

AN ACT ENTITLED

“An Act providing for protection of wild salmon and fish and wildlife habitat”

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA:

*Section 1. The uncodified law of the State of Alaska is amended by adding a section to read:

Alaska Fish Habitat Policy.

Because wild salmon are critically important to Alaska’s communities, economies and cultures, it is the policy of the State of Alaska to:

- (a) ensure sustainable fisheries for current and future generations by maintaining wild salmon stocks, other anadromous fish species, and important fish and wildlife habitat;
- (b) protect water resources and habitat that support Alaska’s wild salmon and other anadromous fish species;
- (c) ensure that development activities comply with enforceable standards that protect wild salmon, other anadromous fish species, and important fish and wildlife habitat; and
- (d) ensure that the Department of Fish and Game protects the natural fishery resources of Alaska consistent with Article VIII of the Alaska Constitution.

*Section 2. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.867. Fish and wildlife habitat protection standards.

- (a) The commissioner shall ensure the proper protection of fish and wildlife, including protecting anadromous fish habitat from significant adverse effects.
- (b) When issuing a permit under AS 16.05.867-16.05.901, the commissioner shall ensure the proper protection of anadromous fish habitat by maintaining:
 - (1) water quality and water temperature necessary to support anadromous fish habitat;
 - (2) instream flows, the duration of flows, and natural and seasonal flow regimes;
 - (3) safe, timely and efficient upstream and downstream passage of anadromous and native resident fish species to spawning, rearing, migration, and overwintering habitat;
 - (4) habitat-dependent connections between anadromous fish habitat including surface-groundwater connections;
 - (5) stream, river and lake bank and bed stability;
 - (6) aquatic habitat diversity, productivity, stability and function;
 - (7) riparian areas that support adjacent fish and wildlife habitat; and
 - (8) any additional criteria, consistent with the requirements of AS 16.05.867-AS 16.05.901, adopted by the commissioner by regulation.
- (c) The commissioner is authorized, in accordance with AS 44.62, to adopt regulations consistent with AS 16.05.867-16.05.901. All regulations, administrative actions and other duties carried out under this chapter shall be consistent with and in furtherance of the standards set out in this section.

* Section 3. AS 16.05.871 is repealed and reenacted to read:

Sec. 16.05.871. Fish habitat permit required for certain activities in anadromous fish habitat.

- (a) Except as provided under AS 16.05.891, a person must obtain an anadromous fish habitat permit under AS 16.05.867 - 16.05.901 before initiating any activity that may use, divert, obstruct, pollute, disturb or otherwise alter anadromous fish habitat. The commissioner may specify in regulation activities that do not require an anadromous fish habitat permit if the activity has only a de minimis effect on anadromous fish habitat.
- (b) The commissioner shall specify in regulation anadromous fish habitat.

- (c) In the absence of a specification under (b) or a site-specific determination by the department under (e) of this section, the commissioner shall presume that a naturally occurring permanent or seasonal surface water body, including all upstream tributaries and segments, is anadromous fish habitat if it is connected to anadromous waters specified under (b) of this section or connected to marine waters.
- (d) The presumption established under (c) of this section applies exclusively to AS 16.05.867-16.05.901.
- (e) The department may conduct a site-specific review at the request of an applicant to determine whether to exclude a water body from the presumption established under (c) of this section. A determination that a water body is not anadromous fish habitat must be supported by the commissioner's written finding and verifiable documentation that it is not anadromous fish habitat. Any site-specific determination must be made available on the department's internet website with public notice provided through the Alaska Online Public Notice System (AS 44.62.175). The commissioner shall adopt regulations specifying how the department shall conduct site-specific reviews.
- (f) In this chapter, "anadromous fish habitat" means a naturally occurring permanent or intermittent seasonal water body, and the bed beneath, including all sloughs, backwaters, portions of the floodplain covered by the mean annual flood, and adjacent riparian areas, that contribute, directly or indirectly, to the spawning, rearing, migration, or overwintering of anadromous fish.

*Section 4. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.875. Anadromous fish habitat permit application.

- (a) An applicant for an anadromous fish habitat permit shall complete an application on a form approved by the department for a permit under AS 16.05.867-16.05.901 and submit the application to the department. The commissioner shall require or collect all information, plans and specifications necessary to assess the proposed activity's potential adverse effects on anadromous fish habitat, and may collect or request additional information to evaluate an application. An applicant shall provide all information required or requested by the commissioner to assess a proposed activity's effects on anadromous fish habitat, including
 - (1) the scope, timing and duration of the proposed activity; and
 - (2) mitigation measures planned for areas of affected anadromous fish habitat.
- (b) Upon receiving a complete fish habitat permit application and any other information requested or collected by the commissioner, the commissioner shall determine whether the proposed activity has the potential to cause significant adverse effects on anadromous fish habitat under AS 16.05.877(a). Before making the determination, the commissioner may work with the applicant in planning the activity to avoid or minimize the activity's potential adverse effects on anadromous fish habitat.
- (c) If the commissioner finds that a proposed activity with proposed conditions and mitigation measures will not cause significant adverse effects to anadromous fish habitat under AS 16.05.877(a), the commissioner shall determine the application is for a minor anadromous fish habitat permit under AS 16.05.883.
- (d) If the commissioner finds that a proposed activity has the potential to cause significant adverse effects to anadromous fish habitat under AS 16.05.877(a), the commissioner shall determine the application is for a major anadromous fish habitat permit under AS 16.05.885.
- (e) The department shall provide public notice of a determination made under this section. The department shall
 - (1) post notice of the determination on the Alaska Online Public Notice System (AS 44.62.175); and
 - (2) make a copy of the application available on the department's website.

* Section 5. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.877. Significant adverse effects.

- (a) The commissioner shall find the potential for significant adverse effects where the activity may, singly or in combination with other factors:
 - (1) impair or degrade any habitat characteristic protected under AS 16.05.867;
 - (2) interfere with or prevent the spawning, rearing, or migration of anadromous fish at any life stage;
 - (3) result in conditions known to cause increased mortality of anadromous fish at any life stage;
 - (4) lower the capacity of anadromous waters to maintain aquatic diversity, productivity or stability; or
 - (5) impair any additional criteria, consistent with the requirements of AS 16.05.867-16.05.901, adopted by the commissioner through regulation.
- (b) The commissioner shall find that the proposed activity will cause substantial damage to anadromous fish habitat and fish and wildlife species if, despite the application of scientifically proven, peer reviewed and accepted mitigation measures under AS 16.05.887, the anadromous fish habitat will be adversely affected such that it will not likely recover or be restored within a reasonable period to a level that sustains the water body's, or portion of the water body's, anadromous fish, other fish, and wildlife that depend on the health and productivity of that anadromous fish habitat.
- (c) In determining whether anadromous fish habitat will recover or be restored within a reasonable period under this section, the commissioner shall account for the life stage, life span, and reproductive behavior of the species of anadromous fish that depend on the habitat adversely affected by the proposed activity using the best available scientific information.
- (d) In determining whether adversely affected anadromous fish species will remain sustainable and recover, the commissioner shall consider likely post-project conditions known to result in the mortality of anadromous fish at any life stage, and known to interfere with or prevent spawning, rearing or migration of anadromous fish using the best available scientific information.

*Section 6. AS 16.05 is amended by adding new sections to read:

Sec. 16.05.883. Minor individual anadromous fish habitat permit.

- (a) A minor anadromous fish habitat permit may be issued by the commissioner for an activity if the commissioner determines that:
 - (1) all application requirements under AS 16.05.875 are met, including the determination that the activity will not cause significant adverse effects to anadromous fish habitat; and
 - (2) public notice has been given as required in AS 16.05.875(e).
- (b) The minor anadromous fish habitat permit under this section must include all permit conditions or mitigation measures required of the permittee under AS 16.05.887.

Sec. 16.05.884. General permits for minor activities.

- (a) The commissioner may authorize a general permit on a regional or other geographical basis for similar activities, if the commissioner determines that:
 - (1) the activity will not singly or cumulatively cause significant adverse effects on anadromous fish habitat;
 - (2) the activity is not related to large-scale development;
 - (3) adverse effects can be avoided by meeting certain conditions and stipulations;
 - (4) any conditions or stipulations are mandatory and enforceable; and

- (5) a general permit is in the public interest.
- (b) The commissioner may issue a proposed general permit or a person may petition the commissioner to issue a proposed general permit.
- (c) A petition shall include a description of the geographic location and the proposed permitted activity and provide information explaining how the activity meets the requirements under (a) of this section. The commissioner shall determine whether to grant or deny a petition within 30 days.
- (d) When the commissioner makes a determination to propose a general permit under (b) or (c) of this section, the commissioner shall provide public notice of the proposed general permit and provide at least 30 days for receipt of public comments. The commissioner shall hold at least one public hearing if requested by an interested person. If the proposed general permit meets the requirements in (a) of this section, the commissioner may make a determination to issue a general permit.
- (e) The commissioner may issue a regional or geographical authorization to cover any person conducting an activity under a general permit or require a person to first obtain a written authorization from the department before being covered under the general permit. The department shall make general permit authorizations available through electronic means. The commissioner shall issue a decision on a request for written authorization within 5 work days after receiving the request. The general permit authorization shall set forth enforceable stipulations to avoid adverse effects to anadromous fish habitat.
- (f) The commissioner shall review a general permit at least every 5 years. The commissioner may make a determination to reissue the general permit if the requirements under (d) of this section are met.
- (g) The commissioner may amend a general permit at any time to include additional stipulations. The commissioner may rescind a general permit if the commissioner determines that the general permit no longer meets the requirements of (a) of this section. The commissioner shall issue public notice of any proposed permit amendment or the intent to rescind a general permit, and shall provide at least 30 days for receipt of public comments.
- (h) Notice under this section shall be provided in accordance with AS 16.05.875(e).

Sec. 16.05.885. Major anadromous fish habitat permit.

- (a) Unless reconsideration is requested under AS 16.05.889, the commissioner shall, after providing notice under AS 16.05.875(e) of a determination under AS 16.05.875(d), prepare a draft major anadromous fish habitat permit assessment that identifies and describes:
 - (1) the proposed activity;
 - (2) the extent, timing and duration of the potential adverse effects the activity could have on anadromous fish habitat and other fish and wildlife;
 - (3) possible alternatives or modifications to the proposed activity that will avoid or minimize the activity's potential adverse effects on anadromous fish habitat;
 - (4) any permit conditions and mitigation measures that the department may require of the permittee under AS 16.05.887;
 - (5) the amount of the performance bond necessary to restore anadromous fish habitat if the permittee is not in compliance with the permit conditions and mitigation measures required under AS 16.05.887; and
 - (6) the commissioner's determination of whether the proposed activity's significant adverse effects, singly or in combination with other factors:
 - (A) will be prevented or minimized under AS 16.05.887; or
 - (B) will cause substantial damage to anadromous fish habitat under AS 16.05.877(b).

- (b) The commissioner shall collect, or require the applicant to collect, the information needed for permitting. The commissioner may recover fees equal to the cost of services for collecting the information and conducting the fish habitat permit assessment.
- (c) Upon completion of the draft assessment under (a) of this section, the department shall:
 - (1) post notice on the Alaska Online Public Notice System (AS 44.62.175);
 - (2) make a copy of the draft assessment available on the department's website; and
 - (3) provide at least 30 days for public comment.
- (d) After the completion of the comment period established by (c)(3) of this section and evaluation of the comments received, the commissioner shall publish a final assessment and a written permit determination on the department's website. The final assessment must include all of the components required for a draft assessment under (a) of this section. The written permit determination shall set forth the reasons for the decision and the basis for concluding that the requirements of AS 16.05.887 and of (e) of this section are met. The department shall post public notice of the final assessment and permit determination on the Alaska Online Public Notice System (AS 44.62.175) and provide written or electronic notice to each person who commented on the commissioner's determination that the application for the permitted activity was an application for a major permit under AS 16.05.875(d) or on the draft assessment prepared under (a) of this section for the activity.
- (e) The commissioner may issue a major permit to an applicant only if:
 - (1) the public notice period required under (c) of this section is complete;
 - (2) any permit conditions and mitigation measures under AS 16.05.887 are mandatory and enforceable;
 - (3) ~~the activity, as authorized by the written permit determination, will not cause substantial damage to anadromous fish habitat under AS 16.05.877(b);~~
 - (4) the applicant, if required, provides the bond required by (g) of this section; and
 - (5) a request for reconsideration of the commissioner's final assessment and written determination under (d) of this section is not timely received under AS 16.05.889.
- (f) If request for reconsideration of the commissioner's final assessment and written determination issued under (d) of this section is timely received under AS 16.05.889(a), the commissioner shall issue a major permit for the activity when the commissioner
 - (1) denies the request for reconsideration or issues a new determination under AS 16.05.889(c); and
 - (2) finds that the requirements of (e) of this section have been met.
- (g) After the commissioner issues a written permit determination under (d) of this section, the applicant shall file with the commissioner, on a form furnished by the commissioner, a performance bond in an amount established by the commissioner payable to the State of Alaska and conditioned on faithful performance of the requirements of this chapter and the permit. The commissioner may not issue a permit until an applicant files the bond in an amount sufficient to ensure compliance with permit terms and the completion of the mitigation measures determined necessary by the commissioner under AS 16.05.887 and included in the written permit determination posted under (d) of this section. The performance bond may be a corporate surety bond issued by a corporation licensed to do business in the state or a personal bond secured by cash or its equivalent. The commissioner may not accept a bond executed by the applicant without separate surety.
- (h) A governmental entity or federally recognized tribe is exempt from the bonding requirements of this section.
- (i) A permittee may not transfer or assign authority to conduct an activity that requires a permit under this section to another person without:
 - (1) the written approval of the commissioner; and
 - (2) posting a performance bond for the transferee or assignee as required under (g) of this section, unless the transferee or assignee is exempt under (h) of this section.
- (j) In this section "federally recognized tribe" has the meaning given in AS 23.20.520.

*As modified by
the Alaska
Supreme Court
8/8/18*

*Section 7. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.887. Permit conditions and mitigation measures.

- (a) The commissioner shall prevent or minimize significant adverse effects to anadromous fish habitat. The commissioner shall require a permittee under AS 16.05.885 to implement the permitted activity in a manner that avoids significant adverse effects to anadromous fish habitat or, if significant adverse effects cannot be avoided, to mitigate significant adverse effects to fish and wildlife including anadromous fish habitat under (b) of this section. ~~Notwithstanding (b) of this section, an anadromous fish habitat permit may not be granted for an activity that will:~~
- ~~(1) cause substantial damage to anadromous fish habitat under AS 16.05.877(b);~~
 - ~~(2) fail to ensure the proper protection of fish and wildlife;~~
 - ~~(3) store or dispose of mining waste, including overburden, waste rock, and tailings in a way that could result in the release or discharge of sulfuric acid, other acids, dissolved metals, toxic pollutants, or other compounds that will adversely affect, directly or indirectly, anadromous fish habitat, fish, or wildlife species that depend on anadromous fish habitat;~~
 - ~~(4) replace or supplement, in full or in part, a wild fish population with a hatchery-dependent fish population;~~
 - ~~(5) withdraw water from anadromous fish habitat in an amount that will adversely affect anadromous fish habitat, fish, or wildlife species; or~~
 - ~~(6) dewater and relocate a stream or river if the relocation does not provide for fish passage or will adversely affect anadromous fish habitat, fish, or wildlife species.~~
- (b) When establishing permit conditions for an activity, the commissioner shall, in order of priority, require a permittee under AS 16.05.883, AS 16.05.884, or AS 16.05.885 to mitigate adverse effects by taking one or more of the following actions:
- (1) limit adverse effects of the activity on anadromous fish habitat by changing the siting, timing, procedure, or other manageable qualities of the activity;
 - (2) if the adverse effects of the activity cannot be prevented under (1) of this subsection, minimize the adverse effects of the activity by limiting the degree, magnitude, duration, or implementation of the activity, including implementing protective measures or control technologies; and
 - (3) if the activity cannot be implemented in a manner that prevents adverse effects to anadromous fish habitat under this subsection, restore the affected anadromous fish habitat.
- (c) Permit conditions and mitigation measures under this section may not offset the activity's adverse effects by restoring, establishing, enhancing, or preserving another water body, other portions of the same water body, or land.
- (d) The commissioner shall require an applicant to employ the best available, scientifically supported techniques to mitigate adverse effects under (b) of this section.
- (e) The department may adopt regulations consistent with AS 16.05.867 - 16.05.901 establishing appropriate permit conditions and mitigation measures applicable to activities subject to permitting requirements under AS 16.05.883, AS 16.05.884 or AS 16.05.885.

*As
Modified by
the Alaska
Supreme Court
8/8/18*

*Section 8. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.889. Reconsideration of determinations.

- (a) Within 30 days after the date of a determination of the commissioner under AS 16.05.871(e), AS 16.05.875(c) or (d), AS 16.05.883, AS 16.05.884(d) or (f), or AS 16.05.885(d), any interested person may request that the commissioner reconsider the determination. A request for reconsideration must be in writing.
- (b) Within 30 days after receiving a request for reconsideration, the commissioner shall issue a written determination granting or denying the request. If the commissioner does not act on

the request for reconsideration within 30 days after receiving the request, the request is denied. If the commissioner grants the request for reconsideration, the commissioner will issue a final determination within 30 days.

- (c) Unless the commissioner orders a remand for further agency proceedings, the commissioner's determination upon reconsideration is the final administrative decision for purposes of appeal to the superior court under AS 44.62.560. A person shall initiate an appeal within 30 days after the date that the final determination is mailed or otherwise distributed, or the date that the request for reconsideration is considered denied by the commissioner's failure to act on the request, whichever is earlier.

*Section 9. AS 16.05 is amended by adding new sections to read:

Sec. 16.05.894. Notification of violation.

When the commissioner finds, after investigation, that a person is violating a provision of AS 16.05.867-16.05.901, a regulation adopted under AS 16.05.867-16.05.901, a permit condition or stipulation imposed under AS 16.05.884, or a permit condition or mitigation measure imposed under AS 16.05.883 or AS 16.05.885, the commissioner shall notify the permittee of the nature of the violation and:

- (1) order that the violation be stopped; or
- (2) if the violation cannot be stopped, order the permittee to prevent or mitigate the adverse effects of the violation on anadromous fish habitat, fish and wildlife, and other adversely affected resources in a manner consistent with AS 16.05.867-16.05.901.

*Section 10. AS 16.05.901(a) is amended to read:

Sec. 16.05.901. Penalty for violations of AS 16.05.867-16.05.901 [16.05.896].

- (a) A person who, with criminal negligence, violates or permits a violation of AS 16.05.867-16.05.901, a regulation adopted under AS 16.05.867-16.05.901, a permit condition or stipulation imposed under AS 16.05.884, a permit condition or mitigation measure imposed under AS 16.05.883 or AS 16.05.885, or an order issued under AS 16.05.894 is guilty of a class A misdemeanor and is punishable as provided in AS 12.55. In this subsection, "criminal negligence" has the meaning given in AS 16.81.900(a).

*Section 11. AS 16.05.901 is amended by adding new subsections to read:

- (c) Notwithstanding (a) of this section, if a person or governmental agency fails to notify the commissioner of an activity for which a permit is required under AS 16.05.867-16.05.901 and the activity causes material damage to anadromous fish habitat or, by neglect or noncompliance with permit conditions and stipulations imposed under AS 16.05.884 or permit conditions or mitigation measures imposed under AS 16.05.883 or AS 16.05.885, causes material damage to anadromous fish habitat, the person or governmental agency is guilty of a class A misdemeanor and is punishable as provided in AS 12.55.
- (d) Each day that a violation under this section occurs or continues is a separate violation.
- (e) A person who violates or permits a violation of AS 16.05.867-16.05.901, or a regulation adopted under AS 16.05.867-16.05.901, a permit condition or stipulation imposed under AS 16.05.884, a permit condition or mitigation measure imposed under AS 16.05.883 or AS 16.05.885, or an order issued under AS 16.05.894 is liable, after notice and hearing, for a civil penalty in an amount not to exceed \$10,000 to be assessed by the commissioner. In determining the amount of the civil penalty, the commissioner shall consider:
 - (1) the character and degree of injury to anadromous fish, other fish, and wildlife habitat;

- (2) the degree of intent or negligence of the respondent in causing or permitting the violation;
 - (3) the character and number of past violations caused or permitted by the respondent; and
 - (4) if the information is available, the net economic savings realized by the respondent through the violation.
- (f) If a respondent violates an order issued under AS 16.05.894, the attorney general, upon the request of the commissioner, may seek an injunction requiring the respondent to suspend an activity, in whole or in part, until the respondent complies with the order.
 - (g) If a respondent violates an order issued under AS 16.05.894 that requires the respondent to repair or correct damage, the commissioner may proceed to repair or correct the damage using state agency employees or contractors and the respondent shall be liable for the cost of the repair. The commissioner shall deliver to the respondent an itemized statement of expenses incurred.
 - (h) The supreme court shall establish by order or rule a schedule of bail amounts for violations under (a) of this section that allow the disposition of a citation without a court appearance. The bail amount for a violation must be stated on the citation.

*Section 12. AS 16.05 is amended by adding new sections to read:

Sec. 16.05. Scope.

The provisions of this Act do not apply to existing activities, operations, or facilities that have received all required federal, state, and local permits, authorizations, licenses, and approvals for activities adversely affecting anadromous fish habitat, on or before the effective date of this Act, until expiration or termination of the user's permit, authorization, license, or approval.

*Section 13. AS 16.05.851 and AS 16.05.896 are repealed.

AS 16.05.851 and AS 16.05.896 are repealed.

*Section 14. The uncodified law of the State of Alaska is amended by adding a section to read:

The provisions of this Act are independent and severable. If any provision of this Act is found to be invalid or unconstitutional, the remainder of this Act shall not be affected and shall be given effect to the fullest extent possible.