

CSHB 199/N

Sectional Analysis

Section 1: Page 1, Lines 5-14

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 2: Page 2, Line 1-Page 3, line 11

Sec. 16.05.871. Determination of anadromous fish habitat.

Section 16.05.871 expands the Department of Fish and Game's (ADF&G) authority to trigger the new law and require a fish habitat permit by creating a rebuttable presumption that naturally occurring permanent and intermittent rivers, lakes, and streams, including the lands beneath and adjacent riparian areas, that are connected to rivers, lakes, and streams that are specified as anadromous fish habitat and are without a physical barrier that is insurmountable to fish 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). ADF&G estimates that less than 50 percent of the anadromous waters in Alaska are listed in the AWC. The AWC serves as the trigger for ADF&G's authority to manage fish habitat and issue permits.

Subsection (a) specifies that the commissioner of ADF&G must identify all or portions of each river, lake, or stream, the lands beneath, and adjacent riparian areas that are anadromous fish habitat. This maintains the requirement that anadromous waters are specified.

Subsection (b) creates a process where ADF&G may pursue, or any person may request, a site-specific determination to verify that a waterbody is *not* anadromous fish habitat. The provision does not require ADF&G to sample all anadromous waters in Alaska. Rather, if there is a potential dispute as to whether a fish habitat permit is required because a waterbody might not be anadromous, a person may request that ADF&G make a site-specific determination and provide a written finding.

Subsection (c) establishes the rebuttable anadromous waters presumption.

Subsection (d) specifies that the presumption under (c) is only applicable to the statutes governing anadromous fish habitat permitting.

Subsection (e) specifies that the commissioner shall specify in regulation:

- (1) each river, lake, or stream, lands beneath, and adjacent riparian areas that are anadromous fish habitat under the bill. This clarifies that specified anadromous fish habitat will be listed in the AWC.
- (2) the procedure for conducting a site-specific review and determination.
- (3) the scope of riparian area that will be considered anadromous fish habitat under the bill.

Subsection (f) defines:

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

Section 3: Page 3, Line 12-Page 5, Line 23

Sec. 16.05.875. Anadromous fish habitat permit.

Subsection (a) creates the requirement that, except in an emergency, an anadromous fish habitat permit must be obtained before constructing a hydraulic project that uses 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, or stream that is presumed or 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.

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 habitat.

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

Subsection (e) establishes the major permit classification for applications that have the potential to significantly adversely affect 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.

Section 3:

Sec. 16.05.877. Significant adverse effects.

While most permit applications can be processed as minor permits, this section identifies criteria used to determine if the level of potential adverse effects to fish habitat could be significant, requiring the application to be processed as a major permit.

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

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

Section 4: Page 5, Line 24-Page 6, Line 111

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 5: Page 6, Line 12-Page 13, Line 26:

Sec. 16.05.883. Minor anadromous fish habitat permit.

Subsection (a) establishes the commissioner’s authority to issue a minor permit. The commissioner must give notice of the decision to issue a minor permit. The minor permit must include any permit conditions and mitigation measures necessary to protect 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), (3), and (4) 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 1 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 authorizations for general permits shall set out conditions and stipulations to avoid adverse effects to anadromous fish habitat.

Subsection (e) gives the commissioner authority to modify or rescind a general permit if the commissioner no longer determines that the general permit protects anadromous fish habitat. If a general permit is changed or rescinded the commissioner must provide public notice and provide at least 30 days for public comment.

(1) and (2) provide additional details for public notice and comment for general permitting.

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

Section 5:

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 significant adverse effects on 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, proposed permit conditions, and the amount of bonding needed to perform required mitigation. 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. 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.

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.

Subsection (d) allows a major permit to be issued when significant adverse effects are minimized using permit conditions and mitigation measures if the habitat effects are not permanent and can be recovered or restored in a reasonable amount of time.

Subsection (e) establishes how the commissioner determines whether the proposed activity is likely to cause substantial damage to anadromous fish habitat under 16.05.887(a). If the significant adverse effects cannot be prevented or minimized to protect fish habitat in accordance with this chapter, the commissioner may not issue the permit.

Subsection (f) provides the scientifically based factors the commissioner uses in determining if anadromous fish habitat will be recovered or restored within a reasonable time to conditions that can sustain anadromous fish.

Subsection (g) 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 and required mitigation measures.

Subsection (h) 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 prevent or minimize significant adverse effects and are mandatory and enforceable, and that the activity will not cause substantial damage to anadromous fish habitat. To receive a permit the applicant must accept all permit conditions and mitigation measures and provide a bond to cover the mitigation plan.

Subsection (j) describes the bond requirements for activities that require habitat restoration or reclamation as part of the permit mitigation plan. Project applicants provide a performance bond sufficient to cover the cost to complete the mitigation plan and fully comply with the permit. The bond must be a secured bond.

Subsection (k) exempts governmental entities from the bonding requirements of the section.

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

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

Section 5:

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 to 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 must be minimized by limiting the degree, magnitude, duration or implementation of the activity. And if effects cannot be avoided, the commissioner must require that impacted fish habitat is restored with appropriate mitigation measures. The commissioner may not approve a mitigation plan that uses offsite mitigation to compensate for onsite damage to fish habitat resulting from the activity.

Subsection (a) establishes that the commissioner will require the permittee to avoid or minimize adverse effects to anadromous fish habitat. The commissioner may not permit an activity that:

(1) will cause substantial damage to anadromous fish habitat (2) requires water treatment or other means of human intervention in perpetuity, (3) converts a wild fish population to a hatchery dependent population, (4) will dewater anadromous fish habitat for period likely to cause permanent or long lasting adverse effects on said habitat or (5) or will permanently relocate all or portions of a river lake or stream if it will disrupt the migration or passage of anadromous fish.

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 by limiting the degree, magnitude, duration or implementation of the activity. And finally, if adverse effects do occur, the commissioner must require mitigation measures that restore the impacted fish habitat.

Subsection (c) requires that all mitigation measures take place onsite where the activity is taking place. The commissioner may not agree to a mitigation plan that offsets onsite impacts by restoring habitat in an offsite location

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

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

Section 5:

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

Subsection (b) 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 (c) 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 6: Page 13, Line 27- Page 14, Line 2:

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 7: Page 14, Line 3-Page 15, Line 11

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.

Sec. 16.05.899. Applicability of permitting requirements

Section 16.05.899 specifies that an existing facility, activity, operation, or project that has in full force and effect all required state authorizations relating to the protection of anadromous fish and anadromous fish habitat on the effective day of this act would 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

Section 8: Page 15, Line 12-17

AS 16.05.901. Penalty for Violations.

Section 16.05.901(a) amends existing language to include new provisions under this chapter. It sets out provisions to address violations of the law. It specifies that person must “knowingly” be in violation to be guilty of a class A misdemeanor for knowing violations.

Section 9: Page 15, Line 18-Page 16, Line 29

AS 16.05.901. Penalty for Violations.

Section 16.05.901 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. This section provides additional options to pursue civil penalties and bailable citations when necessary to enforce the law.

Subsection (c) allows ADF&G to prosecute criminally negligent violations as a class A misdemeanor.

Subsection (d) establishes a class A misdemeanor for failure to notify the commissioner of activities for which a permit is required or for violations of permit requirements if the activity causes material damage to fish habitat.

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

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

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

Section 10: Page 16, Line 30-Page 17, Line 3

AS 16.05.925(a). Penalty for Violations.

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

Section 11. AS 16.20.070. Relationship to other laws.

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

Section 12. 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 13: Page 17, Line 10-Page 18, Line 6:

AS 41.17.010. Declaration of Intent.

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

Section 14. 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 15: Page 18, Line 12-Page 19, Line 20:

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 16. 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.