

# Alaska State Legislature

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## HB 199 Explanation of Changes Version N to I

### Page 1, lines 2 and 3:

- The bill's title was slightly altered. It had previously read "and relating to fishways and the protection of anadromous and **other fish** habitat." It now reads "and relating to fishways and the protection of anadromous **fish** and **anadromous fish** habitat." The major difference being that the protection of the anadromous fish was included instead of only referencing habitat. Other fish habitat was also removed.

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

- **Added a new Section 1** that 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.

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

#### **AS 16.05.841. Fishway required.**

- **Added a new Section 2** that 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 4** on Page 3, lines 18 through 28, formerly **Section 2** on Page 2, line 1 through Page 3, line 11:

**Subsection (a)** on Page 3, lines 19 through 21, formerly Page 2, lines 2 through 4:

- Deleted “adjacent riparian areas” and inserted “wetland” on line 21.

**Former subsection (b) was deleted** (Page 2, lines 5 through 13). This subsection contained the process by which the department may conduct a site-specific analysis to determine anadromy.

**Former subsection (c) was deleted** (Page 2, lines 14 through 23). This subsection contained the anadromous waters presumption.

**Former subsection (d) was deleted** (Page 2, lines 24 through 26). This subsection contained a clarification regarding what area of law the deleted presumption applied to.

**Former subsection (e) was deleted** (Page 2, line 27 through Page 3, line 3). This subsection contained requirements for the department to adopt regulations that are no longer necessary as the corresponding bill sections have been deleted.

**Subsection (b)** on Page 3, lines 22 through 28, formerly subsection (f) on Page 3, lines 4 through 11:

- Deleted “naturally occurring” in front of “permanent” on line 23. This conforming change was made throughout the bill.
- Deleted “adjacent riparian areas” and inserted “wetland” on line 24. This conforming change was made throughout the bill.
- Inserted “wetland” on line 27. This conforming change was made throughout the bill.

**Subsection (a)** on Page 3, line 29 through Page 4, line 8, formerly Page 3, lines 13 through 29:

- Inserted “or governmental agency” after “person” on line 3.
- An error was corrected from the previous draft. On page 3, line 17 of the previous draft, it stated that a person must obtain a permit “before constructing a hydraulic project **that uses** wheeled, tracked, excavating, or log dragging equipment...” This was supposed to read “before constructing a hydraulic project **or using** wheeled, tracked, excavating, or log-dragging equipment...” The error was corrected on Page 4, line 3 of the current version to align with the sponsor’s intent and mirror current statute.
- Deleted references to the anadromous waters presumption.

**Subsection (a)** on Page 5, line 12 through Page 6, line 2: **“Consideration of effects of activity on anadromous fish and anadromous fish habitat.”** Formerly **Subsection (a)** on Page 5, lines 2 through 23: **“Significant adverse effects,”**

- The subsection was renamed as shown above.
- Inserted “anadromous fish” as a factor to be considered along with “anadromous fish habitat” on line 14. This resulted in a conforming change throughout the bill.
- The wording in (a) on lines 13 through 16 was altered. Instead of the more prescriptive language of “the commissioner shall find that a proposed activity has the potential to cause significant adverse effects on anadromous fish habitat under AS. 16.05.871-16.05.901 if the proposed activity...”, it now reads “in

determining if a proposed activity has the potential to adversely affect anadromous fish and anadromous fish habitat under AS 16.05.871-16.05.901, the commissioner shall consider whether the proposed activity...”

- Deleted the term “significant” in front of “adverse effects.” This aligns the terminology in the bill with other regulatory agencies and avoids confusion regarding determining what “significant” is. This conforming change was made throughout the bill.
- Deleted “significantly”, which was formerly on Page 5, line 10.
- Inserted a new (a)(7) on Page 5, lines 30 through 31. It states that the commissioner must consider if an activity will “diminish the stability of a river, lake, stream, or wetland bank or bed” in making the determination under (a).

**Subsection (a)(6)** on Page 8, line 30 through Page 9, line 18, formerly on Page 8, lines 18 through 22:

- **Former Subsection (a)(6)(A) and (B) were deleted.** These subsections specified that the commissioner must provide in the major anadromous permit draft assessment a determination of whether an activity’s adverse effects could be prevented or minimized under (d) of this section or were likely to cause substantial damage under (e) of this section. Both (d) and (e) were deleted in the current draft.
- **New subsections (a)(6)(A)(i)(ii) and (6)(B)(i)(ii) were inserted** on Page 9, lines 1 through 18 in place of the deleted (a)(6)(A) and (B). These new subsections contain the commissioner’s initial determination that a permit may or may 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.

**Former Subsection (d) was deleted** (Page 9, lines 5 through 11). This subsection contained the conditions under which adverse effects can be considered minimized under the bill.

**Former Subsections (e)(1), (2), and (3) were deleted** (Page 9, lines 12 through 16). Subsection (e) stated that adverse effects could not be prevented or minimized if they were likely to cause substantial damage. Subsections (1), (2), and (3) defined substantial damage.

**Former Subsections (f)(1) and (f)(2)(A) and (B) were deleted** (Page 9, line 26 through Page 10, line 7). These subsections contained the factors the commissioner shall consider when determining if fish habitat will recover or be restored within a reasonable period of time and to a condition that will sustain the natural and historic levels of fish.

**Page 10, line 5:**

- Inserted a requirement that the amount of the bond imposed by the department is to be included in the final assessment and written permit determination.

**Subsection (e)(1)(C)(i) and (ii) on Page 10, lines 18 through 29, formerly (h)(1)(c) on Page 10, lines 25 through 27:**

- **Former (h)(1)(c) was deleted.** This specified that a permit may only be issued if it will not cause substantial damage under the now deleted (e).

- In its place, **new subsections (e)(1)(C)(i) and (ii) were inserted.** These new subsections specify that the commissioner may only issue a major permit if it is determined that an 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. This determination is subject to a request for reconsideration.

**Subsection (g)** on Page 11, line 14 through Page 12, line 1, **formerly Subsection (j)** on Page 11, lines 12 through 24:

- Clarified that the bond may be initiated and held by the department or another state agency on Page 11, line 18.
- Added language on Page 11, line 26 through Page 12, line 1 to specify that the commissioner may at any time raise, lower, or eliminate the bond if they find that it is more or less than what is necessary to complete the mitigation measures. Furthermore, the department must provide public notice of such a change. These actions are subject to a request of reconsideration by an interested person or the applicant.

**Subsection (h)** on Page 12, lines 2 through 8:

- **Added a new subsection (h)(2)** on lines 5 through 6 specifying that the department may receive the amount of the bond from another state agency in lieu of a separate bond from the applicant.
- **Added a new subsection (h)(3)** on lines 7 through 8 specifying that a bond required in this chapter may be part of another bond held or initiated by the department or another state agency.

**Subsection (a)** on Page 12, line 17 through Page 13, line 14, formerly Page 12, line 4 through Page 13, line 10.

#### **Sec. 16.05.887 Permit conditions and mitigation measures.**

- **Deleted lines 8 through 9** from the previous version of the bill, which stated that the “commissioner may not issue a permit for an activity that the commissioner determines.” These two lines prefaced the deleted subsections (a)(1), (2), (3), (4), and (5).
- **Former Subsection (a)(1) was deleted** (Page 12, lines 10 through 11). This subsection had stated that a permit may not be issued if it will cause substantial damage under the now deleted AS 16.05.885(e).
  - **In its place, new subsection (a)(1) was inserted** on Page 12, lines 20 through 21. This language was in the in previous subsection (a) and was moved down to (a)(1) for structural purposes.
- **Former Subsection (a)(2) was deleted** (Page 12, lines 12 through 13). This subsection had stated that a permit may not be issued if it necessitates water treatment, groundwater pumping, or other means of mechanical, chemical, or human intervention in perpetuity.
  - **In its place, new subsection (a)(2) was inserted** on Page 12, lines 22 through 23. This subsection specifies that the commissioner must require a permittee to implement the activity in a manner that the commissioner has determined will protect anadromous fish and anadromous fish habitat.
- **Former Subsection (a)(3) was deleted** (Page 12, lines 14 through 15). This subsection specified that a permit may not be issued if it will replace or supplement a wild fish population with a hatchery dependent fish population.
- **Former Subsection (a)(4) was deleted** (Page 12, lines 16 through 17). This subsection specified that a permit may not be issued if it will dewater anadromous fish habitat for a period likely to cause permanent or long-lasting adverse effects to that habitat.

- **Former Subsection (a)(5) was deleted** (Page 12, lines 18 through 19). This subsection specified that a permit may not be issued if it will permanently relocate all or portions of a river, lake, or stream if the relocation will disrupt the passage of anadromous fish.

**Subsection (b)** on Page 12, line 24, formerly page 12, line 2:

- **Subsection (b) on page 12, line 27. Inserted** “to protect anadromous fish and anadromous fish habitat” after “actions.” This simply clarifies the purpose behind the mitigation measures.
- **Subsection (b)(1) on Page 12, line 28. Deleted** “limit” and inserted “prevent.” This aligns with (b)(2) that references effects being “prevented” under (b)(1). It also aligns with the current process of mitigation, which first tries to prevent effects, then minimize, and then restore habitat or take other mitigation measures.
- **Subsection (b)(2) on Page 13, lines 1 through 3. Inserted** “or changing” after “limiting” on line 1. Inserted “or other manageable qualities” after “implementation” on lines 2 through 3. This addition adds more flexibility regarding how the department can minimize effects.
- **Subsection (b)(3) on Page 13, line 6. Deleted** “and” and inserted “or.” It made more sense to require the department to restore habitat or take other mitigation measures, rather than restore habitat and take mitigation measures. Sometimes, restoring is the mitigation measure that needs to be taken whereas in some instances, other mitigation measures may be more appropriate.
- **Subsection (b)(3) on Page 13, lines 6 through 7. Inserted** “that the commissioner determines are necessary to protect anadromous fish and anadromous fish habitat” after “measures.”

**Subsection (a) on Page 13, lines 15 through 23, formerly on Page 13, lines 11 through 26:**

#### **Sec. 16.05.889 Reconsideration of determinations.**

- Added new subsections (a)(1), (2), and (3) that specify that requests for reconsideration are limited to whether a proposed activity should be classified as a minor or major permit, a final determination to issue or refuse to issue a permit, the amount of a required bond, the reduction of the amount of the bond, or the elimination of a bond requirement for an activity. An interested person can request reconsideration of any determination that is part of the final determination. Previously, an interested person could request a reconsideration of any determination at any point along the process, leaving room for abuse.

**Subsection (b) on Page 14, line 20:**

- Added language to specify that the commissioner may wave fees if the applicant or permittee is a governmental agency.

**Subsection (a) on page 15, line 9:**

- Changed the wording so that the grandfather clause applies to facilities, activities, operations, or projects that have in full force and effect “all authorizations required by law” instead of simply “all required state authorizations.”

**Page 15, lines 24 through 29:**

**Sec. 16.05.899 Enforcement Authority.**

This is a new section that 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 are is probable cause to believe a violation has occurred.

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

- Former Section 8 (Page 15, lines 13 through 17) was split into two parts at the request of the Alaska Court System so that the violation and the misdemeanor were not housed in the same subsection.