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State of Alaska
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RE: Comments of Stanley Mack Opposing the Petition of the City of
Dillingham to Annex Nushagak Commercial Salmon District Waters
and Wood River Sockeye Salmon Special Harvest Area Waters

Dear Mr. Williams:

I respectfully request the Local Boundary Commission to deny this Petition, and I provide these written comments pursuant to 3 AAC 110.480(d).¹ Although I am the Mayor of the Aleutians East Borough, I offer these comments solely in my individual capacity as a resident of Sand Point who grew up in King Cove and has been a lifelong commercial fisherman. Several reasons should lead the Commission to deny the City of Dillingham's request to annex 399 square miles of uninhabited territory and thereby grow more than 11 times in size. Approving the proposed annexation would:

¹ The Petition is formally styled "Petition to the Local Boundary Commission for Annexation of Nushagak Commercial Salmon District waters and Wood River Sockeye Salmon Special Harvest area waters, together consisting of approximately 396 square miles of water and 3 square miles of land (small islands) [,] to the City of Dillingham Using the Local Option (Voter Approval) Method." The Petition is dated June 14, 2010, although the City of Dillingham's Mayor has in a letter dated September 21, 2010 submitted to the Commission seven new pages to correct errors in the Petition as originally filed.

- violate the requirement of limitation of community for cities set out in Alaska law;
- promote the balkanization of local government by creating a disincentive to form a borough government that would include the City of Dillingham; and
- work against the best interests of the State by reducing tax revenues that would go to other local governments affected by the fishing industry in Southwest Alaska.

I. The Proposed Annexation Would Violate the Requirement of Limitation of Community for Cities Set Out in Alaska Law

In Alaska, a city is supposed to have jurisdiction over a small area and be a community featuring intense common interests.² The statute setting the requirements for incorporation of a city refers repeatedly to a “community.”³ A leading Alaska Supreme Court case on formation of local governments refers approvingly to cases from other jurisdictions that require the area annexed into what is now called a city in Alaska be “urban or semi-urban in character.”⁴ The Alaska Supreme Court went on to quote from a case stating that⁵

There must exist a village, a community of people, a settlement or a town occupying an area small enough that those living therein may be said to have such social contacts as to create a community of public interest and duty....

² See 3 AAC 110.130(c); and *Mobil Oil Corp. v. Local Boundary Commission*, 518 P.2d 92, 100-01 (Alaska 1974).

³ AS 29.05.011.

⁴ *Mobil Oil Corp. v. Local Boundary Commission*, 518 P.2d at 100. The Alaska Supreme Court opinion refers to a “municipality” as opposed to a city in making a contrast to a borough because the statutes existing in 1971 at the time of the filing of the borough incorporation petition at issue in that case distinguished between municipal corporations formed under Title 29 of the Alaska Statutes and boroughs formed under Title 7 of the Alaska Statutes. *Mobil Oil Corp. v. Local Boundary Commission*, 518 P.2d at 95. Since 1972, the Alaska statutes refer to both cities and boroughs as municipalities. Note that the Commission’s regulations specifically state that “Requirements relating to limitation of community, as set out in 3 AAC 110.130(c), do not apply to boroughs.” 3 AAC 110.190(g).

⁵ *Mobil Oil Corp. v. Local Boundary Commission*, 518 P.2d at 100 (footnote omitted).

The Alaska Supreme Court calls this requirement a "limitation of community,"⁶ and the regulations governing the Commission's decision on a city's proposed annexation now set it out explicitly. 3 AAC 110.130(c) provides⁷:

To promote the limitation of community, *the proposed expanded boundaries of the city*

(1) must be on a scale suitable for city government and may include only that territory comprising an existing local community, plus reasonably predictable growth, development, and public safety needs during the 10 years following the effective date of annexation; and

(2) *may not include* entire geographical regions or *large unpopulated areas*, except if those boundaries are justified by the application of the standards in 3 AAC 110.090 - 3 AAC 110.135 and are otherwise suitable for city government.

The City of Dillingham proposes to annex almost all of Nushagak Bay, an entirely unpopulated area comprising more than 350 square miles whose attraction to the City is the millions of pounds of salmon caught there every year that the City could tax by acquiring jurisdiction.⁸ The proposed annexation would make the City 11 times larger than it is today in area without increasing its population. This request does not fit within the narrow exception to the limitation of community principle set out in 3AAC 110.130(c) and as such does not comply with Alaska law.

The two instances the City of Dillingham cites of the Commission approving the annexation by cities of substantial areas of ocean included substantially different facts from what the Commission faces here.⁹ In the City of Togiak matter, the Commission was heavily influenced by concerns about helping the city address problems created by the alcohol coming from

⁶ *Mobil Oil Corp. v. Local Boundary Commission*, 518 P.2d at 100.

⁷ Emphasis added.

⁸ Along with the proposed annexation of most of Nushagak Bay, the City of Dillingham's Petition also seeks to annex a portion of the Wood River that appears to be relatively small in area.

⁹ See "Summary of Proposed Action[,] Findings of Fact[,] Statement of Decision," "In the Matter of the Annexation of the City of Togiak, Alaska, of Togiak Bay, Consisting of Approximately 183 Square Miles," January 18, 1985 [hereinafter, "1985 Togiak Decision"]; and "Summary of Proposed Action[,] Findings of Fact[,] Conclusions of Law[,] Statement of Decision," "In the Matter of the Petition for Annexation by the City of St. Paul, Alaska of Approximately 194 Square Miles[,] Consisting of Otter Island, Walrus Island and the Territory Three Nautical Miles Seaward of these Islands," January 19, 1986 [hereinafter, "1986 St. Paul Decision"].

vessels into a community in which the sale and importation of alcohol was illegal.¹⁰ The City of Dillingham is a wet community by law, and the strong concerns over illegal alcohol importation that animate the Commission's decision in the City of Togiak matter do not apply.

The St. Paul matter is also distinguishable, as that community is almost uniquely isolated far out in the Bering Sea with the lower-population St. George at 40 miles away being the only other community in a very large area.¹¹ Nushagak Bay, on the other hand, is in the heart of a region featuring numerous fishing-oriented communities.

II. Approving this Annexation Would Promote the Balkanization of Local Government by Inhibiting the Formation of a Borough

The City of Dillingham twice before tried to annex substantial swathes of ocean, and the Commission rebuffed those efforts both times. A quick review of those petitions and how they were adjudicated is instructive.

In 1986, the City of Dillingham petitioned to annex 918.25 square miles, including waterways of Nushagak Bay, including areas in which floating fish processors anchored.¹² The Commission rejected this request, and only approved the annexation of approximately 40 square miles, none of which included any portion of Nushagak Bay.¹³ The Commission noted that the City of Dillingham's petition was motivated by a desire to obtain the revenue generated by raw fish taxes that could be gained by annexing the waters on which floating fish processors did the processing.¹⁴ The Commission found that allowing the annexation of Nushagak Bay as proposed "would not only allow the City to obtain additional revenues without the encouragement to pursue borough formation, it would constrain the area in terms of a potential revenue base for any future borough."¹⁵ Such a result would be undesirable, the Commission stated, because "the

¹⁰ See 1985 Togiak Decision, Summary of Proposed Action and Findings of Fact I and II.A.

¹¹ See 1986 St. Paul Decision, Finding of Fact 4.

¹² "Statement of Decision," "In the Matter of the Petition for Annexation of Territory to the City of Dillingham, Alaska," December 10, 1986 [hereinafter "1986 Dillingham Decision"], pp. 1, 2, and 4.

¹³ 1986 Dillingham Decision, pp. 3, 7-8.

¹⁴ 1986 Dillingham Decision, p.1.

¹⁵ 1986 Dillingham Decision, p. 5.

door must remain open” for the creation of a regional form of government to address regional problems.¹⁶

The City of Dillingham petitioned the next year—1987—to annex 421.25 square miles, 409 of which were water.¹⁷ The area sought to be annexed included “the waterways of Nushagak Bay from Protection Point to and including the mouth of Wood River.”¹⁸ These waters included in the proposed annexation included “the ‘core’ area of anchorage for Nushagak Bay processors” where a majority of floating fish processors in the Bay operated most of the fishing season.¹⁹

The Commission rejected this second large-scale annexation attempt as well, finding that the problems sought to be addressed by the annexation “are regional in nature.”²⁰ Again, the Commission wanted to do nothing to hurt the possibility of a borough being formed²¹:

[C]ity government is intended to address local governmental needs on a community level and a borough government is intended to address such needs on a regional level... [A] city is not the appropriate vehicle to address such needs on a regional level.

The Commission only approved an amended petition that allowed the City of Dillingham to annex 12.25 square miles of land and waterways immediately adjacent to the City.²²

Now the City of Dillingham comes again to the Commission seeking to annex virtually all of Nushagak Bay. The Commission should again deny this request. As the Commission has repeatedly announced before, the way to satisfy the City of Dillingham’s desire to be in a unit of local government holding jurisdiction over a very large area of regional concern is for there to be a borough in that area around the City. Approving the

¹⁶ 1986 Dillingham Decision, p. 6.

¹⁷ “Statement of Decision,” “In the Matter of the Petition for Annexation of Territory to the City of Dillingham, Alaska,” January 16, 1988 [hereinafter “1988 Dillingham Decision”], p. 1.

¹⁸ 1988 Dillingham Decision, p. 1.

¹⁹ 1988 Dillingham Decision, p. 1.

²⁰ 1988 Dillingham Decision, p. 3.

²¹ 1988 Dillingham Decision, p.3.

²² 1988 Dillingham Decision, pp. 2, 11-12.

City of Dillingham's Petition will only create more barriers to the formation of such a borough.

III. Approving this Petition Would Work Against the Best Interests of the State by Reducing Tax Revenues that Go to Other Local Governments Significantly Affected by the Fishing Industry in Southwest Alaska

This proposed annexation will cause a loss of revenues for other local governments—including the Aleutians East Borough—through the operation of the “extraterritorial” payments from the State out of collections of the fisheries business tax (also called the State’s “raw fish tax.”)

State law allows municipalities that demonstrate “significant effects” from commercial fisheries to apply for and receive revenues out of that portion of the State’s raw fish tax collections that was from fish not processed in the jurisdiction of any of the State’s local governments.²³ The Aleutians East Borough faces some of those significant effects, in part because some fish caught in Nushagak Bay are transported to the Borough for processing. (This transportation of fish to the Borough occurs because processing plants in Dillingham lack the capacity to handle all the demand for their services and sometimes cannot process all the fish caught in the Bay.) The Aleutians East Borough thus gets some of this revenue distributed in “extraterritorial” payments, as the City of Dillingham could—and presumably does.²⁴

Some of the money from such “extraterritorial” payments has historically come from processing of fish by floating processors in Nushagak Bay, as the City of Dillingham’s two previous petitions have shown. If the Commission approves this Petition, the City of Dillingham will have jurisdiction of virtually all of Nushagak Bay, and none of the revenues the

²³ See AS 29.60.450(a); AS 43.75.137; and AS 43.75.130.

²⁴ The City of Dillingham’s Petition at page 7 states that “Currently, neither Dillingham nor any other community in the bay area receives any State business fishery tax from the harvest of Nushagak Bay fish that is processed elsewhere. Because of the availability of “extraterritorial” payments, that statement is almost certainly incorrect.

There is at least one other error in the Petition. On page 54, the Petition states that the City of Dillingham will likely structure its proposed new tax similarly to that of the Lake and Peninsula Borough, “where a buyer of resources pays either a sales or severance tax on the value of the raw fish harvested, but not both.” The reality is that the incidence of such a tax is on the fisherman, not the buyer of the fish.

State collects from processing of those fish in the newly annexed area will go into the pot of funds distributed as "extraterritorial" payments. That redistribution of funds will reduce those "extraterritorial" payments that would otherwise go to the Aleutians East Borough and other local governments facing significant effects from commercial fishing. The amount of loss of revenues is hard to measure because of problems in the statistical information being kept by the State and barriers of confidentiality in releasing all the information that has been collected, but it would be a real loss to the Aleutians East Borough and other local governments.

For all the above reasons, I respectfully urge the Commission to deny the Petition.

Sincerely,


Stanley Mack