

# LEGAL SERVICES

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## MEMORANDUM

July 11, 2018

**SUBJECT:** Stand for Salmon Initiative Overview

**TO:** Senator Kevin Meyer  
Attn: Christine Marasigan

**FROM:** Jean M. Mischel  
Assistant Revisor



You have requested a sectional summary of the Stand for Salmon initiative (An Act providing for the protection of wild salmon and fish and wildlife habitat) (17FSH2). As MaryEllen Duffy of our office explained, we generally do not provide sectional summaries of documents this office has not prepared but can provide a brief overview in response to your inquiry about how 17FSH2 would be integrated into existing statutes and the general legal effect if it passed.<sup>1</sup> As a preliminary matter, note that an overview summary of a document should not be considered an authoritative interpretation of 17FSH2 and the initiative itself is the best statement of its contents.

### **Brief Summary**

17FSH2 would establish a multi-tiered permitting regime for activities likely to adversely affect anadromous fish habitat.<sup>2</sup> The initiative amends AS 16.05 by adding new sections to describe fish and wildlife protection standards (sec. 2) and permitting requirements "before initiating any activity that may use, divert, obstruct, pollute, disturb or otherwise alter anadromous fish habitat." (sec. 3). 17FSH2 does not apply to areas exempted by the commissioner after finding a de minimus effect on anadromous fish habitat or to projects that have previously received all required state and federal permits and approvals.

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<sup>1</sup> It appears from your email string that your initial questions related to implementation and costs. Those questions are best directed to the executive branch. This office prepares impartial summaries for the ballot but expresses no opinion or advice regarding an initiative.

<sup>2</sup> Note that 17FSH2 also imposes other "fish and wildlife protection standards." See 17FSH2's sec. 2 available at [www.elections.alaska.gov/petitions/](http://www.elections.alaska.gov/petitions/)

The language<sup>3</sup> of 17FSH2 would likely be interpreted by the agencies charged with its implementation to prohibit uses of anadromous habitat that cause unmitigated and substantial damage to that habitat unless the legislature amends it.

### **Ongoing Litigation**

Because the constitutionality of 17FSH2 is currently being litigated, I will not speculate or comment on how the Alaska Supreme Court will decide the issues.

On September 12, 2017, Lieutenant Governor Byron Mallott denied certification<sup>4</sup> of 17FSH2 as an unconstitutional appropriation of state assets. On October 9, 2017, the Superior Court considered the parties' arguments and, finding that 17FSH2 did not appropriate a state asset, granted the initiative group's motion for summary judgment (requiring the division of elections to provide petition signature booklets to initiative sponsors).<sup>5</sup> On October 20, 2017, the State of Alaska appealed the Superior Court's determination.

Because both parties and *amicus curiae* CAP agree that 17FSH2 is not a give-away program,<sup>6</sup> the only issue for the Alaska Supreme Court to decide is whether 17FSH2 usurps the legislature's discretion to allocate anadromous fish habitat among competing users and purposes.

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<sup>3</sup> If 17FSH2 is approved by the electorate and the legislature declines to define terms used in the initiative, 17FSH2 will still be implemented and its terms will be construed in accordance with the context in which they are found and with their common usage. *Thoeni v. Consumer Elec. Servs.*, 151 P.3d 1249, 1258 (Alaska 2007); *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 905 (Alaska 1987). If the terms used in 17FSH2 are interpreted in accordance with the context in which they are found and with their common usage, then it is possible that certain existing uses of anadromous fish habitat may no longer be permitted, because these uses would cause "substantial damage" to that habitat under 17FSH2's sec. 16.05.877(b).

<sup>4</sup> Under AS 15.45.070, the lieutenant governor is required to review the application for an initiative; if an initiative application does not comply with the constitutional and statutory provisions governing the use of the initiative, the lieutenant governor will deny its placement on the ballot. The Alaska Supreme Court has held that pre-election review of an initiative should be limited to ensuring compliance with "the particular constitutional and statutory provisions regulating initiatives." *State v. Trust the People*, 113 P.3d 613, 625 - 626 (Alaska 2005), (referencing *Boucher v. Engstrom*, 528 P.2d 456, 460 (Alaska 1974)).

<sup>5</sup> *Stand for Salmon v. Mallott*, No. 3AN-17-9183 CI (Alaska Super. October 9, 2017).

<sup>6</sup> *Stand for Salmon*, No. 3AN-17-9183 CI at 8.

The Superior Court determined that 17FSH2 leaves the legislature discretion to allocate assets in a manner it deems appropriate through "the use of a plethora of undefined terms."<sup>7</sup> The court found that while 17FSH2 might steer anadromous fish habitat, as a public asset, away from particular uses, "such steering alone is insufficient to make an initiative unconstitutional" because the pertinent question is whether the initiative provides the legislature sufficient discretion to appropriate state assets in the manner it sees fit.<sup>8</sup> The Superior Court also determined that 17FSH2 was constitutional because the legislature was free to amend 17FSH2, after it is approved, and define its terms in a manner such that it would not impede legislative discretion.

Because the impact of the initiative can only be determined after legislative action occurs, the court finds, as a matter of law, that the initiative is not an allocation and is thus constitutionally permissible.<sup>9</sup>

The question before the Alaska Supreme Court is whether the regulatory regime that would be established by 17FSH2 "encroaches on the legislative branch's exclusive 'control over the allocation of state assets among competing needs.'"<sup>10</sup>

#### **Legal Effect of 17FSH2 -- Overview**

Legislative action is not required in order for 17FSH2 to become law. If the Supreme Court upholds its constitutionality and the electorate approves the initiative, the initiative will take effect as law 90 days after certification of the election results by the lieutenant governor. The revisor will incorporate the initiative into the Alaska Statutes as is done for other laws.

17FSH2 establishes a fish habitat policy in uncodified law to ensure sustainable fisheries, protect water resources and habitat that support anadromous fish, ensure development activities comply with enforceable standards to protect important fish and wildlife habitat, and require the Department of Fish and Game to protect natural fishery resources consistent with the constitution. (sec. 1). The initiative also establishes permitting standards to maintain water quality, flows, and bed stability, among other things as described. (sec. 2).

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<sup>7</sup> *Id.* at 13 - 14. Note that under art. II, sec. 6 of the Constitution of the State of Alaska and applicable case law, the legislature retains broad power to amend 17FSH2 at any time so long as such amendment does not constitute a de facto repeal. *Warren v. Thomas*, 568 P.2d 400 (Alaska 1977).

<sup>8</sup> *Id.* at 17.

<sup>9</sup> *Id.* at 20.

<sup>10</sup> *Alaska Action Center v. Municipality of Anchorage*, 84 P.3d 989, 990, 994 (Alaska 2004) (quoting *Pullen v. Ulmer*, 923 P.2d 54, 63 (Alaska 1996) and citing *McAlpine v. University of Alaska*, 762 P.2d 81, 89 (Alaska 1988)).

The initiative repeals and reenacts AS 16.05.871 (Protection of fish and game; requiring the commissioner to specify important rivers, streams, and lakes, and parts of them to spawning, rearing, or migration of anadromous fish habitat and approval of a project affecting a specified waterway unless the commissioner "finds the plans and specifications insufficient for the proper protection of fish and game.")

17FSH2 would replace AS 16.05.871 with a permit requirement for any activity that may alter anadromous fish habitat unless the commissioner of fish and game specifies the activity in regulation as having a de minimus effect on the habitat. (sec. 3).

17FSH2 contains a permit application procedure and standards for minor individual and general permits and for major permits, based on the potential for significant adverse effects of a proposed activity and describes "significant adverse effects." (secs. 4 - 6). The initiative requires the commissioner to "prevent or minimize significant adverse effects to anadromous fish habitat" through permit decisions, including permit denial or permit conditions and mitigation measures. (sec. 7). The decisions of the commissioner are subject to reconsideration and appeal. (sec. 8). Violations and penalties are specified. (secs. 9 - 11).

17FSH2 contains an applicability provision (scope), a repealer of AS 16.05.851 (hatchery requirement) and 16.05.896 (penalty for material damage), and a severability clause. (secs. 12 - 14).

If you have questions, please do not hesitate to contact me.

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