public process. That statement is incorrect.

To comply with the Alaska Constitution, DNR must conduct a "best interest finding" (BIF) before it disposes of interests in state lands. Under current law, Alaskans have an opportunity to comment on the possible impacts a proposal may have on water, fish, and human health before DNR makes a final decision. The proposed changes will remove the requirement for public review and comment on preliminary BIFs for some kinds of decisions, including exploration licenses, removing the ability for the public to weigh in on these agency decisions regarding the impacts of development throughout the state. The proposed changes removing a requirement for notice and comment on these documents will strip the public of its ability to participate in decisions that may adversely affect fish and wildlife habitat. DNR has also raised the requirements for who may participate in the administrative process for most DNR decisions, further limiting the public's ability to seek reconsideration of DNR decisions that impact subsistence and cultural resources.

C. Makes Administrative Standing Very Difficult to Establish

The new standard in the bill replaces "aggrieved" as the standard for someone to establish standing before DNR. Currently AS 44.37.011(b) states, "[i]f a person is aggrieved by a decision of the Department of Natural Resources . . . the person may appeal to the commissioner." DNR interprets the term "aggrieved by" to mean "affected by." 11 AAC 02.010(a).

"Aggrieved" is used as a standard in Alaska law — dozens of times. *See, e.g.*, AS 29.40.060(a) ("The assembly shall provide by ordinance for an appeal by a municipal officer or person aggrieved from a decision of a hearing officer, board of adjustment, or other body to the superior court."); AS 34.45.400(a) ("A person aggrieved by a decision or action of the department under this chapter may apply to the department within 60 days after the mailing date of the department's notice to the person, giving notice of the grievance and requesting an informal conference. At the conference the person aggrieved may present arguments and evidence relevant to the decision or action of the department. "); AS 18.80.135(a) ("A complainant, or person against whom a complaint is filed or other person aggrieved by an order of the commission, may obtain judicial review of the order in accordance with AS 44.62.560 - 44.62.570."). The Alaska Supreme Court views "aggrieved" as equivalent to the standard for judicial standing in Alaskan courts. As such, "aggrieved" does not describe someone who "just doesn't like" a decision by DNR (something a DNR representative said during the House

Resource Committee hearing). Someone who is "aggrieved" "has an interest adversely affected by the conduct complained of." *Gilbert M. v. State,* 139 P.3d 581, 586 (Alaska 2006).

Sections 30 and 31 of these two bills require a person to be "substantially and adversely affected" in order to appeal a decision to the Commissioner. Section 33 of the bill defines "adversely affected" as creating or imposing "an adverse and direct effect or detriment on the person or the interests of that person." Similarly, Section 39 requires "physical or financial detriment" to be established to challenge a water appropriation. These new standards impose much higher burdens of proof for anyone to appeal a legally questionable decision by DNR. Impacts to cultural uses would be hard to prove. And subsistence impacts, no matter how concrete, would be insufficient to challenge water appropriations to other users, which are permanent property rights that can significantly affect fish, wildlife, habitat and other users. Providing input to the government and questioning its decisions is a basic tenet of democracy. Nunamta opposes these legislative changes.

D. Codifies in a Very Expansive Way DNR's Practice of Using General Permits

Section 1 of the bill adds general permitting authority to DNR's enabling statute. DNR stated that they are clarifying their already existing general permitting authority. A DNR representative told House Resources on January 30, 2013, that DNR already has this authority under AS 38.05.020, but that a specific reference to "general permitting" would avoid procedural lawsuits (which is another way of saying that a Court might not agree that the authority already exists). The referenced section provides the Commissioner's general authority to carry out the chapter. There is no express authority for general permits, and while creating such authority may make sense, the scope of authority that this bill creates is far too broad to be supportable.

The bill gives DNR general permitting authority whenever an activity is "unlikely to result in significant and irreparable harm." The examples mentioned by DNR in the House Resources Committee included general permits for nontimber forest products (e.g., commercial pine cone collection) and the Cook Inlet Boat Storage Area. Other possible areas cited by DNR as ripe for general permitting were commercial filming on state lands, personal use cabins, and float home renewals. But the permitting authority is much broader than that, and could include much bigger decisions, including some resource extraction decisions. Activities authorized under general permits would not be subject to any public notice and comment once the general permit is established. Because the general permitting authority is defined in a way that could lead to Alaskans receiving no public notice and comments on resource decisions that directly affect them, Nunamta opposes this change to the law. If there is to be general permitting, it should be restricted to those kinds of activities that "will not result in significant harm," rather than the proposed language "unlikely to result in significant and irreparable harm."

HB 47

If passed, HB 47 will impose a mandatory bond requirement on any person "seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects in industrial operation." HB 47 at § 1. "Industrial operation" includes "a construction, energy, or timber activity and oil, gas, and mineral exploration, development, and production." *Id.* Under this legislation, a party that challenges an industrial permit, whether they seek preliminary relief or not, will have to post a bond covering broad categories of project costs to even file a case or maintain an appeal. The costs the bond must cover include employee wages and benefits, as well as contractor or subcontractor payments.

The bill represents a significant change from the statutes, regulations, and court rules that are currently in place in Alaska. Indeed, it fundamentally changes the balance of the separation of powers that defines our government. In an original action, a court currently has considerable discretion regarding imposing a bond when a party seeks a temporary restraining order or preliminary injunction. Alaska R. Civ. P. 65(c). This broad discretion is consistent with Federal Rule of Civil Procedure 65(c). If a party files an appeal of a permitting decision, under Alaska Appellate Rules 204(d) and 603(a)(2), the Superior Court sitting as a court of review also has considerable discretion regarding imposing a bond to stay the decision of the agency. *See Breck v. Moore*, 910 P.2d 599, 609 (Alaska 1996). The Court also has broad authority to dismiss frivolous claims and to sanction parties who abuse the system.

Alaska is already the only state in the nation that imposes on litigants the cost of paying for an opposing party's costs and fees in court challenges. Thus, there are already substantial hurdles and significant deterrents to bringing lawsuits. This bill will effectively prevent anyone but the wealthiest corporations from being able to challenge resource permitting decisions in the state. Nunamta opposes this bill. It represents another shift in government favoritism to Outside and foreign interests seeking to exploit Alaskan resources while taking away the rights of Alaskans to seek balanced decisions that protect their fish and water resources.

SB 32

This bill states that in addition to Lake Elva and Grant Lake, "[d] evelopment and operation of a hydroelectric site at . . . Chikuminuk Lake is not considered an incompatible use" in Wood-Tikchik State Park. Chikuminuk Lake is important for subsistence and a hydroelectric site would have a significant adverse impact to the fish habitat there. Further, the enabling legislation for Wood-Tikchik State Park did not provide for Chikuminuk Lake as a hydroelectric site. SB 32 does not provide any basis for such a significant change to the lands and waters long protected as a state park. Nunamta strongly opposes this bill.

HB 78/SB 27

This bill authorizes DNR and DEC to apply for delegation of dredged and fill permitting under Section 404 of the Clean Water Act from the U.S. Army Corps of Engineers. The 404 Program is extremely expensive to implement and maintain, and only two other states (Michigan and New Jersey) have such oversight — and Michigan is trying to give the program back.

In December, Virginia released a feasibility study analyzing whether to seek delegation of the 404 Program and found it to be much too expensive. Virginia found that the delegation process was complex and lengthy, with no guarantee that the program would ultimately be delegated. The cost was estimated at $18 million for the assumption of the program over five years and $3.4 million annually thereafter. There is also no federal funding to defray the costs of the program. So, despite the fact Alaska is tightening its belt and is dealing with a permit backlog, this bill would commit significant financial resources for decades to come. Further, even if Alaska assumed authority over the 404 Program, the Army Corps retains jurisdiction over navigable waters —most waters in Alaska— and their associated wetlands.

The irony of the bill, however, is that it appears to be a reaction to the Environmental Protection Agency's watershed assessment in Bristol Bay and the potential decision to place certain areas off limits for dredged and fill permits for large-scale industrial mining in the world's premier salmon fisheries. EPA's jurisdiction and authority under Section 404(c) would not be affected by Alaska taking over the 404 Program.

Nunamta is strongly opposed to the passage of this bill.

Thank you for your attention to these issues.

Sincerely,

Luki Akelkok, Chairman

Thomas Tilden, Vice Chairman

Sharon Clark, Secretary/Treasurer

Bobby Andrew, Spokesman

Jimmy Coopchiak, Boardmember

Moxie Andrew, Jr., Boardmember

Kenneth Nukwak, Boardmember

Herman Nelson, Boardmember

Dennis Andrew, Sr., Boardmember

Joyce Armstrong, Boardmember

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Debbie Haseth, Boardmember

cc: Bristol Bay Native Corporation
Bristol Bay Native Association
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Rep. Chenault
Rep. Johnson
Rep. Keller
Rep. Hughes
Rep. Hawker
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