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HB 199 Sectional Analysis version I

Section 1: Page 1, line 5 through Page 2, line 28:

This section adds legislative findings and policy language to the uncodified law of the State of Alaska:

Subsection (a) on Page 1, line 7 through Page 2, line 4 contains language stating the legislature's policy to ensure sustainable fisheries by protecting anadromous fish and habitat, having standards governing activities that protect anadromous fish and habitat, providing regulatory certainty and clear criteria that allows for responsible resource development, and that the Alaska Department of Fish and Game (ADF&G) protect anadromous fishery resources in a manner consistent with Article VIII of the Constitution of the State of Alaska.

Subsection (b) on Page 2, lines 5 through 28 provides additional language containing guidelines for protecting anadromous fish spawning, rearing, and migratory habitat. This language was pulled directly from (c)(1)(A)(i), (ii), (iii), (iv), (v), (1)(C), (1)(D), (1)(E), and (1)(F) of 5 AAC 39.222, Policy for the Management of Sustainable Salmon Fisheries, which is part of a regulation package passed by the Alaska Board of Fisheries that provides guidelines for the protection of salmon habitat.

Section 2: Page 2, line 29 through Page 3, line 7:

AS 16.05.841. Fishway required.

This section amends the Fishway Act to require that the passage of upstream and downstream fish is provided for. Currently, AS 16.05.841 only requires fish passage for downstream migrants.

Section 3: Page 3, lines 8 through 17:

Sec. 16.05.861. Penalty for violating fishway requirements.

Section 16.05.861 is a conforming amendment to reflect the repeal of AS 16.05.851 that allowed an exception to the fishway requirement.

Section 4: Page 3, lines 19 through 28:

Subsection (a) specifies that the commissioner of ADF&G must identify all or portions of each river, lake, stream, or wetlands, and the lands beneath that are anadromous fish habitat. Under current law, each anadromous waterbody must be field sampled and then nominated to be included in the Anadromous Waters Catalogue (AWC). This maintains that requirement.

Subsection (b) defines:

- (1) anadromous fish habitat to mean all or portions of a permanent or intermittent river, lake, stream, or wetland, and the lands beneath that contribute directly to the spawning, rearing, migration, or overwintering of anadromous fish.
- (2) a “river”, “stream”, or “wetland” to include the foreshore portion of the river, stream, or wetland above the mean low tide line.

Section 5: Page 3, line 29 through Page 6, line 4:

Sec. 16.05.875. Anadromous fish habitat permit.

Subsection (a) creates the requirement that, except in an emergency or as authorized by a general minor permit, an anadromous fish habitat permit must be obtained before constructing a hydraulic project or using wheeled, tracked, excavating, or log-dragging equipment, or before conducting an activity that has the potential to use, divert, obstruct, pollute, or change the natural flow or bed of a river, lake, stream, or wetland that is identified as anadromous fish habitat. This maintains the wording in current statute regarding the types of activities that would be required to be permitted.

Subsection (b) requires an applicant to complete an application and provide all necessary information that ADF&G deems necessary to assess the proposed activity’s effects on anadromous fish habitat.

Subsection (c) requires the commissioner to review a completed application accompanied by the required fees and make a determination about the proposed activity’s effects on anadromous fish and anadromous fish habitat. It also specifies that before making a determination, the commissioner may work with the applicant to plan the activity to avoid or minimize the potential effects.

Subsection (d) establishes the minor permit classification for applications that will not adversely affect anadromous fish and anadromous fish habitat.

Subsection (e) establishes the major permit classification for applications that have the potential to adversely affect anadromous fish and anadromous fish habitat.

Subsection (f) requires public notice for the commissioner’s determination for classification of major and minor permits.

Subsection (g) clarifies that the definition of “anadromous fish habitat” is consistent with the meaning provided throughout the chapter.

Page 5, line 12: Sec. 16.05.877. Consideration of effects of activity on anadromous fish and anadromous fish habitat.

While most permit applications can be processed as minor permits, this section identifies criteria used to determine if an activity has the potential to cause adverse effects on anadromous fish and anadromous fish habitat. If the commissioner determines that the potential exists, the application will be processed as a major permit.

Subsection (a) sets out the factors for the commissioner to consider in determining whether a proposed activity has the potential to cause adverse effects on anadromous fish and anadromous fish habitat.

Subsection (b) clarifies that the definition of “anadromous fish habitat” is consistent with the meaning provided throughout the chapter.

Section 6: Page 6, lines 5 through 23

Sec. 16.05.881. Construction without approval prohibited.

This section is amended to make reference to the new two-tiered permitting scheme and retain the requirement that a person or government entity can be found guilty of a misdemeanor for failing to comply with this chapter.

Section 7: Page 6, line 24 through Page 14, Line 6:

Sec. 16.05.883. Minor anadromous fish habitat permits.

Subsection (a) establishes the commissioner’s authority to issue a minor permit. The commissioner must give public notice of the decision to issue a minor permit. The minor permit must include any permit conditions and mitigation measures necessary to protect anadromous fish and anadromous fish habitat.

Subsection (b) establishes the general minor permit. This allows the issuance of a blanket permit for minor activities on a regional or geographical basis without an application by a determination by the commissioner for activities that will not cause significant adverse effects on anadromous fish habitat if certain conditions are met. This provision allows ADF&G to issue blanket permits for similar activities. E.g. ATV stream crossings.

(1), (2), and (3), set the conditions that must be met for the issuance of a general permit.

Subsection (c) specifies that when the commissioner makes a determination to issue a general minor permit, they must provide notice, a public comment period, and, if requested, hold one public hearing. It also stipulates that the general permits must be renewed every 5 years.

Subsection (d) clarifies that the commissioner may issue a regional or geographical authorization for a general permit or may require a person to obtain written authorization. The department must approve or deny the request within 5 days. It further allows general permit authorizations to be issued electronically. It clarifies that, if applicable, authorizations for general permits shall set out conditions and stipulations to avoid adverse effects to anadromous fish and anadromous fish habitat.

Subsection (e) gives the commissioner authority to modify or rescind a general permit if the commissioner determines that the general permit does not protect anadromous fish and anadromous fish habitat. If a general permit is amended or rescinded the commissioner must provide public notice. (1) and (2) provide additional details for public notice for general permitting.

Subsection (f) stipulates the public notice and comment requirements for issuing a general minor permit.

Subsection (g) clarifies that the definition of “anadromous fish habitat” is consistent with the meaning provided throughout the chapter.

Page 8, line 15: Sec. 16.05.885. Major anadromous fish habitat permit.

Section 16.05.885 establishes the requirements for the major permit process. The major permit process under Sec. 16.05.885 provides for more scrutiny of proposed activities that have the potential to cause adverse effects on anadromous fish and anadromous fish habitat. It requires the commissioner to prepare a fish habitat permit assessment that details the activity, the potential effects, possible alternatives or modification to the activity, the proposed permit conditions, the amount of bonding needed to restore habitat if the permit conditions and mitigations are not complied with, and if a permit may or may not be issued based on whether the plans and specifications are sufficient to protect anadromous fish and anadromous fish habitat. This process allows the commissioner to gather the kind of information, at the applicant’s expense, that can help inform the types of mitigation requirements and permit conditions that are necessary to protect fish habitat. Most notably, it also provides opportunities for public involvement through notice and a public comment period on the draft assessment. The current law does not provide for any public notice or opportunity to participate in the process.

Subsection (a) requires the commissioner to prepare a draft anadromous fish habitat permit assessment and identifies the information that must be included in the assessment to help inform the decision-making process. Of note is (6)(A) and (6)(B) which contain the commissioner’s initial determination that a permit may or not be issued based on whether the activity’s adverse effects can be prevented or if the effects can be minimized to the extent necessary to protect anadromous fish and anadromous fish habitat, the affected habitat can be restored to the extent necessary to protect anadromous fish and anadromous fish habitat, or the effects of the activity can be otherwise mitigated to the extent necessary to protect anadromous fish and anadromous fish habitat.

Subsection (b) specifies that the commissioner shall collect or shall require the applicant to collect information to determine whether a proposed activity should be permitted under this section. It further allows the costs of preparing the assessment and collecting the information requested by the commissioner to be shifted to the applicant.

Subsection (c) provides for public notice and an opportunity for the public to comment on the draft assessment.

Page 10, line 1:

Subsection (d) requires the commissioner to provide public notice of and publish a final assessment and a written permit determination after reviewing public comments. The final assessment and permit must include all permit conditions, required mitigation measures, and imposed bonding.

Subsection (e) imposes conditions that the commissioner must meet, and an applicant must comply with, before issuing a permit. The commissioner must find in a written determination that public notice was provided, the permit conditions and mitigation measures are mandatory and enforceable, and that the activity shall be permitted because the activity's adverse effects can be prevented or the effects can be minimized to the extent necessary to protect anadromous fish and anadromous fish habitat, the affected habitat can be restored to the extent necessary to protect anadromous fish and anadromous fish habitat, or the effects of the activity can be otherwise mitigated to the extent necessary to protect anadromous fish and anadromous fish habitat. To receive a permit, the applicant must accept all permit conditions and mitigation measures and provide a bond to cover the restoration of habitat if the permit conditions and mitigation measures are not complied with; additionally, a permit may only be issued if a request for reconsideration was not timely received.

Subsection (f) specifies that if a request for reconsideration of the commissioner's final assessment and written determination is timely received, a major permit shall be issued when the commissioner denies the request for reconsideration or issues a new determination and the requirements in (e) have been met.

Page 11, line 14:

Subsection (g) describes the bond requirements to pay for the restoration of anadromous habitat. Project applicants must provide a performance bond sufficient to cover the cost of restoring anadromous fish habitat if permit conditions and mitigation measures are not complied with. The bond may be initiated and held by the department or another state agency and must be a secured bond. This section further allows the commissioner to raise, lower, or eliminate the bond if conditions change, but they must provide public notice of the change. Any changes to the bond are subject to a request for reconsideration.

Subsection (h) exempts governmental entities from the bonding requirements of the section, allows the department to receive the bond from another government agency, and clarifies that the bond may initiated and held by the department or by another state agency.

Subsection (i) requires the approval of the commissioner and, if required, a new performance bond, before a permit can be transferred or assigned.

Subsection (j) clarifies that the definition of "anadromous fish habitat" is consistent with the meaning provided throughout the chapter.

Page 12, line 17: Sec. 16.05.887. Permit conditions and mitigation measures.

Section 16.05.887 sets forth the requirements for permit conditions and mitigation measures for permits issued under this chapter. When issuing a permit, the commissioner must prevent or minimize adverse effects on anadromous fish and anadromous fish habitat. The commissioner must establish, in order of priority, permit stipulations and mitigation measures that first avoid adverse effects through siting, timing or other project design stipulations. If effects cannot be avoided, impacts of the activity must be minimized by limiting the degree, magnitude, duration, implementation, or other design stipulations. If effects cannot be avoided, the commissioner must require that impacted fish habitat is restored or that other appropriate mitigation measures be taken that are determined to be necessary to protect anadromous fish and anadromous fish habitat.

Subsection (a) requires that activities be implemented in a manner most likely to avoid or minimize adverse effects on anadromous fish and anadromous fish habitat and that the commissioner has determined will protect anadromous fish and anadromous fish habitat.

Subsection (b) requires the commissioner, when developing a permit, to first try to avoid adverse effects by working with the applicant on project design and by imposing siting, timing and other stipulations and conditions. If adverse effects are not avoidable, the commissioner must minimize the adverse effects of the activity by limiting the degree, magnitude, duration, implementation, or other design stipulations. And finally, if adverse effects do occur, the commissioner must restore the impacted fish habitat or take other appropriate mitigation measures that are necessary to protect anadromous fish and anadromous fish habitat.

Subsection (c) provides that the department shall adopt regulations establishing permit conditions and mitigation measures applicable to activities subject to permitting requirements.

Subsection (d) clarifies that the definition of “anadromous fish habitat” is consistent with the meaning provided throughout the chapter.

Page 13, line 15: Sec. 16.05.889. Reconsideration of determinations.

Section 16.05.889 sets forth the administrative review and appeal procedures for decisions made under this chapter.

Subsection (a) allows an interested person to request a reconsideration of a determination to classify a permit as a minor or major, a final determination to issue or refuse to issue a permit, as well as the amount of the bond required, a reduction or increase to that bond, or the elimination of a bond requirement.

Subsection (b) sets a 30-day time limit to request reconsideration of decisions made under this chapter. The request must be in writing.

Subsection (c) requires the commissioner to respond to a request for reconsideration within 30 days. The request is deemed denied in 30 days if the commissioner does not act. If the commissioner grants the request for reconsideration, the commissioner has an additional 30 days to make a final determination.

Subsection (d) establishes that the commissioner’s determination on reconsideration is a final agency action under the Administrative Procedure Act. A person may appeal the final determination to the superior court within 30 days and may only appeal the points raised in the request for reconsideration.

Section 8: Page 14, lines 7 through 13: Sec. 16.05.891. Exemption for emergency situations.

Section 16.05.891 adds “state agency” to the exemption for emergency arising from weather or stream flow conditions. It also contains a conforming language to reflect the new provisions in this chapter.

Section 9: Page 14, lines 14 through 26: AS 16.05.893. Fees.

Section 16.06.893 directs the commissioner to charge reasonable fees to process and administer the fish habitat permits.

Subsection (a) establishes the authority for the commissioner to set fees.

Subsection (b) allows the commissioner to adopt regulations governing fee waivers when it is in the public interest.

Subsection (c) requires the fees collected to be separately accounted for.

Sec. 16.05.894. Notification of Violation

Section 16.05.894 requires the commissioner to provide notice to a permittee for permit violations and order the violation to be stopped. If a violation cannot be stopped, the commissioner is required to order the permittee to prevent or mitigate adverse effects of the violation on fish habitat.

Page 15, line 6: Sec. 16.05.897. Applicability of permitting requirements

Section 16.05.897 specifies that an existing facility, activity, operation, or project that has in full force and effect all authorizations required by law relating to the protection of anadromous fish and anadromous fish habitat on the effective day of this act will remain under the permitting regime as it existed the day before the effective day of this act, including renewals and minor authorizations in perpetuity, until that existing facility, activity, operation, or project significantly expands or increases in scope, area, or frequency, or otherwise takes action outside of, those actions for which it was authorized on the day before the effective date of sec. 3 of this Act.

Sec. 16.05.899. Enforcement authority.

Section 16.05.899 gives authority for departmental employees designated by the commissioner to directly issue citations for a violation of AS 16.05.871-16.05.901 or a regulation adopted under those statutes if it is not a misdemeanor and there is probable cause to believe a violation has occurred.

Section 10: Page 15, line 30 through Page 16, line 2:

AS. 16.05.901(a). Penalty for Violations.

Section 16.05.901(a) is amended to provide ADF&G with additional authority to respond to violations of this chapter. Under current law, ADF&G can only pursue a misdemeanor charge for permit violations.

Section 11: Page 16, line 3 through Page 17, line 17:

AS 16.05.901. Penalty for Violations.

Subsection (c) allows ADF&G to prosecute knowing violations of AS 16.05.871-16.05.901 or a regulation adopted under those statutes as a class A misdemeanor.

Subsection (d) allows ADF&G to prosecute criminally negligent violations of AS 16.05.871-16.05.901, a regulation adopted under those statutes, a permit condition and mitigation measure imposed, or an order issued under 16.05.894 as a class A misdemeanor.

Subsection (e) provides that if someone fails to notify the commissioner of an activity for which a permit is required and causes damage to anadromous fish habitat or by neglect or noncompliance with permit conditions and mitigation measures causes damage to anadromous fish habitat, a person is guilty of a class A misdemeanor.

Subsection (f) establishes that each day of violation is a separate violation.

Subsection (g) sets out the process and requirements for the commissioner to impose a civil penalty for violations of a fish habitat permit.

Subsection (h) allows the commissioner to ask the attorney general to seek an injunction to suspend an activity where a person has failed to comply with a notice of violation from the commissioner.

Subsection (i) gives the commissioner the authority, after notice, to repair damage caused by violations that have not been corrected and to hold the violator liable for the costs.

Subsection (j) applies fine amounts set by the Supreme Court for citations issued by ADF&G. This allows for ADF&G to write tickets for violations that can be handled without the involvement of a state prosecutor.

Subsection (k) clarifies that the definition of “anadromous fish habitat” is consistent with the meaning provided throughout the chapter.

Section 12: Page 17, lines 18 through 22:

AS 16.05.925(a). Penalty for Violations.

This section is a clerical change to account for new sections.

Section 13 Page 17, lines 23 through 25:

AS 16.20.070. Relationship to other laws.

This section is a clerical change to account for new sections and renumbering.

Section 14: Page 17, lines 26 through 28:

AS 37.05.146(c). Definition of Program Receipts and Non-General Fund Program Receipts.

This section is a clerical change to account for new sections.

Section 15: Page 17, line 29 through Page 18, line 25:

AS 41.17.010. Declaration of Intent.

This section is a clerical change to account for new sections and renumbering.

Section 16: Page 18, lines 26 through 30:

AS 44.62.330(a)(27). Application of AS 44.62.330.

This section is a clerical change to account for new sections and renumbering.

Section 17: Page 18, line 31 through Page 20, line 8:

AS 46.15.020(b). Authorities and Duties of the Commissioner.

This section is a clerical change to account for new sections and renumbering.

Section 18: Page 20, line 9:

Repeal of 16.05.851 and 16.05.896.

This section repeals 16.05.851 and 16.05.896. The new sections and permitting structure render the sections obsolete.