

HB 199
Sectional Analysis

Section 1. 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. Sec. 16.05.871. Determination of anadromous fish habitat.

Section 16.05.871 creates a rebuttable presumption that all waters in Alaska are anadromous and included in the Anadromous Waters Catalog (AWC) until proven otherwise. Under current law, each anadromous waterbody must be field sampled and then nominated to be included in the AWC. The Department of Fish and Game (ADF&G) estimates that less than 50 percent of the anadromous waters in Alaska are listed in the AWC. The AWC catalog serves as the trigger for ADF&G's authority to manage fish habitat and issue permits. The rebuttable anadromous waters presumption maintains and fills the AWC and by doing so expands ADF&G jurisdiction and authority to protect fish habitat and issue permits in all anadromous waters.

Subsection (a) maintains the requirement that anadromous waters are specified and listed in the AWC, including the waters added as a result of the presumption created in subsection (c).

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 a rebuttable anadromous waters presumption.

Subsection (d) defines "anadromous fish habitat" to mean a naturally occurring permanent or seasonal surface water body and its adjacent riparian areas that contribute, directly or indirectly, to the spawning, rearing, migration, or overwintering of anadromous fish.

Section 3. Sec. 16.05.873. General permit for fish and wildlife habitat protection.

Section 16.05.873 provides ADF&G with the authority to issue general permits for similar activities that pose little potential to significantly affect anadromous fish habitat. General permits can be issued on a regional or other geographic basis rather than requiring ADF&G to issue individual minor permits to each permittee. Under current law, ADF&G issues general permits for activities like stream crossings for light vehicles (i.e., ATV and snow machine) in areas frequented for recreational enjoyment and for geographies in rural Alaska where light vehicles are used as the main form of transportation. This section explicitly allows for that practice to continue but it also sets forth a public process so ADF&G can collect public input and create general permits to address regional concerns and needs.

Subsection (a) establishes five factors that must be met before an activity can be covered under a general permit;

Subsection (b) provides for public notice and comment before a general permit is issued. It also allows for a public hearing if requested and requires the renewal of general permits every 5 years;

Subsection (c) describes how individuals get authority to conduct an activity covered by a general permit. It requires ADF&G to approve or deny an authorization within 5 days and provide authorization through electronic means. Authorizations include all the conditions and stipulations required under the general permit to avoid adverse effects to fish and wildlife habitat;

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

Subsection (e) provides additional details for public notice and comment for general permitting.

Section 3. Sec. 16.05.875. Anadromous fish habitat permit.

Section 16.05.875 creates the requirement that a fish habitat permit must be obtained before conducting activities that may impact anadromous fish habitat. The section creates a two tiered permit system – minor and major permits – based on the level of potential impact the activity may have on anadromous fish habitat. The minor permit process is streamlined to process applications quickly for activities that, with appropriate conditions and mitigation requirements, will not significantly adversely affect fish habitat. Conversely, the major permit process applies if the activity has the potential to significantly adversely affect anadromous fish habitat and the application requires more scrutiny. This section also requires public notice of minor permits and public notice and an opportunity to comment on major permits. The current law does not provide any public process.

Subsection (a) establishes that a fish habitat permit is required before proceeding with an activity that may “use, divert, obstruct, pollute or otherwise alter anadromous fish habitat.” This preserves language from the current statute to avoid confusion about the types of activities that require a permit under the new permitting scheme. *See* AS 16.05.871(b).

Subsection (b) requires an applicant to complete an application and provide all necessary information that the Department of Fish and Game deems necessary to assess the proposed activity’s effects on fish and wildlife habitat, the scope and duration of the activity and planned mitigation measures. The monetary burden to provide the information is shifted from ADF&G to the applicant.

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 to inform whether the application will be processed as a minor or major permit.

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 both major and minor permit applications. A major permit determination also provides 30 days for public comment of the determination. The minor permit determination is streamlined to provide a permit at the same time that a permit determination is made.

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 significantly adversely affect anadromous fish habitat.

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

Section 4. Sec. 16.05.881. Construction without approval prohibited.

Section 16.05.881 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. Sec. 16.05.883. Minor anadromous fish habitat permit.

Section 16.05.883 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.

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 significantly adversely affect 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) shifts the administrative cost of preparing the assessment and the cost of collecting the information requested by the commissioner 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.

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 (i) clarifies that if a request for reconsideration of the commissioner's determination is timely received, the permit cannot be issued until the commissioner denies the request or issues a new determination.

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 then 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 for to compensate for onsite damage to fish habitat resulting from the activity.

Under this chapter, no permit can be issued that will cause substantial damage to fish habitat or cannot ensure the proper protection of fish and game. In addition, no permit can be issued if it relies on a mitigation plan that requires water treatment in perpetuity, replaces a wild fish population with a hatchery dependent population, or dewateres anadromous fish habitat for more than 5 years.

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 fish habitat, 2) requires water treatment or other means of human intervention in perpetuity, 3) cannot ensure the proper protection of fish and wildlife, 4) converts a wild fish population to a hatchery dependent population, or 5) dewateres or relocates an anadromous waterbody for more than 5 years.

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 under 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. Sec. 16.05.891. Exemption for emergency situations.

Section 16.05.891 is a conforming amendment to reflect the new provisions in this chapter.

Section 7. 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) allows the fees collected to be separately accounted for.

Section 7. 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.

Section 8. 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, including a class A misdemeanor for knowing violations.

Section 9. 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. 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. 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. 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.