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MEMORANDUM

February 26, 2003

SUBJECT: Executive Order 107 (Work Order No. 23-GS1071\A)

TO: Representative Paul Seaton
Attn: Cameron Yourkowski

FROM: George Utermohle *GU*
Legislative Counsel

This memorandum is in response to your request for information regarding Executive Order 107 (cited herein as EO 107).

BACKGROUND. Executive Order 107 provides for the transfer of certain permitting functions from the Department of Fish and Game to the Department of Natural Resources and for the transfer of certain functions within the Department of Natural Resources.

The authority of Governor Frank Murkowski to issue EO 107 arises from art. III, sec. 23, Constitution of the State of Alaska. Article III, sec. 23, of the Alaska Constitution states:

Reorganization. The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

The executive order power of the governor is discussed in the Alaska Constitutional Convention Proceedings (pages 2226-2229) and it appears clear that the delegates viewed it as providing the governor the power, as an administrative matter, to reorganize the functions of the executive branch, but not to enlarge, diminish, or otherwise alter those functions.

The power of the governor to amend statutes as necessary to reorganize the executive branch is a legislative power that is conferred on the governor by the Alaska Constitution. The power to pass laws is conferred upon the legislature by the Alaska Constitution art. II, sec. 1 which states: "The legislative power of the State is vested in a legislature

consisting of a senate with a membership of twenty and a house of representatives with a membership of forty." As a consequence of the doctrine of separation of powers which is inherent in the Alaska Constitution (Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947 (Alaska 1975)), one branch of government is prohibited from encroaching upon and exercising the powers of another branch. The blending of governmental powers is permitted only to the extent granted by the constitution and will not be inferred. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976). Just as the legislature's power over executive branch appointments is limited to the confirmation of certain appointments as expressly provided by the constitution (Id.), and just as the governor's power to veto appropriations made by the legislature is limited to that provided by the constitution (See, Alaska Legislative Council v. Knowles, 21 P.3d 687 (Alaska 2001)), the governor's executive order power is limited to that expressly set out in art. III, sec. 23. The governor's executive order power will be narrowly construed and will be confined within the bounds expressed in the constitution.

SPECIFIC QUESTIONS. You have asked a number of questions regarding the effect of EO 107 on the role of the Department of Fish and Game in issuing permits for fishways (AS 16.05.840) and anadromous fish streams (AS 16.05.870) and in regard to forest resources and forest practices under the proposed amendments to AS 41.17. The best way to address your questions is to answer each one separately.

ONE: *Can the legislature amend EO 107 or can it only disapprove the executive order?*

The legislature has only two options in regard to an executive order. Either the legislature accepts the executive order as the governor presented it, or the legislature may disapprove the executive order. The state constitution contains the requirement that disapproval of an executive order is accomplished ". . . by resolution concurred in by a majority of the members in joint session . . ." (Article III, Section 23) This requirement must be complied with or any attempt by the legislature to disapprove an executive order will probably be held invalid by the court. The legislature has no power to amend an executive order directly, although it may seek to enact legislation that amends statutes affected by an executive order.

In addition to the procedure set out in the constitution, Uniform Rule 49(a)(4) provides

A special concurrent resolution is employed to consider disapproval of an executive order of the governor laid before the legislature under provisions of Sec. 23, Art. III, of the State Constitution. This resolution must be considered by a standing committee of each house and may be adopted by a majority vote of the full membership of the legislature in joint session without recourse to three readings.

TWO: *Will the Department of Fish and Game have any legal authority over what is now Title 16 permitting for anadromous fish streams under AS 16.05.870 or fishways under AS 16.05.840?*

EO 107 transfers all authority currently exercised by the commissioner of fish and game over permitting for anadromous fish streams and fishways to a newly created deputy commissioner of natural resources. The deputy commissioner of natural resources will exercise all of the authority formerly exercised by the commissioner of fish and game. The executive order does not expressly provide any role for the Department of Fish and Game in permitting for anadromous fish streams or fishways.

THREE: Is there any legal responsibility for the Department of Natural Resources to ask for the opinion of the Department of Fish and Game on anadromous fish stream permits or fishway permits? Is the Department of Natural Resources under any legal obligation to follow recommendations of the Department of Fish and Game? Is the Department of Natural Resources under any obligation to inform the Department of Fish and Game of applications for anadromous fish stream permits or fishway permits?

The answer to all three questions is no. The Department of Natural Resources is not required to consult with the Department of Fish and Game regarding anadromous fish stream and fishway permits. The Department of Fish and Game may still provide advice to the deputy commissioner of natural resources, regardless of whether it is solicited or not by the deputy commissioner, but the deputy commissioner is not required to follow that advice. There is no provision of the executive order that requires the Department of Natural Resources to inform the Department of Fish and Game of applications for or the issuance of anadromous fish stream permits or fishway permits, though the Department of Natural Resources could provide such information to the Department of Fish and Game if it chose to do so.

FOUR: Under the statutory changes made by EO 107, will the Department of Fish and Game have any legal responsibility for monitoring, enforcing, requiring compliance, and evaluating anadromous fish stream permits or fishway permits?

The answer is no. The statutory changes made by EO 107 repeal the permitting function for anadromous fish streams and fishways from AS 16. Once those provisions are removed from AS 16, the Department of Fish and Game is no longer responsible for monitoring, enforcing, or otherwise implementing those provisions unless the new provisions added to AS 41.14 authorize the department to provide those functions. The new statutory provisions regarding anadromous fish stream permits and fishway permits do not give any responsibility for implementing any of those provisions to the Department of Fish and Game.

FIVE: What is the role of the commissioner of natural resources in the issuance of anadromous fish stream permits and fishway permits under EO 107? The executive order appears to vest the deputy commissioner of natural resources with authority to issue the permits. Is this authority delegated to the deputy commissioner by the commissioner of natural resources?

The responsibility for issuance of anadromous fish stream permits and fishway permits is assigned by law to the deputy commissioner. There is no delegation of authority from the commissioner to the deputy commissioner. The commissioner is still the chief executive officer of the Department of Natural Resources and supervises the deputy commissioner of natural resources, however the deputy commissioner, not the commissioner, has the legal responsibility for issuing anadromous fish stream permits and fishway permits.

SIX: Under EO 107, what would be the appeals process for anadromous fish stream permits and fishway permits and how would it differ from the present process of the Department of Fish and Game?

An appeal of the decision of the commissioner of fish and game in regard to an application for an anadromous fish stream permit under AS 16.05.870 is subject to the administrative adjudication provisions of AS 44.62.330 - 44.62.630 which provides for appeal procedures, a hearing before a hearing officer, and judicial review of the agency decision. An appeal of the decision of the deputy commissioner of natural resources in regard to an anadromous fish stream permit would be made to the commissioner of natural resources under AS 44.37.011(b). An appeal of the decision of the commissioner is then reviewable in the courts. Section 41 of the executive order provides that functions of the Department of Natural Resources relating to the protection of fish and game under AS 41.14.870 (anadromous fish stream permits) are subject to the administrative adjudication provisions of AS 44.62.330 - 44.62.630. An appeal of a decision to the commissioner of natural resources under AS 44.37.011 would also be subject to administrative adjudication procedures of AS 44.62.330 - 44.62.630.

There are no formally established appeal procedures regarding fishway permits under AS 16.05.840. Appeals under AS 16.05.840 are not subject to the administrative adjudication provisions of AS 44.62.330 - 44.62.630 and the commissioner of fish and game has not adopted any regulation specifically relating to such appeals. Upon the transfer of responsibility for fishway permits to the Department of Natural Resources, an appeal of the decision of the deputy commissioner may be made to the commissioner, and then to the courts under AS 44.37.011(b). The department may adopt appeal procedures that it considers necessary by regulation.

SEVEN: Will the Department of Natural Resources public notice requirements apply to anadromous fish stream permits and fishway permits issued by the department?

The new provisions regarding anadromous fish stream permits and fishway permits added by EO 107 do not require public notice of applications for or issuance of those permits.

The public notice provisions of AS 38.05.945 do not apply to anadromous fish stream permits and fishway permits. However those permits could, through the enactment of separate legislation, be added to the list of items under AS 38.05.945 for which the Department of Natural Resources must provide public notice.

EIGHT: AS 16.05.870(d) says the Department Fish and Game must provide for "proper protection." Is there any legal definition for "proper protection"? If not, how will "proper protection" be defined under EO 107?

There is no legal definition of "proper protection." Proper protection is whatever protection is appropriate under the circumstances. The commissioner of fish and game has never defined "proper protection", though the term is used in numerous fish and game statutes and regulations. The commissioner of fish and game determines what constitutes proper protection on a case by case basis. Under EO 107, the deputy commissioner of natural resources may exercise his/her discretion to determine what constitutes proper protection in each case. The deputy commissioner may adopt regulations as necessary to define "proper protection" if he/she so chooses.

NINE: Under AS 16.05.840 a fishway must be provided only when the commissioner of fish and game determines that a fishway is necessary. Is there any legal standard for determining when a fishway or other device is necessary? Under the statutory changes made by EO 107, will the determination of when it is necessary to provide for fish passage be exclusively within the discretion of the deputy commissioner of natural resources?

There is no standard for determining when a fishway or other device is necessary for fish passage. The commissioner of fish and game exercises his/her discretion in making that determination. Even if the commissioner makes the determination that a fishway or other device would be necessary to provide for fish passage, the commissioner has the authority under AS 16.05.850 to waive the requirement for a fishway in favor of a hatchery if the cost of a fishway is too great. If EO 107 takes effect, then the deputy commissioner of natural resources will have the same discretion that is currently exercised by the commissioner of fish and game in regard to fishways around or over dams and other obstructions to fish passage.

TEN: When EO 107 takes effect, will the Department of Natural Resources have a broader mandate giving it permitting authority over all lands? If so is there a conflict legal or otherwise with the department's more limited mandate for state lands?

When EO 107 takes effect the Department of Natural Resources will be responsible for issuing anadromous fish stream permits and fishway permits. The requirements for these permits will apply throughout the state on state, private, and other government land¹.

¹ The applicability of the permit requirements of the current AS 16.05.840 and 16.05.870 and the proposed AS 41.14.840 and 41.14.870 to federal land depends on the nature of the federal land involved. In some cases, the state will not be able to require the federal government or its agents or contractors to comply with the permits if the requirements interferes with a federal program. The supremacy clause of the federal constitution

One of the major responsibilities of the Department of Natural Resources is for the management of state lands. There is no conflict between the responsibilities of the department for the management of state lands and the regulation of private, state, or other government activities in the waters of the state. The legislature may assign any functions it considers appropriate to the Department of Natural Resources. Likewise, the governor by executive order may transfer any function currently assigned to another state agency to the Department of Natural Resources. There are virtually no constitutional limits on the types of functions that can be assigned to the department. If, for policy reasons, the legislature determines that the scope of the Department of Natural Resources should be limited to matters directly related to state lands then it can limit the functions of the department accordingly by law.

ELEVEN: Will federal agencies have to go to the Department of Natural Resources for their in-stream permitting rather than the Department of Fish and Game?

To the extent that the federal government is subject to, or submits itself, to the state permitting process for anadromous fish streams and fishways, the federal government will have to apply for those permits through the Department of Natural Resources. The Department of Fish and Game will no longer have any responsibility for those permits after EO 107 takes effect.

TWELVE: Under EO 107, what happens to the due deference currently accorded to the Department of Fish and Game under AS 41.17 in regard to streamside buffer areas?

Under AS 41.17 (commonly referred to as the Forest Resources and Practices Act) buffer areas must be established around an anadromous water body on private land under AS 41.17.116, around an anadromous or high value resident fish water body on state lands under AS 41.17.118, and around an anadromous or high value resident fish water body on state lands not managed by either the Department of Natural Resources or the University of Alaska under AS 41.17.119. The Department of Fish and Game is responsible for cataloging anadromous fish streams and for identifying uncatalogued streams that exhibit evidence of anadromous fish. The Department of Fish and Game is also responsible for identifying water bodies containing high value resident fish.

Under AS 41.17.098(d) the commissioner of natural resources must give due deference to the Department of Fish and Game in regard to the effects of timber operations on fish habitat, including the effects of variations from the riparian standards established under AS 41.17.117 - .119.

When EO 107 takes effect, the expertise and views of the Department of Fish and Game are no longer entitled to deference under AS 41.17. Section 23 of the executive order provides that the deputy commissioner of natural resources is the expert on fish and

protects the federal government from having to comply with state regulations that interfere with the mission of federal agencies.

wildlife habitat for purposes of AS 41.17. All deference formerly accorded to the Department of Fish and Game in regard to the effects of timber operations on fish habitat must now be accorded to the expertise of the deputy commissioner of natural resources. Responsibility for identifying anadromous fish streams will also pass to the deputy commissioner of natural resources.

THIRTEEN: Is the due deference currently accorded to the Department of Fish and Game under AS 41.17.098(d) equivalent to the authority of the Department of Fish and Game to issue anadromous fish stream permits and fishway permits?

Due deference accorded to the Department of Fish and Game under AS 41.17 is completely separate and distinct from the authority of the department to issue anadromous fish stream permits. The due deference requirement provides that the Department of Natural Resources is to defer to the advice given by the Department of Fish and Game in regard to the effect of timber operations on fish habitat. The due deference provisions give the Department of Fish and Game much more input into the timber management process than does the anadromous fish stream permits. The anadromous fish stream permits relate mostly to activities occurring in the stream bed, while the due deference provision gives the department an opportunity to address timber operations occurring above the stream that may affect fish habitat.

FOURTEEN: Is the requirement for due deference to the expertise to the Department of Fish and Game more effective than providing an opportunity to review and consult?

The "due deference" provision gives the Department of Fish and Game a much more effective means to affect timber operations as necessary to protect fish and wildlife habitat than would the opportunity to consult. Under AS 41.17.098(e) and (f), "'due deference' means that deference that is appropriate in the context of the agency's expertise and area of responsibility and all the evidence available to support a factual assertion. Where due deference is given, if the commissioner [of natural resources] does not agree with a commenting agency, the commissioner shall prepare a written statement of the reasons for the disagreement. . . . If a disagreement [between the agency and the commissioner] . . . exists, an officer of an agency may require reevaluation of the disagreement at a higher level within the agencies, or by the governor if necessary, before a decision is made by the commissioner."

An opportunity to consult would provide the Department of Fish and Game with the ability to provide advice and insight into fish and wildlife habitat issues, but the responsibility for matters affecting fish and wildlife habitat under AS 41.17 would lie solely with the Department of Natural Resources.

FIFTEEN: Under EO 107 does the Department of Natural Resources have an obligation to give due deference to the Department of Fish and Game?

None of the provisions of the executive order provide that the Department of Natural Resources must give due deference to the Department of Fish and Game in regard to anadromous fish stream permits, fishway permits, or fish and wildlife habitat matters under AS 41.17.

* * *

There are two provisions of EO 107 where the governor appears to have exceeded his authority.

First, in sec. 5 of the executive order, a new sec. 41.14.165 is added to provide that a peace officer may issue a citation for violations of the requirements of the fish passage and anadromous fish stream permits. Included in the new sec. 41.14.165 is a requirement that the Alaska Supreme Court determine which misdemeanors under the new AS 41.14 are appropriate for disposition without court appearance. Also included in that section is a requirement that the court establish an advisory committee consisting of certain members, including judges and the chairs of the House and Senate judiciary committees. The governor's executive order authority is a limited authority to restructure the executive branch of state government. That authority does not allow the governor to place duties on either the legislative or judicial branch of government. In this case, both the Alaska Supreme Court and the legislature could completely ignore the requirements imposed by this section because the governor does not have the authority to impose any duty on them through an executive order.

Second, in sec. 45 of the executive order, a provision is added to protect certain Department of Fish and Game employees from losing their "police officers retirement benefits" if they are transferred to the Department of Natural Resources by the order. This section does not involve a reorganization of functions of the executive branch. Instead, it relates to the retirement benefits accorded to state employees under law. No matter how well intentioned the purpose of this section may be, the governor does not have the power under an executive order to change laws regarding employee retirement benefits.

In both instances, the change the governor sought to make may be necessary and appropriate to fully achieve the intent of the executive order. However, the changes cannot be made in an executive order. In the event that the executive order does take effect, it would be advisable that the legislature enact these provisions in legislation so that there would be no legal uncertainty as to the duty of the Alaska Supreme Court in regard to bailable offenses and bail schedules for offenses under AS 41.14 and as to the status of retirement benefits for certain employees who are transferred to the Department of Natural Resources under the executive order.

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EO 107 makes a number of technical conforming amendments to the numerous statutes that must be changed to conform to the transfer of responsibility from the commissioner of fish and game under AS 16.05.870 to the deputy commissioner of natural resources under AS 41.14.870. However, the executive order fails to contain two statutes that should be amended to eliminate soon to be obsolete references to AS 16.05.870. AS 46.15.035(c) and 46.15.037(c) provide for the reservation of a volume of water necessary to protect fish habitat in anadromous fish streams identified by the Department of Fish and Game under AS 16.05.870 when the state approves the transfer of water from one hydrologic unit to another, or when the state sells water from a hydrologic unit. Both of these statutes should be amended to replace the reference to "AS 16.05.870" with "AS 41.14.870". The executive order cannot be amended, so these changes must be made in a separate bill.

* * *

If I may be of further assistance, please advise.

GU:lmb
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Habitat move

*Governor will get his way;
it's time to hold him accountable*

The Republican-dominated House apparently plans to let Gov. Murkowski have his way and strip the Department of Fish and Game of responsibility for habitat protection permits. Friday, the House voted not to expedite a resolution rejecting the governor's controversial reorganization. It was almost a straight party-line vote, with only Republican Paul Seaton of Homer breaking ranks.

The deadline to reject the governor's move is fast approaching, and four more committees would have to clear the repeal measure before the House could vote on it. As a result, the habitat permit job will almost certainly be moved to the development-oriented Department of Natural Resources.

The Legislature's refusal to block the move comes as no surprise. It's an item of faith with the governor and his legislative acolytes that obstructionist greenie bureaucrats are thwarting Alaska's economic progress. It's a myth, but it's a powerful one. In the case of habitat permits, the myth has survived repeated, heavy doses of fact.

When the Alaska Constitution was being drafted, the founders considered using a single resource agency to both regulate and promote development. They decided against it. The founders were not a bunch of greenie lock-up types. They wanted to stimulate development. They knew the state didn't have a lot of money to spend on unnecessary bureaucrats. But they also knew Alaska had to carefully balance development with protection of the state's world-class fish and wildlife.

Attempts to speed up development with environmental shortcuts will almost certainly backfire. Take the Lower Cook Inlet oil and gas lease sale. The Department of Natural Resources insisted on including sensitive habitat areas and declined to include other mitigation measures. The state was sued and lost. In another case, Gov. Wally Hickel tried to ram through the Copper River Highway without doing the necessary environmental homework. Ten years later, the state is finishing the last of four costly remediation projects required to clean up the environmental and legal messes.

Alaska now has a Republican governor and Republican Legislature, so there's no room for political buck-passing. Gov. Murkowski has repeatedly said he wants Alaskans to hold him accountable. When projects are held up because of legal problems that could have been avoided, Alaskans will know who to blame.

EO 107

February 25, 2003

The Honorable Les Gara
Alaska State Legislature
State Capitol, Room 422
Juneau, AK 99801

Dear Representative Gara:

You asked for my perspective on the effect of Governor Frank Murkowski's Executive Order 107 on Alaska's fish resources. This order transfers responsibility for protection of fish habitat, specifically in-stream permitting authority for anadromous and resident fish habitat and joint authority on logging within the 66-foot riparian buffers on private timberland in the coastal forest, from the commissioner of the Alaska Department of Fish and Game (ADF&G) to a deputy commissioner in the Department of Natural Resources (DNR).

My perspective on this issue may be unique. I worked as a resource manager and supervisor in DNR for nine years, was Habitat Director at ADF&G for seven years, and served as Commissioner of Fish and Game for eight years. I know and understand the statutory missions of both departments, and have worked with and appreciate the capable, professional staff in both departments.

I believe that moving ADF&G's in-stream permitting authority and ADF&G's responsibility for stream buffers to DNR will be bad for fish and for Alaskans who depend on wild fish for their jobs, recreation, or subsistence.

Executive Order 107 proposes a radical change to the way Alaska's wild fish have been managed since before statehood. At statehood, the Alaska Legislature decided to create two separate resource agencies, and purposefully assigned ADF&G responsibility for managing Alaska's fish and wildlife and protecting its habitat. The continued strength of Alaska's wild fish resources is testament that ADF&G has done its job well for the past 43 years.

In 1989, the legislature amended the state's Forest Resources and Practices Act, and after numerous hearings and vigorous debate and analysis, it once again decided to maintain authority for in-stream permitting within ADF&G despite pressure from the timber industry to move that authority to DNR. The legislature even went further and gave ADF&G deference on whether or not DNR should allow logging within the 66-foot buffers along salmon streams on private land in the coastal forest of Alaska. The order transfers ADF&G's responsibilities for

buffers to DNR. As a result, salmon streams in the coastal forest will now be at far greater risk of harm.

You asked: *"Why will implementation of the Anadromous Fish Act, the Fishway Act, and the Forest Resources and Practices Act be less protective of salmon and trout if they are housed in DNR?"*

Anadromous Fish Act

First, and most important, the Anadromous Fish Act gives broad discretion to the commissioner of ADF&G. The commissioner, and now the deputy commissioner of DNR, can be either rigorous or lax in the implementation of this broad discretion.

For example, the Anadromous Fish Act presently requires the ADF&G commissioner to **"determine the waters in the state that are important for the rearing, spawning and migration of anadromous fish."** Under the order, this discretion will move from the agency with the scientific expertise to make the determination, to a deputy commissioner of DNR who now will decide what constitutes **"important habitat."** If DNR decides a stream is not **"important"** it will not receive protection under the Anadromous Fish Act. People will be able to mine, drive equipment through, or dig up spawning beds without a permit.

The Anadromous Fish Act also gives the ADF&G commissioner broad discretion to determine what constitutes **"proper protection"** for the rearing, spawning and migration of anadromous fish in **"important"** streams. Again, implementation can be either lax or rigorous. The level of rigor and care will now be in the hands of a deputy commissioner in DNR, not the commissioner of ADF&G.

There are no hard and fast standards of protection in the Anadromous Fish Act. It made sense to Alaska's first legislature to give ADF&G biologists the broad discretion and flexibility to decide what is important habitat using their expertise and professional judgment, and to make field determinations of what protections are needed given the fish resources present and the proposed development. That system has worked successfully to protect Alaska's fish habitat even as Alaska developed its lands and resources over the last four decades.

Fishway Act

The Fishway Act also gives broad discretion to the commissioner of ADF&G. It says: **"if the commissioner considers it necessary, every dam or other obstruction built by any person across a stream frequented by salmon or other fish**

shall be provided by that person with a durable and efficient fishway...." Since statehood it has been the responsibility of the commissioner of ADF&G to determine when it is necessary to provide fish passage. Under this order, a deputy commissioner in DNR will judge when it is necessary to provide fish passage. Again, there is no definitive standard of protection; protection depends on the expertise and commitment of the responsible agency.

Frankly, I do not believe a DNR deputy commissioner will implement this statutory discretion over the fate of anadromous and resident fish species with the same expertise and commitment that commissioners of ADF&G have exercised for the last 43 years. DNR statutes say nothing about managing, protecting, maintaining, enhancing and extending the fish and wildlife of Alaska. Their mission is not to protect and manage these stocks for the commercial, recreational, and subsistence needs of Alaskans; it is to develop Alaska's other natural resources.

I have been part of cabinet-level decisions, both as the director of the Habitat Division and as commissioner of ADF&G, that would have resulted in the unnecessary loss of salmon and trout if ADF&G had not been present as the agency with the statutory authority to protect fish habitat. Without ADF&G commissioner level responsibility the fish, and people dependent on them, will suffer--plain and simple.

Second, location of habitat biologists in DNR will effectively sever their daily access to other ADF&G staff and expertise. Permit decisions are not made in isolation by the Habitat Division. Professional biologists in the Sport Fish, Commercial Fisheries, and Wildlife divisions of ADF&G also bring their expertise to permit decisions. Habitat division staff rely on their knowledge about what fish live in a stretch of stream, and the life stage and sensitivity of a species at the time of proposed development. This collaboration will not occur as easily, if at all, between departments.

Third, I understand the administration has indicated that only between eight and 12 of the 20 habitat permitters will move to DNR. If this is correct, fewer habitat biologists will mean project reviews will either be slower, made with less knowledge of field conditions, or merely a rubber stamp of whatever is proposed.

Currently most projects, and all major projects, get a pre- and post-construction site visit by ADF&G staff. This allows ADF&G to work directly with developers to design project-specific steps to address the needs of the specific species and habitat. Grayling over-wintering habitat in a North Slope oil field requires different approaches to habitat protection than bank stabilization to protect a private home on the Kenai River. Good decisions about such diverse development

in such diverse fish habitat cannot be made from a desk with a rubber stamp. And while each individual decision may appear insignificant, it is the cumulative impact of all these decisions over 43 years that has protected the integrity of Alaska's fish habitat.

You asked for: *"an example that illustrates the difference between the ADF&G and DNR approaches to in-stream fish habitat protection."*

One example that illustrates the different approach I think you will see to in-stream salmon and trout habitat permitting involved the Unuk River near Ketchikan.

The Unuk River produces great king and coho salmon runs valued by sport and commercial users. It also supports other salmon species, char and trout. Years ago, DNR approved a log salvage operation that allowed an amphibious vehicle to operate in the streambed to remove trees that had washed into the river. At the time, ADF&G was concerned about the loss of wood in the river, but did not have good enough information about its role as fish habitat to support an objection.

ADF&G researched the fish habitat function of trees that wash into the Unuk River and found that deep scour pools form along the huge trunks and provide critical over-wintering habitat for thousands of juvenile king and coho salmon as well as trout. The trees form logjams that, in turn, form pools that aid adult salmon migration and provide summer rearing habitat for juvenile king and coho salmon. Logs that jam side channels of this glacial river turn turbid channels into clear water rearing areas for juvenile coho.

When the log salvage license came up for renewal it was denied, because the ADF&G commissioner had good science to support his strong objections to the operation. These logs were, and still are, more valuable in the river. If not for ADF&G's authority, science, and adamant opposition, DNR would have again allowed logging in the Unuk River, thus destroying valuable fish habitat. **The executive order effectively removes ADF&G from these types of decisions.** Next time, only the DNR State Forester and deputy commissioner will have authority over the outcome of logs and fish in the Unuk and every other river in Alaska.

Stream Buffers

Executive Order 107 removes any role for ADF&G in approving or denying the harvest of trees from within the 66-foot stream buffers along salmon streams on private land in the coastal forest of Alaska. These trees are critical

to the health of salmon streams. Research done by the National Marine Fisheries Service, Auke Bay Lab, and others throughout the northwest, has shown that fish streams need a minimum of 100-foot buffers to protect fish habitat. That is why Alaska law requires mandatory 100-foot no cut buffers on public lands in the coastal forest. The politics of creating buffers on private lands required compromising this 100-foot standard and adopting a 66-foot standard on private lands. The 66-foot buffer is not a "no cut" buffer. Trees can be removed if the DNR forester agrees. ADF&G is supposed to get deference, but not a veto, on whether to cut in the buffer.

DNR has ignored ADF&G on many occasions and allowed cutting in the 66-foot buffers. In fact, DNR accepted a "formula variation" request from Koncor Forest Products on Afognak Island that proposed removing every tree larger than a certain diameter from the buffer, regardless of their value for fish habitat protection. ADF&G objected and eventually its objection and public pressure forced DNR to deny the request.

ADF&G currently has some influence over DNR's decision on whether to cut trees in the buffers. That will change under the order. The DNR State Forester will now make the decision whether to log the buffers after giving due deference to his deputy commissioner. **ADF&G will have no voice in whether these trees stay in the buffer and continue to provide fish habitat.** Far more trees will be removed from these protective buffers without ADF&G participating in the decision.

Under Executive Order 107, habitat biologists and the many Alaskans who depend on salmon, trout, char, and grayling won't have the weight and stature of the commissioner of ADF&G looking out for the health of the habitat that produces these fish. Instead, the care of Alaska's fish will be relegated to a deputy commissioner in DNR. Anyone who believes this will lead to equivalent protection for Alaska's salmon and trout is sadly mistaken.

Lastly, I question why some feel this order is necessary. ADF&G routinely reviews some 2,000 permit requests every year (38,000 in the last twenty years) and 99 percent are granted within 15 days. Sure, some developers complain. Any agency that brings the fish and wildlife issues to the table when mining, oil and gas, roads, timber and other development projects are reviewed is bound to have its critics. I don't believe this warrants having ADF&G's authority to protect salmon and trout streams stripped and permitting development with no input from the department that knows best what is needed for fish and has the courage to say it.

If you look closely into the concerns Governor Murkowski has raised you will find ADF&G staff are doing their job. Are Alaska's oil, transportation, mining, and timber resources being developed? Yes. Does the public trust that a permit issued by ADF&G will protect fish? Yes. Will this same trust exist if DNR is issuing the permit? No. Are well-designed projects unreasonably delayed by the in-stream permitting requirements of ADF&G? No. Are poorly designed projects improved by having ADF&G approve their in-stream components? Yes. And are the fish and wildlife of Alaska still the envy of the world in large part because ADF&G has consistently brought good science and a strong commitment to fish and wildlife resources to the table? A resounding Yes.

If this or any future administration thinks the policies of ADF&G are unnecessarily protective of fish habitat for certain development projects, it can adopt different implementation policies without destroying the checks and balances that have served Alaska well for 43 years.

The executive order is bad public policy and will be bad for Alaska's fish and wildlife. The process for making this radical change denies Alaskans the chance to understand its meaning and voice their opinion. I hope the legislature will hold enough hearings to understand the long-term effects of this move and listen to the people of Alaska. I hope the administration allows biologists to be heard without fear of reprisal.

I have not addressed the impact of Executive Order 106, however, this too will lead to great loss of Alaska's fish and wildlife. I hope the legislature takes the time to listen to all sides on these issues and seriously considers the long-term ramifications of these proposals. The health of Alaska's world-class fish resources deserve the time and attention of the legislature.

If you have further questions please don't hesitate to ask.

Sincerely,

A handwritten signature in cursive script, appearing to read "Frank Rue", with a long horizontal flourish extending to the right.

Frank Rue

cc: Representative Paul Seaton, Chair, Fisheries Committee

Alaska State Legislature

no objection

Chair
Seaton

Vice Chair
Wilson

Members
Berkowitz
Guttenberg
Heinze
Kott
Samuels



State Capitol
Juneau, AK 99801
(907) 465-3306
(907) 465-3472

House Special Committee on Fisheries

MEMORANDUM

TO: House Fisheries Committee Members

FM: Representative Paul Seaton, Chair
House Fisheries Committee

DATE: March 28th, 2003

RE: Waiving HSCR 1 From Fisheries Committee

HSCR 1 is sponsored by Rep. Gara and is intended to reject Executive Order 107. EO 107 transfers the Department of Fish and Game Habitat Division to the Department of Natural Resources.

I support the waiving HSCR 1 from the House Special Committee on Fisheries.

Cheryl M. Brown Heinze
Representative Heinze

[Signature]
Representative Samuels

[Signature]
Representative Ogg

[Signature]
Representative Berkowitz

[Signature]
Representative Guttenberg

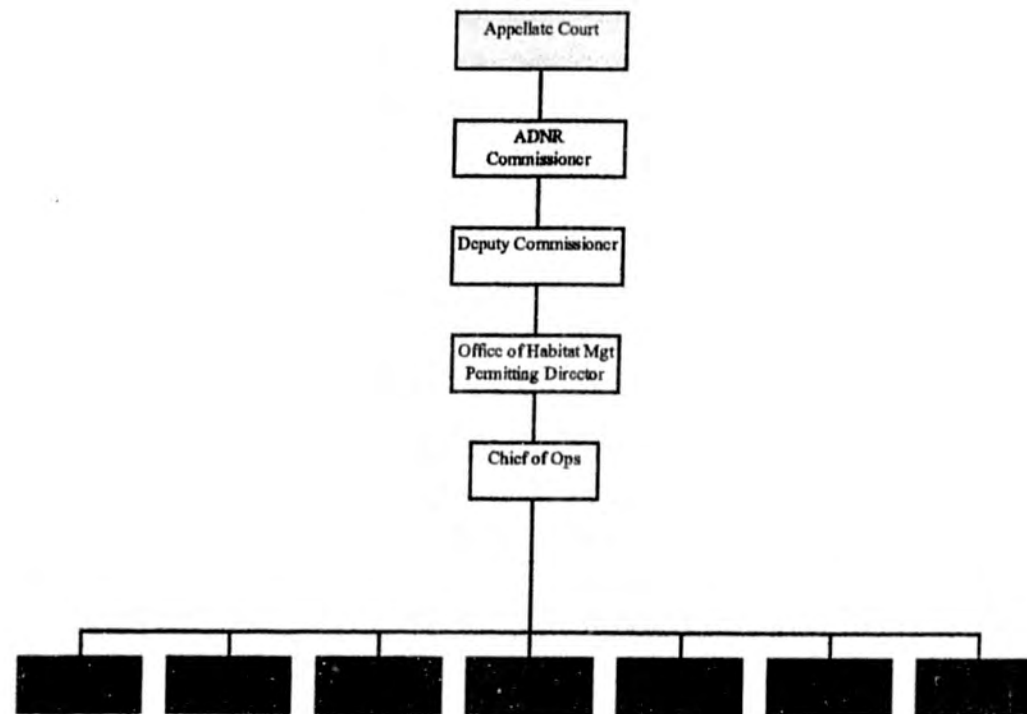
Beggy Wilson
Vice-Chair Wilson

Paul R. Seaton
Chair Seaton

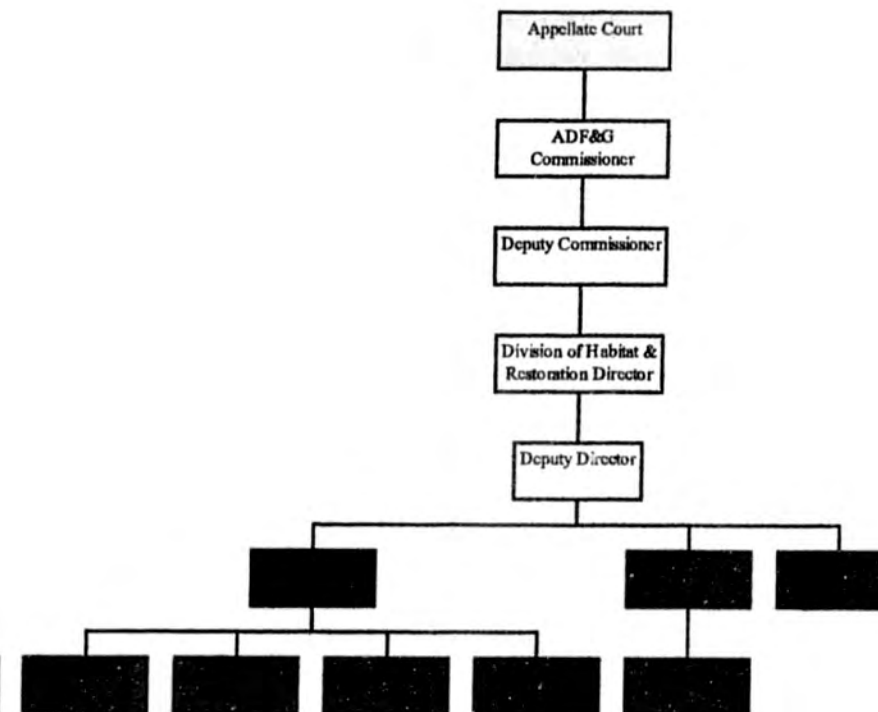
Please feel free to contact me with questions anytime x2689, or you can contact my Committee Aide, Cameron Yourkowski, x3306. Thank you.

.840 Permits -- Appeal Procedures

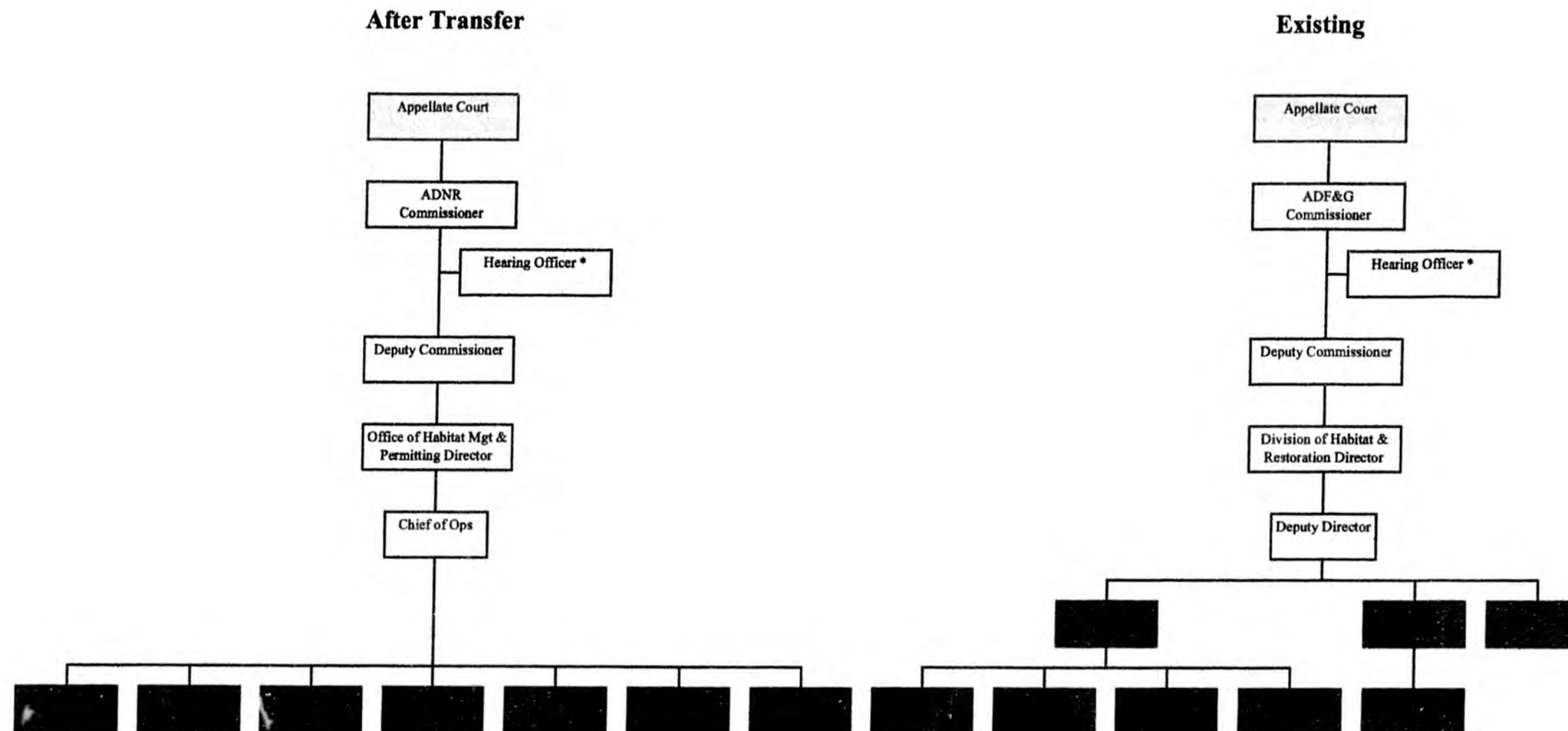
After Transfer



Existing



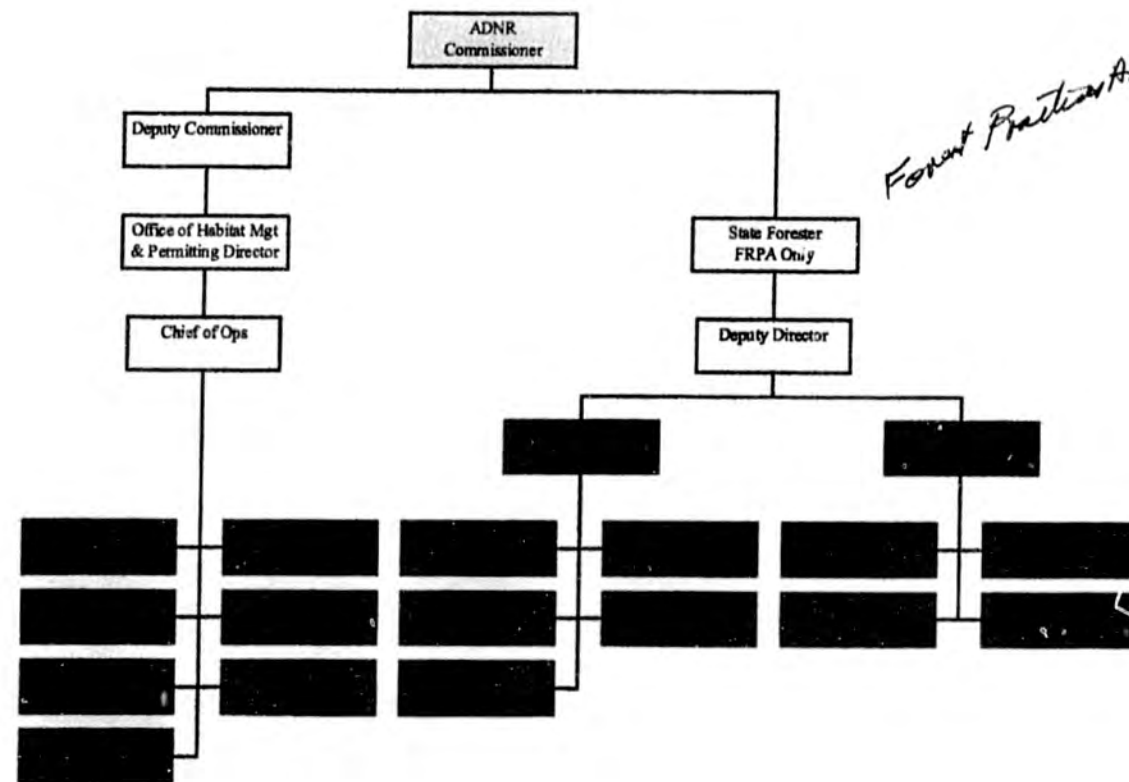
.870 Permits -- APA Appeal Procedures
AS 44.62.330-.630



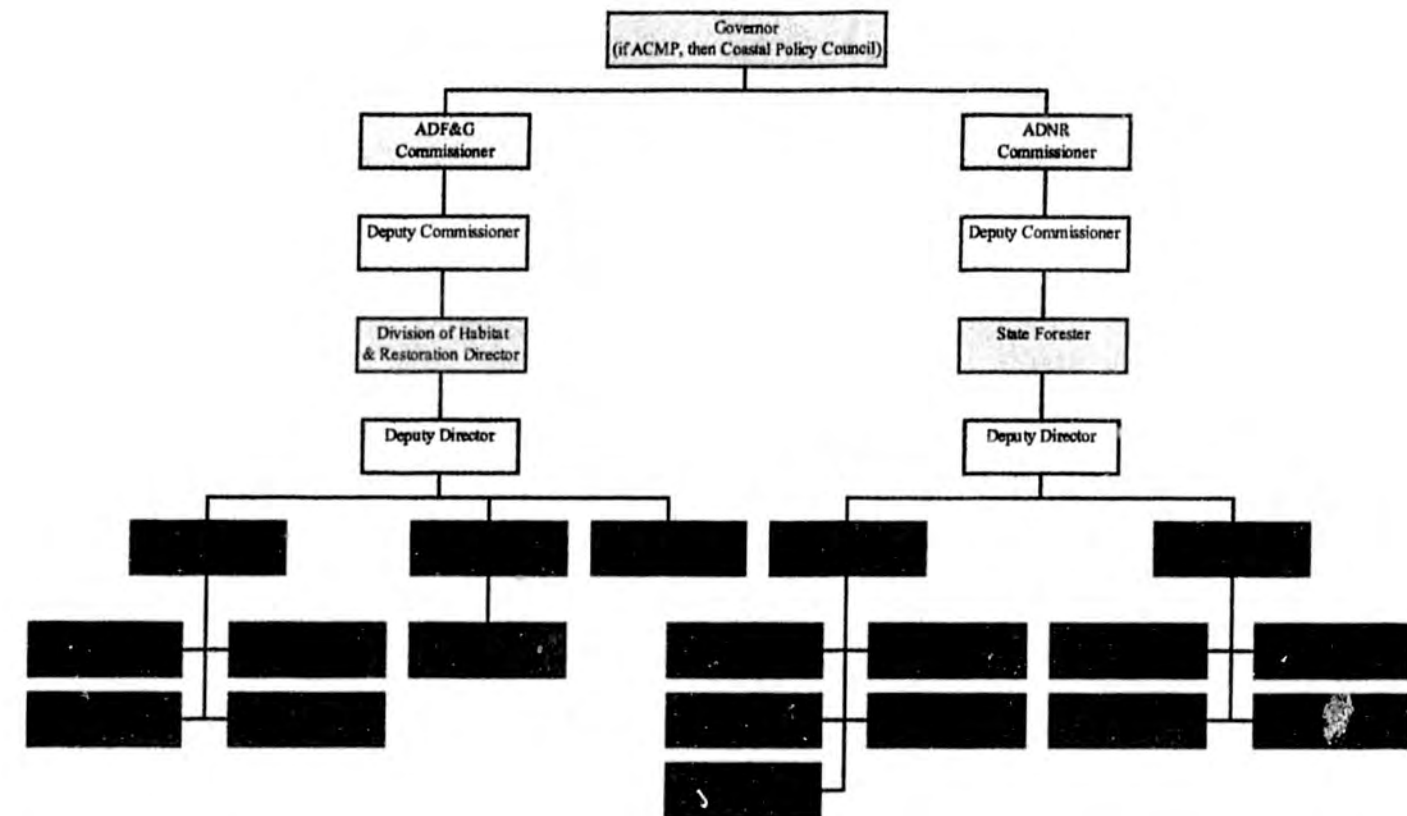
* Hearing Officers are not permanent positions within these two departments. Instead, when a hearing is requested, either a department employee is tasked, or a professional services contract secures a 3rd party hearing officer, or funds are RSA'd to another department for an employee to conduct the hearing. After conducting the hearing and reviewing all the facts, a Hearing Officer makes a recommendation to the Commissioner. The final decision of the department, however, is made by the Commissioner.

Conflict Resolution Between Forestry and Habitat (Forest Resource Practices Act Only)

After Transfer



Existing



Department of Fish and Game

Division of Habitat and Restoration

**Reorganization Proposal
In Accordance With Executive Order No. 107**

Effective Date: April 15, 2003

27 Biol.

Functions Moving to DNR (36 positions)

- Title 16 fish passage and anadromous fish stream permitting
- Anadromous Waters Catalog (regulatory function)
- Project-related research and monitoring
- Consistency reviews, land use plan reviews, review of 6217 documents, coastal boundaries atlas
- Forest Resources and Practices Act permitting

14.5 Biol.

Functions Moving to Sport Fish (19.5 positions)

- Fish stream surveys and database
- Various research and restoration projects (e.g., stream bank restoration manuals and assistance, ATV study and mapping)
- Oil spill contingency plan reviews
- ACMP support to DFG Commissioner
- Special Areas Permitting
- • Kachemak Bay National Estuarine Research Reserve (10.5 positions)

3 Biol

Functions Moving to Wildlife Conservation (4.5 positions)

- Access Defense
- CARA/SWG
- North Slope Grizzly Project

3 Biol

Functions Moving to Comm Fish (3 positions)

- LTF Dive Survey
- Mariculture Leases
- Invasive Species

EVOS (1 position)

- ARLIS Librarian

30 full time
23 currently full time
Added area in Mat Su
Kos. + Sitka

DEPARTMENT OF NATURAL RESOURCES
Office of Habitat Management & Permitting

Job Class		HB IV	HB III	HB II	HB I	Admin Mgr	Admin Asst	Admin Clk	Exec	Totals
Range		20	18	16	14	17	13	10	26/24	
AREA OFFICES	Anch Area	1 ^s	6	2	1		1	1		12
	Mat-Su		1 ^s	1				0.5		2.5
	Kenai		1 ^s					1		2
	Fairbanks	1 ^s	4	2			1			8
	POW		1 ^s					0.5		1.5
	Petersburg		1 ^s							1
	Juneau	1 ^s	1	2			1			5
	JPO	1								1
	HQ					1			2	3
Totals		4	15	7	1	1	3	3	2	36

s = lead biologist/supervisor

DEPARTMENT OF FISH & GAME
Sport Fish Habitat Component inc. SSF

Job Class		HB IV	HB III	HB II	HB I	Cart II	Admin Mgr	AP II-IV	Totals
Range		20	18	16	14	15	15	16-20	
	Anchorage	1 ^s	5	2		1	1	1	11
	Fairbanks		1						1
	Juneau		1						1
	SSF		2	1	1.5			2	6.5
Totals		1	9	3	1.5	1	1	3	19.5

Kachemak Bay Research Reserve

Job Class		HB IV			HB I	Educ	Res	Acct	Adm	Totals
Range		FB IV	FB III	HB II	FB I	Spec	Analys	Clrk I	Clk III	
Range		20	18	16	14	19	16	9	10	
	Homer	2 ^s	1	1.5	2	1	1	1	1	10.5

Wildlife Component

Job Class		HB III	HB II	HB 1	Cart II	FWT III			
Range		18	16	14	15	11			Totals
Anchorage		1		1	1	0.5			3.5
Fairbanks		1							1
Totals	0	2	0	1	1	0.5	0	0	4.5

Comm Fish, EVOS Component

Job Class	HB IV	HB III	Libr II						
Range	20	18	17						Totals
Anchorage	1	1	1						3
Juneau		1							1
Totals	1	2	1	0	0	0	0	0	4

Habitat Division Layoffs and Position Deletions

ANTICIPATED LAYOFFS

Anchorage -
 11-6029 Regional Supervisor
 11-6041 Habitat Biologist II
 11-6054 Habitat Biologist II
 11-6149 Cartographer I
 11-6053 Administrative Clerk
 11-6066 Administrative Clerk
 Non-Perm Administrative Clerk
 Non-Perm F&W Technician II
 Non-Perm Fisheries Biologist III
 Non-Perm Natural Resource Mgr I

Fairbanks
 11-6010 Regional Supervisor

Juneau
 11-6011 Deputy Director
 11-6003 Regional Supervisor
 11-7711 Assistant Director
 11-6047 Habitat Biologist III
 11-6043 Administrative Assistant
 11-7714 Accounting Technician
 Non-Perm College Intern

Sitka
 11-6135 Habitat Biologist III
 11-1702 Habitat Biologist I
 11-6058 Administrative Clerk

Ketchikan
 11-6069 Habitat Biologist III

Craig
 11-6083 Habitat Biologist II

VACANT POSITIONS TO BE DELETED

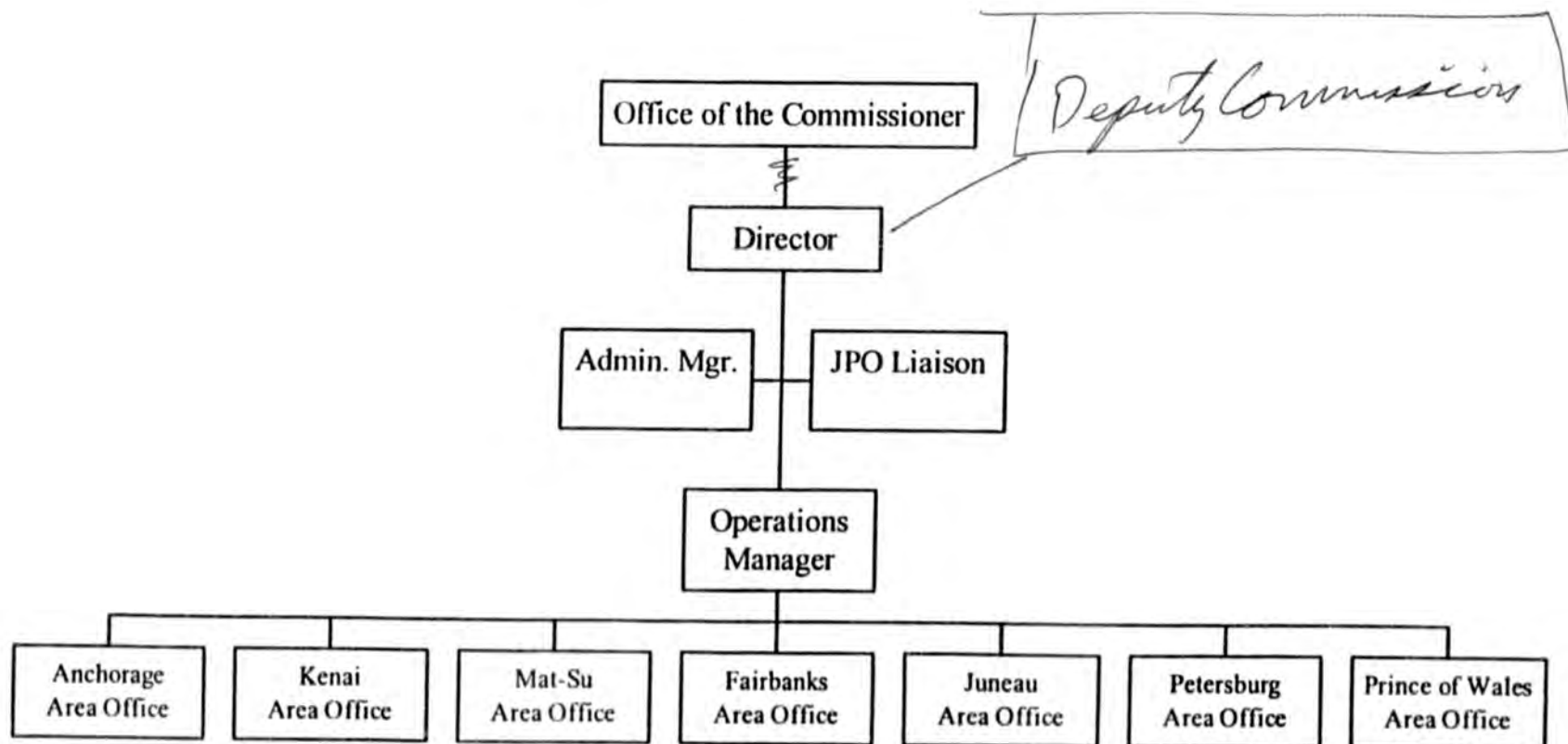
Anchorage
 11-135X Pipeline Liaison
 11-6146 Habitat Biologist III
 11-7716 Habitat Biologist III
 11-7717 Habitat Biologist III
 11-7600 Habitat Biologist I
 11-7090 F&W Technician III

Fairbanks
 11-6061 Habitat Biologist I

Juneau
 11-6018 Habitat Biologist I
 11-7097 Habitat Biologist I
 11-7713 F&W Technician III
 11-7108 Accounting Technician II
 11-6012 Administrative Clerk

Layoff notices issued March 7, 2003 with an effective date of May 1, 2003.

DEPARTMENT OF NATURAL RESOURCES
Office of Habitat Management & Permitting



**Director
Sport Fish**

Anchorage	Juneau	Fairbanks	Southeast Sustainable Salmon Fund	Kachemak Bay Research
Habitat Biologist IV - 1 Habitat Biologist III - 4 Habitat Biologist II - 2 Cartographer II - 1 Administrative Manager - 1 Analyst Programmer - 1	Habitat Biologist III - 1	Habitat Biologist III - 1	Habitat Biologist III - 2 - Juneau Habitat Biologist II - 1 - Juneau Habitat Biologist I - 1.5 - Juneau Analyst Programmer - 2 Anchorage	Habitat Biologist IV - 1 Fishery Biologist IV - 1 Fishery Biologist III - 1 Habitat Biologist II - 1.5 Habitat Biologist I - 1 Fishery Biologist I - 1 Education Specialist - 1 Research Analyst II - 1 Accounting Clerk I - 1 Administrative Clerk III - 1



**Alaska Department of
Fish and Game**

Kevin Duffy, Acting Commissioner
PO Box 25526
Juneau, AK 99802-5526



**Alaska Department of
Natural Resources**

Tom Irwin, Commissioner
400 Willoughby Ave Ste 500
Juneau, AK 99801

Contacts: Nancy Long, ADF&G - 465-6166 or Wyn Menefee, DNR - 269-8412

News For Immediate Release

March 7, 2003

**ADF&G Working with DNR on Transition of
Title 16 Permitting Responsibilities**

The plan transferring Title 16 habitat permitting functions from the Department of Fish and Game (ADF&G) to the Department of Natural Resources (DNR) is designed to streamline permitting without sacrificing Alaska's environmental safeguards. Specific permitting functions will move to DNR, while certain habitat related functions will remain within ADF&G divisions.

"In order to facilitate this process change, Commissioner Irwin and I will be developing a detailed memorandum of understanding to ensure close coordination between the agencies," said Kevin Duffy, Acting Commissioner of ADF&G. "I'm looking forward to the new relationship between our agencies and will work hard to make this a positive transition."

DNR is creating the Office of Habitat Management and Permitting to administer the agency's new responsibilities. The new DNR office will include:

- Title 16 fish passage and anadromous fish stream permitting
- Anadromous Waters Catalog (regulatory function)
- Project-related research and compliance monitoring
- Consistency review, land use plan review
- Forest Resources and Practices Act permitting, monitoring and compliance

"I welcome this transition which will allow habitat biologists to work closely with the other permitting functions within DNR," said DNR Commissioner Tom Irwin. "I am impressed with the dedicated and professional staff that has been working on this reorganization." While protecting valuable fish and wildlife habitats, the new office will work to reduce permit issuance times and lower permitting costs through close coordination.

-More-

Habitat-related activities that will be maintained within other ADF&G divisions include:

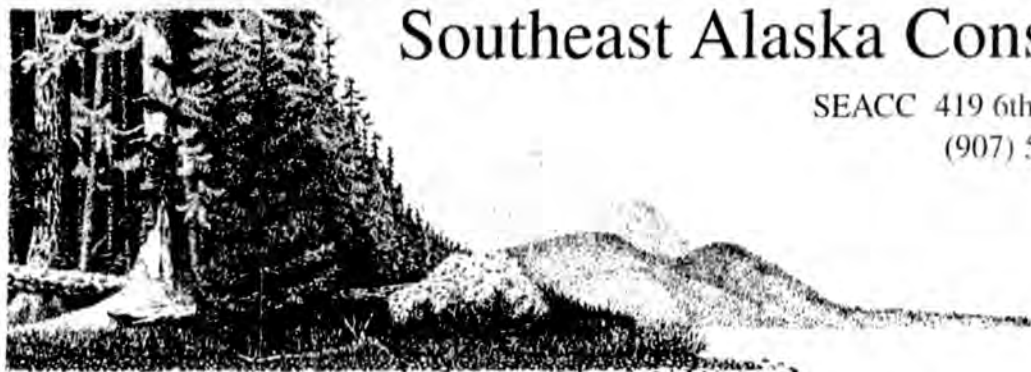
- Special area permitting
- Fish stream surveys and database
- Various research and restoration projects
- Oil spill contingency plan reviews
- Land use support
- Wildlife-related projects
- Mariculture leases
- Log Transfer Facility Dive surveys

"An outstanding group of experienced and professional staff dedicated to resource conservation will be transferring to DNR," Duffy said. "In addition, I am very pleased that many of our staff will remain within the department."

The plan anticipates transferring 36 ADF&G Habitat positions to DNR with a remainder of 38 positions moving to other ADF&G divisions. The streamlining effort will layoff 22 currently filled positions from ADF&G's Habitat Division and eliminates 12 currently vacant positions.

The Executive Order directing the transition will become effective April 15, 2003.

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Southeast Alaska Conservation Council

SEACC 419 6th Street, Suite 200, Juneau, AK 99801
(907) 586-6942 phone • (907) 463-3312 fax
www.seacc.org • info@seacc.org

Testimony on Executive Order 107

Before the

Alaska House Special Committee on Fisheries, March 26, 2003

by

Bruce Baker, President, Board of Directors, Southeast Alaska Conservation Council

I'm Bruce Baker and am testifying on behalf of the Southeast Alaska Conservation Council (SEACC), a coalition of 18 volunteer conservation groups in fourteen communities across Southeast Alaska from Yakutat to Ketchikan. SEACC is dedicated to safeguarding the integrity of the region's unsurpassed natural environment while providing for balanced, sustainable use of our region's resources.

Ten years ago I retired from ADF&G after serving 11 years as Deputy Director of its Habitat Division. SEACC agrees with much of the previous legislative testimony against Executive Order (EO) 107. My primary question tonight is why the legislature would acquiesce to the relinquishment of the authority you've retained over fish and game habitat protection since statehood.

We urge you to carefully consider the following points:

1. EO 107 reduces the authority and right of the legislature to influence executive management of the state's fish and wildlife by shifting the core statutory responsibilities of the ADF&G (Alaska Department of Fish and Game) Commissioner, an executive officer appointed by the Governor and subject to legislative confirmation, to a deputy commissioner of DNR (Department of Natural Resources) appointed by the DNR Commissioner and not subject to legislative confirmation.

Under the Alaska Constitution and existing law, the legislature enjoys the power to exercise direct influence over the Governor's management of fish and wildlife resources by exercising its authority to confirm the Commissioner of ADF&G and members of the Boards of Fisheries and Game, appointed by the Governor. (See Article III, Sec. 25 of Alaska Constitution; AS 44.39.030; AS 16.05.221(a), (b)). The Alaska Constitution (Article III, sec. 25) states: "The head of each principal department shall be a single executive . . . He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session . . ."

The power of Governor Murkowski to amend statutes as required to reorganize the executive branch is a legislative power conferred expressly upon the executive in the Constitution (Article III, sec. 23).

- EO Section 5 transfers the Commissioner of Fish and Game's authority to protect fish passage (AS 16.05.840) and fish and game habitat (AS 16.05.870) to the DNR deputy commissioner.
- EO Section 23 transfers ADF&G's authority to protect fish habitat from the effects of logging operations under the Forest Practices Act (AS 41.17.098(c)) to the DNR deputy commissioner.

The first Alaska Legislature specifically assigned accountability for core ADF&G functions to the Commissioner of Fish and Game. The law permits the legislature to retain influence over the executive branch's management of fish and game by making the state official directly responsible for fish passage (AS 16.05.840) and fish and game habitat protection (AS 16.05.870), the ADF&G Commissioner, subject to the legislature's constitutional power to confirm. However, EO 107 assigns these core fish and game responsibilities to a deputy commissioner, a position not directly accountable to the legislature. The Commissioner of DNR will not have any direct authority or responsibility for these functions. We contend that the Governor lacks the constitutional authority to reassign critical fish and game functions, specifically delegated by the legislature to a commissioner-level officer, to a lesser official such as the DNR deputy commissioner. EO 107 is, therefore, constitutionally impermissible because it does not simply reorganize the functions of the executive branch but significantly alters those functions by assigning them to an executive official who is not the head of the department.

Under Section 40 of the EO, the DNR Commissioner is given the authority to appoint the deputy commissioner. Although the legislature has the authority to confirm the DNR Commissioner, the executive order transfers the responsibility and accountability for fish passage and the protection of fish and game not to a DNR Commissioner but rather to a deputy commissioner that he or she appoints. Although the legislature has provided the DNR Commissioner with the authority to assign functions within the department (AS 44.17.010), the executive order does not assign the fish passage and protection of fish and game functions to the Commissioner of DNR or to the department itself. Instead, the order assigns these critical functions to a deputy commissioner. Under EO 107, the Commissioner of DNR will not have any direct authority or responsibility for these functions.

2. EO 107 Fails to Specify any Minimum Qualifications for the DNR deputy commissioner.

Section 23 of the EO directs the State Forester to "recognize the expertise of the deputy commissioner with regard to fish and wildlife habitat." However, Section 40 does not require the DNR Commissioner to appoint a person with any expertise related to

protection of fish and wildlife habitat as deputy commissioner. In comparison, the ADF&G Commissioner must be a "qualified executive with knowledge of the requirements for the protection, management, conservation, and restoration of the fish and game resources of the state." (AS 16.05.010). In addition, anyone appointed Fish and Game Commissioner by the Governor must come "from a list of qualified persons nominated by the Board of Fisheries and Board of Game ... [and] confirmed by a majority of the members of the legislature in joint session." (AS 44.39.030)

The Executive Order has transferred responsibility for protection of the State's fish and game resources from a "qualified executive with knowledge of the requirements for the protection ... of the fish and game resources of the state" to a person with unspecified qualifications and unknown abilities. This approach to fish and game management is little more than a throw of the dice. Continued good health of Alaska's salmon will be subject to capricious judgment of a single individual instead of the collective wisdom of all those currently responsible for the sustained maintenance of a most incredible renewable Alaska resource.

3. No person with supervisory authority over the deputy commissioner is required to possess any knowledge or experience regarding protection of fish and game habitat.

There is no statutory requirement for the DNR Commissioner to have any knowledge or experience regarding fish and wildlife habitat protection. Executive Order 107 transfers the authority of the DNR Commissioner under Alaska's Forest Practices Act to the state forester. Under AS 41.17.020, the state forester must have "(1) a bachelor's or higher degree in forest management and at least three years of field experience in forestry; or (2) at least eight years of professional work experience a forester." Consequently, no official with supervisory or management authority above or equivalent to the deputy commissioner is required to have any knowledge or experience regarding fish and habitat protection.

In conclusion, unless a majority of the legislature in joint session disapproves of this executive order, it will:

- Reduce this and future legislatures' control over the state's fish and game resources by placing the core responsibilities for fish passage and habitat protection into the hands of a state official not directly accountable to the legislature and it will
- Transfer responsibility for the protection of the state's fish and game resources from a "qualified executive with the knowledge of the requirements for the protection . . . of the fish and game resources of the state" to a person with unspecified qualifications and unknown abilities.

We urge the legislature to put the long-term health of Alaska's fish and game, and welfare of all the Alaskans who depend upon these renewable resources, ahead of any short-term political objectives. Thank you for allowing me to testify.

Testimony of Frank Rue regarding EO 107
Special House Committee on Fisheries
March 26, 2003

Good evening and thank you for this opportunity to testify on EO 107.

For the record my name is Frank Rue. I served as the commissioner of ADF&G for the past eight years. Before that I was the ADF&G Habitat director for seven years and for nine years before that I was a resource manager for the DNR.

I do not support EO 107 and urge you to disapprove it and instead work with the administration and the public to address any real or perceived problems with the ADF&G administration of the Anadromous Fish Act, the Fishways Act and the Forest Resources and Practices Act.

I am submitting, for the record, two letters, one signed by the last five commissioners of Fish and Game to Governor Murkowski and one from me to Representative Gara. I believe they are both relevant to your deliberations.

Tonight I will limit my remarks to the two reasons the administration has given to justify this move.

First, that this restructuring will lead to a more efficient and streamlined permitting process; and second, that DNR will maintain the same level of protection as ADF&G.

If this move is about efficiency, or removing layers of the bureaucracy, I don't see it. You could reduce three regional supervisors to one operations manager in the name of efficiency and leave the function in ADF&G. You can cut deputy directors and biologists in the name of efficiency and leave the function in ADF&G.

The fact is that the vast majority of projects that require an anadromous fish habitat permit or a fishway permit are single-permit projects and require no other authorization. Those permits are issued in an average of just 14 days, so what layers of bureaucracy are being removed and what timelines are being sped up by moving the function to DNR? NONE.

Projects that do require more than an ADF&G permit seldom require a DNR permit too. The Corps of Engineers and ADF&G are far more likely to issue permits for the same project, so what duplication is being removed? NONE.

Forest practices-related culverts do not require a permit from DNR. The timber industry was very adamant that there be no FRPA permits. The only permit needed by a timber company for a culvert is an ADF&G permit. Here again, no duplication is removed by putting DNR in charge of fish habitat.

If the level of protection is to be the same under DNR as it is under ADF&G, then why make the move? In fact, this move is about weakening the standard of protection for Alaska's salmon, trout and other fish.

There are several reasons I believe the level of protection will be lower under DNR than it has been under ADF&G.

Start with the different missions of the two departments. DNR is focused primarily on developing renewable and non-renewable resources on state lands -- oil and gas; minerals; timber; agriculture and parks. It is expressly not responsible for management of Alaska's wildlife or development of its fisheries.

Fish and Game is responsible for managing fish and wildlife for the sustainable use and enjoyment of Alaskans.

What this means in reality is the commissioner of DNR gets out the cut and the commissioner of fish and game gets out the catch.

The ADF&G commissioner goes to work every day, responsible for Alaska's commercial, sport, subsistence and personal use fisheries. These are fisheries people need to feed themselves and their families and they generate close to a billion dollars in income each year. They employ more Alaskans than any other sector of the economy.

When faced with a development project that could impact important fish habitat, who do you think will have greater concern and determination to make sure that habitat is protected?

The commissioner of ADF&G, who is responsible for all the fisheries in the state; who knows that habitat protection is one of the foundations of sustainable fish and wildlife management; who knows that he or she will fail the fishermen of Alaska if habitat is lost?

Or -- under the scheme of EO 107 -- a deputy commissioner in DNR, who has no responsibility to the fishermen of Alaska?

The level of protection will also be lower because a deputy commissioner in DNR, not the commissioner of ADF&G who is confirmed by the legislature, is the last administrative stop for anadromous and resident fish habitat decisions.

A deputy commissioner in DNR, and not the commissioner of ADF&G, will decide what is "important habitat," what is "proper protection" and when fish passage is "necessary."

In-stream habitat of king salmon, steelhead and rainbow trout will have less stature in DNR than a potato! A potato at least has a cabinet-level DNR commissioner responsible for its well being.

A deputy commissioner at DNR does not have equal standing with the commissioner of DOT or his own boss or the Regional Forester of the US Forest Service to bring issues to their attention and effectively argue for fish habitat protection. **Fish habitat will lose out.**

I have 23 years of experience at DNR and ADF&G negotiating the Forest Resources and Practices Act; negotiating with DOT as transportation projects are built to protect fish habitat; negotiating oil and gas stipulations on state and federal leases; working to keep trees important to stream habitat in buffers; and working to protect critical wildlife and fish habitat in state and federal forest plans.

I can guarantee you, from my experience, that ADF&G commissioners will care more and have a higher standard of protection for fish than will a deputy commissioner at DNR.

The level of protection will be lower because 22 people have been cut from the Habitat Division. The workload has not gone down; time in the field will.

Will the remaining positions that go to DNR be biologists now and in the future? They don't have to be under the order; they could be resource managers, foresters, or hydrologists rather than trained fish habitat biologists.

The level of protection will be lower because the biologists who are left at DNR will be isolated from their peers at ADF&G Commercial Fisheries and Sport Fish divisions. One operations manager, instead of three knowledgeable regional supervisors, will be responsible for the biologists and issues from Barrow to Ketchikan.

It is curious that the Governor wants less and not more supervision and support for these same biologists he accused of having personal agendas.

None of this makes sense unless you want less protection for Alaska's fish and easier, cheaper development of timber, roads and mines that will impact salmon and trout.

There is an alternative.

If you want the same standard of protection, leave the function of fish habitat protection in ADF&G. If the legislature agrees that positions should be cut from the Habitat Division, you can do that and keep the function in ADF&G.

If the legislature feels that the policies ADF&G uses to implement the Anadromous Fish Act and the Fishways Act need to be changed that can be done by working with the administration and the public to implement regulations. That way Alaskans will have more say about how much or how little protection they want for Alaska's salmon and trout habitat than they will if EO 107 is allowed to go into effect.

I do not think there is a way for the legislature to make a silk purse out of a sow's ear. EO 107 is a sow's ear for Alaska's fish despite the best intentions of the current commissioner of DNR. Please work to reject EO 107.

Thank you for holding this hearing, and for your attention. I would be happy to answer any questions you might have.

Frank Rue Carl Rosier Don Collinsworth Ron Skoog Jim Brooks
c/o 7083 Hendrickson Road
Juneau, AK 99801

January 30, 2003

Dear Governor Murkowski:

As former commissioners of the Alaska Department of Fish and Game, with a combined experience of over 30 years managing the department, we urge you not to move the statutory authority and responsibility to protect Alaska's salmon, trout, and other fish resources from the Department of Fish and Game (ADF&G) to the Department of Natural Resources (DNR).

We served under Republican, Democratic, and Independence party governors and we all agree that ADF&G must continue to be responsible for protecting the stream habitat of Alaska's salmon and trout. We share the belief that the loss of this authority will result in unnecessary and potentially irreversible harm to these resources that are critical to Alaska commercial, sport, and subsistence users.

At Alaska's Constitutional Convention in 1955, our founding fathers debated whether the new state should have one resource agency or two. They understood the need to develop our oil, mineral, and timber resources, and build the roads and highways needed to open up our vast state, and they recognized the need to balance that development with protection of fish and wildlife by purposefully giving the responsibility and authority to protect in-stream fish habitat to ADF&G.

The two resource agency approach provides for appropriate checks and balances in development decisions and it recognizes the importance and value of both our renewable and non-renewable resources.

When the first Alaska Legislature passed the statutes that define the basic responsibilities of state agencies, it agreed that habitat protection was best served as part of ADF&G's mandate to protect and manage fish and wildlife resources. This issue was debated again in 1989 when Alaska revised its Forest Practices Act. Again, the Legislature saw the wisdom in retaining ADF&G's authority to protect fish streams under the anadromous fish act (AS 16.05.870) and Alaska's fishway act (AS 16.05.840).

We understand your administration's goal of streamlining economic development, but feel the problem you are trying to fix is not rooted in ADF&G's implementation of its permitting authority. In fact, 2,000 "Title 16" permits are issued each year by ADF&G in an average time of just 15 days, with 99 percent of them approved. This achievement can be credited to a responsive, professional and experienced staff in the Habitat, Commercial Fisheries and Sport Fish divisions who have a long, laudable record of working collaboratively to maintain Alaska's fishery resources and the habitat on which they depend. We do not think it is possible to replicate this capability within another agency

and doing anything less will erode or destroy Alaska's capacity to aid development in ways that avoid or minimize threats to our fishery resources.

We know from experience that some would prefer not to worry about impacts of development on salmon, trout, and other fish. Life might be easier without having to ensure adequate culverts, bridges, and buffers around spawning streams, but this comes at a cost to those Alaskans who depend on fish for a job or a meal, and for whom the loss of fish habitat will mean an inevitable loss of opportunity.

Naturally, any regulatory agency has its critics, but if you think ADF&G is being unreasonably restrictive on a given project, you as Governor, or your commissioner of Fish and Game, have the authority to intervene. As commissioners, all of us have at various times taken such actions to ensure proper regulatory balance.

Since Alaska became a state 43 years ago, Alaskans have prided themselves on doing things differently than in the lower 48. In fact, Alaska's oil and gas, mining, transportation, and timber industries have done an outstanding job of developing their industries while at the same time, with the help of ADF&G, taking the prudent steps needed to protect our unsurpassed resources of salmon and trout.

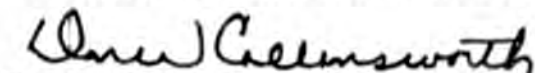
You only have to look south to see how many salmon and trout runs have been destroyed or endangered by thoughtless development--the kind of careless development that will occur without ADF&G authority for in-stream permitting.

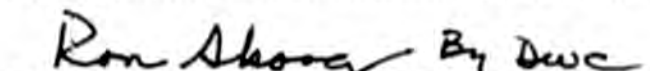
As we all look for new directions to grow our economy, we hope that Alaskans will continue to be able to enjoy the bounty of their fishery resources. We fear that sacrificing competent vigilance by ADF&G over critical fish habitat will lead to an unnecessary and tragic loss for all Alaskans.

Sincerely,


Frank Rue, Commissioner ADF&G 1995 - 2002


Carl Rosier, Commissioner ADF&G 1991 - 1995


Don Collinsworth, Commissioner ADF&G 1983 - 1991


Ron Skoog, Commissioner ADF&G 1977 - 1983


Jim Brooks, Commissioner ADF&G 1972 - 1977

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House Special Committee on Fisheries

MEMORANDUM

TO: The House Fisheries Committee

FM: Representative Paul Seaton, Chair
House Fisheries Committee

DATE: March 14th, 2003

RE: EO 107 Hearing

The purpose for this hearing is for the House Special Committee on Fisheries to gain information to help determine if the structure and function of Executive Order (EO 107) will continue to protect the State's fish habitat, thereby insuring the best opportunity for sustainable fisheries, and maximizing benefit for the people of the State.

To accomplish this goal, the Fisheries Committee has submitted a series of detailed questions for the Department of Natural Resources (DNR) to respond to at the hearing.

To date, the Senate Resource Committee held a four-hour hearing and the House State Affairs Committee held two hearings, each lasting 2.5 hours. The format of these hearings promoted public testimony and were beneficial in getting the breadth of public comment and sentiment, but testimonies limited to 2-minutes did not allow for in-depth follow-up questions by the Committee members.

To accomplish the purpose of the hearing, the Fisheries Committee will follow an invitational panel format, like the one used by the US Senate and House Committees. Before the weekend, the Committee will receive written testimony from the House State Affairs Committee (with permission from STA Chair Weyhrauch), as well as the comments that have been submitted to the Fisheries Committee. This will allow time for the Committee members to review the individual concerns raised by Alaskans.

- 1] The first panel will be composed of DNR and other members of the administration to respond to the submitted questions. There will also be time for Committee member's questions.
- 2] There will be two or three public / industry panels, each with a 5 minute presentation and time for follow-up questioning.
- 3] DNR will return for a final round of Committee questions.

The purpose of this format is to shed the most possible light on EO 107's effects on habitat. All people testifying, including Committee members, are reminded to focus on EO 107 impacts, not on past disputes, which range from justification or non-justification of EO's to the validity of press releases. Please keep in mind that this hearing is about the ability of EO 107 to protect the State's fish habitats.

Panelists (subject to change)

Department of Natural Resources

Commissioner Irwin and Staff
Nancy Welch, Div. of Mining and Water

Department of Fish and Game

Kevin Duffy, Commissioner
Kevin Brooks, Director of Administrative Services
Kerry Howard, Habitat Division

Industry

Alaska Trollers Assoc; Dale Kelley
Kenai Peninsula Fishermen's Assoc; Paul Shadura (Anch. LIO)

ERROL CHAMPION; INDUSTRY CONSULTANT

*Kenai
Silver Bay
Loggery*

Former State Officials and Experts

Frank Rue, Former ADF&G Commissioner
Catherine Pohl, Habitat Biologist
Steve Albert, Habitat Biologist (Anch. LIO)
~~Bob Churchill,~~
Clem Tillion, (off-net)

Public Interest Groups

Trout Unlimited; Jeff Parker, Jan Konigsberg (Anch. LIO)
AK Marine Conservation Council; Paula Terrel
AK Center for the Environment; Seth Little (Anch. LIO)
SE AK Conservation Council, Bruce Baker, President

*not on line yet
maybe no show.*

Please feel free to contact me with questions anytime x2689, or you can contact my Committee Aide, Cameron Yourkowski, x3306. Thank you.

Alaska State Legislature



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House Special Committee on Fisheries

MEMORANDUM

TO: All House Fisheries Committee Members

FM: Representative Paul Seaton, Chair
House Fisheries Committee

DATE: March 18th, 2003

RE: Add to EO 107 Packet

➔ Please replace the questions submitted to DNR from the House Fisheries Committee (March 15, 2003) with this revised version. Some questions have been added, but more importantly some have been deleted.

It is the purpose of this hearing on Executive Order 107 to determine how the proposed habitat permitting structure under DNR will sufficiently protect fisheries habitat and will increase permitting efficiency. The House Fisheries Committee supports both of these efforts.

Throughout the hearings on EO 107 in the Senate Resource and House State Affairs Committees, the public, industry, interest groups, Representatives and Senators have raised many questions and concerns in regards to how this new permitting structure will work. The House Fisheries Committee has compiled these questions into the attached letter submitted to DNR. These questions come from a broad range of concerned citizens.

In compiling these questions, the Fisheries Committee has worked to make sure that submitted questions stuck to the focus of this hearing. **Inadvertently, the opinions of some individuals were included in the previous version of this document. Specifically, comments referring to the ADF&G Sport Fish Division were slanderous and completely inappropriate for this hearing. In no way should any of these statements be considered fact, and in no way should they be considered the official opinion of the House Fisheries Committee or any of its members.**

The Fisheries Committee apologizes for any incorrect information or accusations inadvertently disseminated by the Committee.

If you have any questions please contact the Committee Aide, Cameron Yourkowski, 465-3306.

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House Special Committee on Fisheries

March 15, 2003

Tom Irwin, Commissioner
Department of Natural Resources
400 Willoughby Ave. 5th Flr
Juneau, Ak 99801-1724

Dear Commissioner Irwin,

The House Special Committee on Fisheries will be holding a hearing on EO 107 on Wednesday, March 26th, 2003, in Room #519, from 6:30P.M. to 10:00P.M.

The purpose of this hearing will be to determine, in detail, how the new DNR Division of Habitat Management and Permitting (DHMP) will provide sufficient protection to fisheries habitat and will increase permitting efficiency.

The House Fisheries Committee respectfully requests the presence of DNR Commissioner Irwin, the Deputy Commissioner of the Division of Habitat Management and Permitting, and any assistants necessary for answering detailed questions (Chris Kennedy, Nancy Welch). The Committee asks that these public servants be available to answer questions for the duration of the meeting.

Specific questions that we will focus on in the Committee are listed below; Most of these questions refer to the structure, mission, and regulations of the new DHMP. Please come prepared to answer these questions to the best of the Departments ability.

Sincerely,
(email)

Rep. Paul Seaton, Chair
House Fisheries Committee

QUESTIONS TO DNR FROM THE HOUSE FISHERIES COMMITTEE

Who will the Deputy Commissioner be?

Dick LeFever

✓ How many Habitat biologists are being lost. How will the remaining biologists be organized around the state?

✓ Specifically, how will permitting be expedited and maintain standards with less biologists? Will biologists visit each stream site before permitting Title 16 permits? Is there a commitment by the Department of Natural Resources that there would continue to be the same level of permit monitoring, compliance and enforcement as previously existed under ADF&G?

✓ How does funding for the new DHMP compare to past Habitat Div. Funding levels?

4.36 → 8.1
4-6.1 spent
2 mil

✓ Commissioner Irwin has stated that agencies work together more efficiently when they are housed under the same departmental structure. Specifically, how will the DHMP issue permits more efficiently? How will this intra-agency efficiency between DNR and DHMP be superior to the efficiencies experienced between DNR, ADF&G, and the Habitat and Restoration Division?

✓ There has been a great deal of talk about the slow turnover time for permits when multiple agencies are involved. Can you explain the different procedural approach DNR will take with respect to the permitting of single-agency and multiple-agency projects?

Large
Mining
Permitting
process.

Temp water rights - 20 days - outside CZ right 60 days
Why is there such a time delay in issuing water usage permits by DNR? Specifically, what procedures will ensure that Title 16 permits are free from similar delays?

No notice periods etc

Will the new DHMP and the Deputy Commissioner have a separate and different mission statement than the Department of Natural resources? What is the mission statement?

Will be the same

9 AS 16.05.870 says the Department of Fish and Game must provide for "proper protection" of fish streams. Will the Deputy Commissioner define "proper protection?" If so, how?

No regulatory definition in ADF&G or will be in DNR

Considering the mission statements of DNR and the new DHMP, will federal agencies (EPA, Dep. Of Interior) accept the DHMP permits without additional federal permitting?

What is the legal relationship between the Deputy Director and the Commissioner in reference to the permit appeals process? Will DNR develop appeals regulations with respect to in-stream permits? What will those regulations include?

Considering the potential passage of HB 86, would there be any appeals process without "new scientific information or newly recognized local traditional knowledge."

Since the Commissioner is a part of the appeals process for permits issued by the Deputy Commissioner, is the commissioner effectively eliminated as arbitrator between DHMP and the Chief Forester?

OK

Will public notices be required for all of the new permits now issued by DNR? Will DNR include the in-stream permits under the public notice provisions of AS 38.05.945?

840 + 810 yes if associated with major permits
Because the Forest Practices Act only applies to state lands, will there continue to be any authority for salmon stream buffers on federal lands? *Fed. Resource Practice Act* 700

Not yet done
What is the Memorandum of Understanding between DNR-DHMP and ADF&G? 

Yes
Would the DNR Commissioner continue the historical practice of the Fish and Game Commissioner to delegate the authority for making the initial permitting decisions to the habitat biologists? Would these decisions therefore become subject to the process for appeals to the DNR Commissioner?

Under EO 107, the DNR Commissioner or the Deputy Commissioner would have broad discretion to interpret the Anadromous Fish Act. For example, the Commissioner/Deputy Commissioner would "determine the waters in the state that are important for the rearing, spawning, and migration of anadromous fish," and the DNR Commissioner/Deputy Commissioner would decide what constitutes "important habitat," and what constitutes "proper protection" for the rearing, spawning, and migration of anadromous fish in "important" streams. Similar discretion is afforded under the Fishway Act. Given the differing mandates of the Department of Natural Resources and the Department of Fish and Game, what safeguards would prevent this discretion from becoming unduly conflicted or compromised because it would now reside with the DNR Commissioner/Deputy Commissioner? *Conservation police mission*

19 new species inquiry with
The National Oceanic and Atmospheric Administration (NOAA) under the Department of Commerce has a similar structure as is being proposed by EO 107. For example, NOAA Fisheries is responsible for both the promotion of fisheries in federal waters and the protection of fisheries resources. It has been suggested that this has caused increased litigation, introduced costly delays, and contributed to agency gridlock. How would DNR avoid similar problems?

The Governor and the ~~Acting~~ Commissioner of Fish and Game and the Commissioner of the Department of Natural Resources have assured the public on several occasions that "the same level of environmental protection will continue to be provided for Alaska's fish and wildlife." Under EO 107, the Habitat Division authority for issuing permits and for the monitoring, compliance and enforcement of these permits would now be the responsibility of DNR, with fewer biologists. Is there a commitment by the Governor that the habitat biologists who are being transferred from the Alaska Department of Fish and Game would be "housed" in the newly formed Office of Habitat Management and Permitting?

see 23
yes
Is there a commitment by the Department of Natural Resources to require the State Forester to grant "due deference" under the Forest Practices Act to the Office of Habitat Management and Permitting on issues relating to the harvest of trees from within the 66 foot stream buffers on salmon streams on private land? 

OK
Can DNR use federal Dingle-Johnson monies or only Fish and Game? *16. 777*

Within DNR, how will positions be filled once a biologist leaves the position and how do we guarantee that biologist will be hired to fill vacant positions? Presently, personnel in ADF&G have Position Control Numbers (PCN) and Personnel Description Questionnaires (PDQ) that define the requirements for the position and the duties of the job. When a vacant position becomes available

the PCN hiring requirements and PDQ responsibilities can be rewritten. Therefore, DNR can, after a period of time, rewrite these positions to have non-biologist (environmental engineers, foresters, or water quality backgrounds) fill them. After a period of time, biologist could represent a small group in DNR as opposed to the 20-30 some biologist who are being transferred today. What assurances can we have that prohibits this long-term reduction in force of people who care about the resources and are knowledgeable about them?

Mission + Measures defined by legislature.

How will the structure of DNR be formed to avoid targeted budget reductions? Next year the Governor could eliminate the whole DNR budget for biologists if Executive Order 107 creates a separate layoff structure in DNR. Again, biologist would be reduced in number and after a number of years duties could be transferred to people in other Divisions of DNR who are less qualified.

Thank you for your attention to these important questions. If you have any questions, please feel free to contact my Committee Aide, Cameron Yourkowski, 465-3306.

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House Special Committee on Fisheries

AGENDA-March 18th, 2003

Rm#519; 7:00-10:00 pm

1) EXECUTIVE ORDER 107 TRANSFER OF HABITAT DIV. TO DNR

TESTIMONY, EO 107

Thank you. If you have any questions you can contact my committee staff person, Cameron Yourkowski, at 465-3306

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House Special Committee on Fisheries

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- 1) Letter to Commissioner Irwin (DNR); Intent of Hearing, and pre-submitted questions.
- 2) Sponsor Statement EO 107; Gov. Murkowski.
- 3) Press Release, ADF&G / DNR; Functions of transferred, new structure.
- 4) Executive Order 107.
- 5) Fiscal Note, EO 107.

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House Special Committee on Fisheries

March 12, 2003

Tom Irwin, Commissioner
Department of Natural Resources
400 Willoughby Ave. 5th Flr
Juneau, Ak 99801-1724

Dear Commissioner Irwin,

The House Special Committee on Fisheries will be holding a hearing on EO 107 on Tuesday, March 18th, 2003, in Room #519, from 7:00P.M. to 10:00P.M.

The purpose of this hearing will be to determine, in detail, how the new DNR Division of Habitat Management and Permitting (DHMP) will provide sufficient protection to fisheries habitat and will increase permitting efficiency.

The House Fisheries Committee respectfully requests the presence of DNR Commissioner Erwin, the Deputy Commissioner of the Division of Habitat Management and Permitting, and any assistants necessary for answering detailed questions (Chris Kennedy, Nancy Welsh). The Committee asks that these public servants be available to answer questions for the duration of the meeting.

Specific questions that we will focus on in the Committee are listed below; Most of these questions refer to the structure, mission, and regulations of the new DHMP. Please come prepared to answer these questions to the best of the Departments ability.

Sincerely,

Rep. Paul Seaton, Chair
House Fisheries Committee

Alaska State Legislature

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House Special Committee on Fisheries

QUESTIONS TO DNR FROM THE HOUSE FISHERIES COMMITTEE

Who will the Deputy Director be?

How many Habitat biologists are being lost. How will the remaining biologists be organized around the state?

Specifically, how will permitting be expedited and maintain standards with less biologists? Will biologists visit each stream site before permitting Title 16 permits?

How does funding for the new DHMP compare to past Habitat Div. Funding levels?

Commissioner Irwin has stated that agencies work together more efficiently when they are housed under the same departmental structure. Specifically, how will the DHMP issue permits more efficiently? How will this intra-agency efficiency between DNR and DHMP be superior to the efficiencies experienced between DNR, ADF&G, and the Habitat and Restoration Division?

There has been a great deal of talk about the slow turnover time for permits when multiple agencies are involved. Can you explain the different procedural approach DNR will take with respect to single agency and multiple-agency projects?

Why is there such a time delay in issuing water usage permits by DNR? Specifically, what procedures will ensure that Title 16 permits are free from similar delays?

Will the new DHMP and the Deputy Director have a separate and different mission statement than the Department of Natural resources? What is the mission statement?

AS 16.05.870 says the Department of Fish and Game must provide for "proper protection" of fish streams. Will the Deputy Commissioner define "proper protection?" If so, how?

Considering the mission statements of DNR and the new DHMP, will federal agencies (EPA, Dep. Of Interior) accept the DHMP permits without additional federal permitting?

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House Special Committee on Fisheries

What is the legal relationship between the Deputy Director and the Commissioner in reference to the permit appeals process? Will DNR develop appeals regulations with respect to in-stream permits? What will those regulations include?

Considering the potential passage of HB 86 (see attached) would there be any appeals process without "new scientific information or newly recognized local traditional knowledge."

Since the Commissioner is a part of the appeals process for permits issued by the Deputy Commissioner, is the commissioner effectively eliminated as arbitrator between DHMP and the Chief Forester?

Will public notices be required for all of the new permits now issued by DNR? Will DNR include the in-stream permits under the public notice provisions of AS 38.05.945?

Because the Forest Practices Act only applies to state lands, will there continue to be any authority for salmon stream buffers on federal lands?

Thank you for your attention to these important questions. If you have any questions, please feel free to contact my Committee Aide, Cameron Yourkowski, 465-3306.

EO 107

FRANK H. MURKOWSKI
GOVERNOR
GOVERNOR@GOV.STATE.AK.US



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

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JUNEAU, ALASKA 99811-0001
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February 10, 2003

The Honorable Pete Kott
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, AK 99801-1182

Dear Speaker Kott:

Under the authority of art. III, sec. 23, of the Alaska Constitution, I am transmitting an Executive Order transferring certain functions relating to the protection of fish habitat from the Department of Fish and Game to the Department of Natural Resources (DNR).

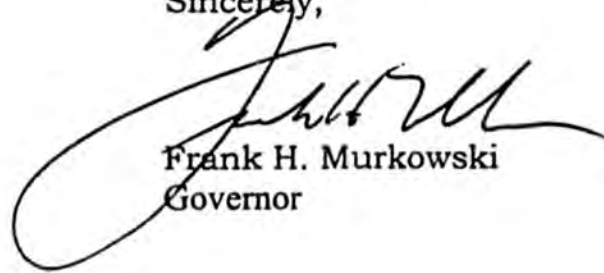
Currently, the division of habitat and restoration in the Department of Fish and Game oversees the requirements of AS 16.05.840, relating to maintaining fish passage whenever a stream frequented by fish is obstructed. The same division oversees the permitting function laid out in AS 16.05.870, which ensures the protection of water bodies important for anadromous fish. To better coordinate these complex and important functions with the management of our state's resources, it makes sense to transfer them to the DNR under the supervision of a deputy commissioner of that department. I envision that the expert staff needed to carry out these functions will join the DNR.

Because this function now will reside in the DNR, the important consultative role of the Department of Fish and Game under the Forest Resources and Practices Act (AS 41.17) (Act) also must be moved to the DNR; the Executive Order assigns that role to the same DNR deputy commissioner. At the same time, the role currently assigned to the commissioner of natural resources in the Act is transferred to the state forester in the division of forestry, preserving the balance between forest stewardship and stream preservation that the legislature envisioned.

The Honorable Pete Kott
February 10, 2003
Page 2

These changes will help us achieve efficient, fair, and balanced review of projects that seek to tap our state's natural resources.

Sincerely,

A handwritten signature in dark ink, appearing to read "Frank H. Murkowski", is written over the typed name and title.

Frank H. Murkowski
Governor

EO 107

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**Alaska Department of
Fish and Game**

Kevin Duffy, Acting Commissioner
PO Box 25526
Juneau, AK 99802-5526



**Alaska Department of
Natural Resources**

Tom Irwin, Commissioner
400 Willoughby Ave Ste 500
Juneau, AK 99801

Contacts: Nancy Long, ADF&G - 465-6166 or Wyn Menefee, DNR - 269-8412

News For Immediate Release

March 7, 2003

**ADF&G Working with DNR on Transition of
Title 16 Permitting Responsibilities**

The plan transferring Title 16 habitat permitting functions from the Department of Fish and Game (ADF&G) to the Department of Natural Resources (DNR) is designed to streamline permitting without sacrificing Alaska's environmental safeguards. Specific permitting functions will move to DNR, while certain habitat related functions will remain within ADF&G divisions.

"In order to facilitate this process change, Commissioner Irwin and I will be developing a detailed memorandum of understanding to ensure close coordination between the agencies," said Kevin Duffy, Acting Commissioner of ADF&G. "I'm looking forward to the new relationship between our agencies and will work hard to make this a positive transition."

DNR is creating the Office of Habitat Management and Permitting to administer the agency's new responsibilities. The new DNR office will include:

- Title 16 fish passage and anadromous fish stream permitting
- Anadromous Waters Catalog (regulatory function)
- Project-related research and compliance monitoring
- Consistency review, land use plan review
- Forest Resources and Practices Act permitting, monitoring and compliance

"I welcome this transition which will allow habitat biologists to work closely with the other permitting functions within DNR," said DNR Commissioner Tom Irwin. "I am impressed with the dedicated and professional staff that has been working on this reorganization." While protecting valuable fish and wildlife habitats, the new office will work to reduce permit issuance times and lower permitting costs through close coordination.

-More-



**Alaska Department of
Fish and Game**



**Alaska Department of
Natural Resources**

HABITAT POSITIONS TRANSFER PLAN OUTLINE

Functions Moving to DNR, Office of Management and Permitting (36 approx. positions)

- Title 16 fish passage and anadromous fish stream permitting
- Anadromous Waters Catalog (regulatory function)
- Project-related research and monitoring
- Forest Resources and Practices Act permitting

Functions Moving Within ADF&G Divisions (38 approx. positions)

Functions Moving to ADF&G Sport Fish (29 approx. positions)

- Fish stream surveys and database
- Various research and restoration projects (e.g. stream bank restoration manuals and assistance, ATV study and mapping)
- Oil spill contingency plan reviews
- Kachemak Bay National Estuarine Research Reserve

Functions Moving to ADF&G Wildlife Conservation (6 approx. positions)

- Access Defense
- CARA/SWG
- North Slope Grizzly Project
- Special Areas permitting

Functions Moving to ADF&G Commercial Fisheries (2 positions)

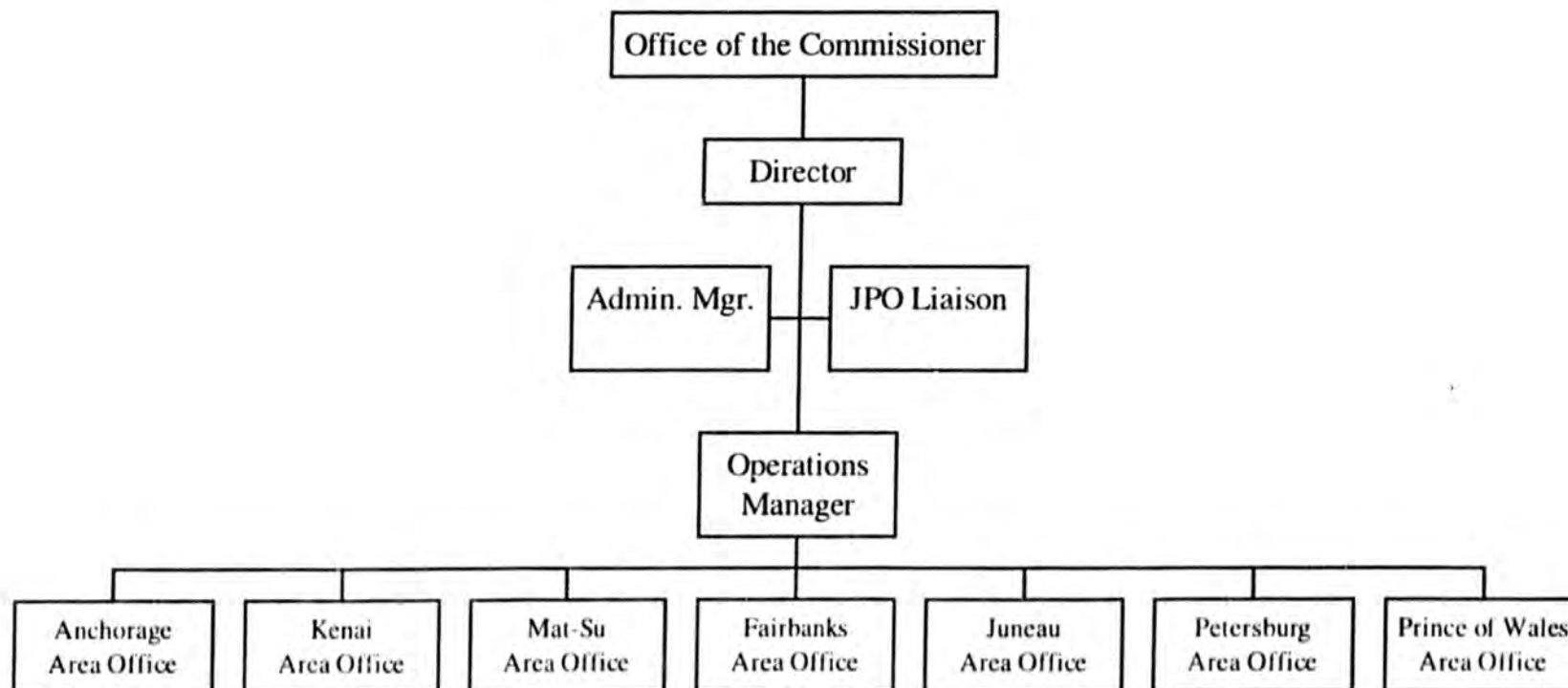
- Log Transfer Dive Survey
- Mariculture Leases

Functions Moving to EVOS (1 positions)

- ARLIS Librarian

March 7, 2003

DEPARTMENT OF NATURAL RESOURCES
Office of Habitat Management & Permitting



Introduced in the House: 2/12/03

Referred: State Affairs, Resources, House Special Committee on Fisheries

Introduced in the Senate: 2/12/03

Referred: State Affairs, Resources

EXECUTIVE ORDER NO. 107

1 Under the authority of art. III, sec. 23, of the Alaska Constitution, I order the following:

2 * **Section 1.** The uncoded law of the State of Alaska is amended by adding a new section
3 to read:

4 FINDINGS. As governor, I find that the transfer of certain functions relating to the
5 protection of fish habitat in rivers, lakes, and streams of the state, and related functions
6 regarding fish and game protection, from the Department of Fish and Game to a deputy
7 commissioner of natural resources would be in the best interests of efficient administration.
8 To preserve the existing statutory balance between stream preservation and forest
9 stewardship, the role currently assigned to the commissioner of natural resources under the
10 Forest Resources and Practices Act is transferred to the state forester in the division of
11 forestry, Department of Natural Resources. These transfers will permit closer and more
12 balanced coordination, improving the planning process for projects affecting these bodies of
13 water.

14 * **Sec. 2.** AS 16.05.920(a) is amended to read:

15 (a) Unless permitted by AS 16.05 - AS 16.40, by AS 41.14, or by regulation
16 adopted under AS 16.05 - AS 16.40 or AS 41.14, a person may not take, possess,
17 transport, sell, offer to sell, purchase, or offer to purchase fish, game, or marine
18 aquatic plants, or any part of fish, game, or aquatic plants, or a nest or egg of fish or
19 game.

20 * **Sec. 3.** AS 16.05.925(a) is amended to read:

21 (a) Except as provided in AS 16.05.430, 16.05.665, 16.05.722, 16.05.723,
22 16.05.783, 16.05.831, [16.05.860, AND] 16.05.905, and AS 41.14.860, a person who
23 violates AS 16.05.920 or 16.05.921, or a regulation adopted under this chapter or

1 AS 16.20, is guilty of a class A misdemeanor.

2 * Sec. 4. AS 16.20.070 is amended to read:

3 Sec. 16.20.070. Relationship to other laws. AS 16.20.050 and 16.20.060 do
4 not affect AS 41.14.870 - 41.14.890 [AS 16.05.870 - 16.05.890].

5 * Sec. 5. AS 41 is amended by adding a new chapter to read:

6 Chapter 14. Rivers, Lakes, and Streams.

7 Sec. 41.14.150. Enforcement authority. The following persons are peace
8 officers of the state and they shall enforce this chapter:

9 (1) an employee of the department authorized by the deputy
10 commissioner;

11 (2) a police officer in the state;

12 (3) any other person authorized by the deputy commissioner.

13 Sec. 41.14.160. Duty to arrest. Each peace officer designated in
14 AS 41.14.150 shall arrest a person violating a provision of this chapter, or any
15 regulation adopted under this chapter, in the peace officer's presence or view, and shall
16 take the person for examination or trial before an officer or court of competent
17 jurisdiction unless in the judgment of the peace officer it would be in the state's best
18 interest to issue a warning or a citation under AS 41.14.165.

19 Sec. 41.14.165. Form and issuance of citation. (a) When a peace officer
20 stops or contacts a person concerning a violation of this chapter or of a regulation
21 adopted under this chapter that is a misdemeanor, the peace officer may, in the
22 officer's discretion, issue a citation to the person as provided in AS 12.25.180.

23 (b) The supreme court shall specify by rule or order those misdemeanors that
24 are appropriate for disposition without court appearance, and shall establish a schedule
25 of bail amounts. Before establishing or amending the schedule of bail amounts
26 required by this subsection, the supreme court shall appoint and consult with an
27 advisory committee consisting of two officers of the division of fish and wildlife
28 protection of the Department of Public Safety, two representatives of the department,
29 two district court judges, and the chairpersons of the House and Senate Judiciary
30 Committees of the legislature. The maximum bail amount for an offense may not
31 exceed the maximum fine specified by law for that offense. If the misdemeanor for

1 which the citation is issued may be disposed of without court appearance, the issuing
2 peace officer shall write on the citation the amount of bail applicable to the violation.

3 (c) A person cited for a misdemeanor for which a bail amount has been
4 established under (b) of this section may, within 15 days after the date of the citation,
5 mail or personally deliver to the clerk of the court in which the citation is filed by the
6 peace officer

7 (1) the amount of bail indicated on the citation for that offense; and

8 (2) a copy of the citation indicating that the right to an appearance is
9 waived, a plea of no contest is entered and the bail is forfeited.

10 (d) When bail has been forfeited under (c) of this section, a judgment of
11 conviction shall be entered. Forfeiture of bail and all seized items is a complete
12 satisfaction for the misdemeanor. The clerk of the court accepting the bail shall
13 provide the offender with a receipt stating that fact if requested.

14 (e) If the person cited fails to pay the bail amount established under (b) of this
15 section or to appear in court as required, the citation is considered a summons for a
16 misdemeanor.

17 (f) Notwithstanding other provisions of law, if a person cited for a
18 misdemeanor for which a bail amount has been established under (b) of this section
19 appears in court and is found guilty, the penalty that is imposed for the offense may
20 not exceed the bail amount for that offense established under (b) of this section.

21 **Sec. 41.14.170. Power to execute warrant.** Each peace officer designated in
22 AS 41.14.150 may execute a warrant or other process issued by an officer or court of
23 competent jurisdiction for the enforcement of this chapter, and may, with a search
24 warrant, search any place at any time. The judge of a court having jurisdiction may,
25 upon proper oath or affirmation showing probable cause, issue a warrant in all cases.

26 **Sec. 41.14.180. Power to search without warrant.** Each peace officer
27 designated in AS 41.14.150 may without a warrant search any thing or place if the
28 search is reasonable or is not protected from searches and seizures without warrant
29 within the meaning of art. I, sec. 14, Alaska Constitution, which specifically
30 enumerates "persons, houses and other property, papers, and effects." However,
31 before a search without warrant is made a signed written statement by the person

1 making the search shall be submitted to the person in control of the property or object
2 to be searched, stating the reason the search is being conducted. A written receipt
3 shall be given by the person conducting the search for property which is taken as a
4 result of the search. The enumeration of specific things does not limit the meaning of
5 words of a general nature.

6 **Sec. 41.14.190. Seizure and disposition of equipment.** Boats, aircraft,
7 automobiles or other vehicles, sleds, and other paraphernalia used in or in aid of a
8 violation of this chapter or a regulation adopted under this chapter may be seized
9 under a valid search, and all fish and game, or parts of fish and game, or nests or eggs
10 of birds, taken, transported, or possessed contrary to the provisions of this chapter or a
11 regulation adopted under this chapter shall be seized by any peace officer designated
12 in AS 41.14.150. Upon conviction of the offender or upon judgment of the court
13 having jurisdiction that the item was taken, transported, or possessed in violation of
14 this chapter or a regulation adopted under this chapter, all fish and game, or parts of
15 them are forfeited to the state and shall be disposed of as directed by the court. If sold,
16 the proceeds of the sale shall be transmitted to the proper state officer for deposit in
17 the general fund. Boats, aircraft, or other vehicles, sleds, and other paraphernalia
18 seized under the provisions of this chapter or a regulation adopted under this chapter,
19 unless forfeited by order of the court, shall be returned, after completion of the case
20 and payment of the fine, if any.

21 **Sec. 41.14.195. Forfeiture of equipment.** (a) Vessels, aircraft, other motor
22 vehicles, sleds, and other paraphernalia or gear used in or in aid of a violation of this
23 chapter, or regulations adopted under this chapter, and all fish and game or parts of
24 fish and game or nests or eggs of birds taken, transported, or possessed contrary to the
25 provisions of this chapter, or regulations adopted under this chapter, may be forfeited
26 to the state

27 (1) upon conviction of the offender in a criminal proceeding of a
28 violation of this chapter in a court of competent jurisdiction; or

29 (2) upon judgment of a court of competent jurisdiction in a proceeding
30 in rem that an item specified above was used in or in aid of a violation of this chapter
31 or a regulation adopted under this chapter.

1 (b) Items specified in (a) of this section may be forfeited under this section
2 regardless of whether they were seized before instituting the forfeiture action.

3 (c) An action for forfeiture under this section may be joined with an
4 alternative action for damages brought by the state to recover damages for the value of
5 fish and game or parts of them or nests or eggs of birds taken, transported, or
6 possessed contrary to the provisions of this chapter or a regulation adopted under it.

7 (d) It is no defense that the person who had the item specified in (a) of this
8 section in possession at the time of its use and seizure has not been convicted or
9 acquitted in a criminal proceeding resulting from or arising out of its use.

10 (e) Forfeiture may not be made of an item subsequently sold to an innocent
11 purchaser in good faith. The burden of proof as to whether the purchaser purchased
12 the item innocently and in good faith shall be on the purchaser.

13 (f) An item forfeited under this section shall be disposed of at the discretion of
14 the department. Before the department disposes of an aircraft it shall consider transfer
15 of ownership of the aircraft to the Alaska Wing, Civil Air Patrol.

16 **Sec. 41.14.200. Power to administer oaths.** Each peace officer designated in
17 AS 41.14.150 may administer to or take from any person, an oath, affirmation, or
18 affidavit when it is for use in a prosecution or proceeding under or in the enforcement
19 of this chapter.

20 **Sec. 41.14.840. Fishway required.** If the deputy commissioner considers it
21 necessary, every dam or other obstruction built by any person across a stream
22 frequented by salmon or other fish shall be provided by that person with a durable and
23 efficient fishway and a device for efficient passage for downstream migrants. The
24 fishway or device or both shall be maintained in a practical and effective manner in
25 the place, form, and capacity the deputy commissioner approves, for which plans and
26 specifications shall be approved by the deputy commissioner upon application. The
27 fishway or device shall be kept open, unobstructed, and supplied with a sufficient
28 quantity of water to admit freely the passage of fish through it.

29 **Sec. 41.14.850. Hatchery required.** If a fishway over a dam or obstruction is
30 considered impracticable by the deputy commissioner because of cost, the owner of
31 the dam or obstruction, in order to compensate for the loss resulting from the dam or

1 obstruction shall, at the owner's option

2 (1) pay a lump sum acceptable to the deputy commissioner to the state
3 fish and game fund;

4 (2) convey to the state a site of a size satisfactory to the deputy
5 commissioner at a place mutually satisfactory to both parties, and erect on it a fish
6 hatchery, rearing ponds, necessary buildings, and other facilities according to plans
7 and specifications furnished by the commissioner of fish and game, and give a good
8 and sufficient bond to furnish water, lights, and necessary money to operate and
9 maintain the hatchery and rearing ponds; or

10 (3) enter into an agreement with the deputy commissioner, secured by
11 good and sufficient bond, to pay to the fish and game fund the initial amount of money
12 and annual payments thereafter that the commissioner of fish and game considers
13 necessary to expand, maintain, and operate additional facilities at existing hatcheries
14 within a reasonable distance of the dam or obstruction.

15 **Sec. 41.14.860. Penalty for violating fishway and hatchery requirements.**

16 (a) The owner of a dam or obstruction who fails to comply with AS 41.14.840 or
17 41.14.850 or a regulation adopted under AS 41.14.840 or 41.14.850 within a
18 reasonable time specified by written notice from the deputy commissioner is guilty of
19 a misdemeanor, and is punishable by a fine of not more than \$1,000. Each day the
20 owner fails to comply constitutes a separate offense.

21 (b) In addition to the fine, the dam or other obstruction managed, controlled,
22 or owned by a person violating AS 41.14.840 or 41.14.850 or a regulation adopted
23 under AS 41.14.840 or 41.14.850 is a public nuisance and is subject to abatement.

24 **Sec. 41.14.870. Protection of fish and game.** (a) The deputy commissioner
25 shall, in accordance with AS 44.62 (Administrative Procedure Act), specify the
26 various rivers, lakes, and streams or parts of them that are important for the spawning,
27 rearing, or migration of anadromous fish.

28 (b) If a person or governmental agency desires to construct a hydraulic
29 project, or use, divert, obstruct, pollute, or change the natural flow or bed of a
30 specified river, lake, or stream, or to use wheeled, tracked, or excavating equipment or
31 log-dragging equipment in the bed of a specified river, lake, or stream, the person or

1 governmental agency shall notify the deputy commissioner of this intention before the
2 beginning of the construction or use.

3 (c) The deputy commissioner shall acknowledge receiving the notice by return
4 first class mail. If the deputy commissioner determines that the following information
5 is required, the letter of acknowledgement shall require the person or governmental
6 agency to submit to the deputy commissioner:

7 (1) full plans and specifications of the proposed construction or work;

8 (2) complete plans and specifications for the proper protection of fish
9 and game in connection with the construction or work, or in connection with the use;
10 and

11 (3) the approximate date the construction, work, or use will begin.

12 (d) The deputy commissioner shall approve the proposed construction, work,
13 or use in writing unless the deputy commissioner finds the plans and specifications
14 insufficient for the proper protection of fish and game. Upon a finding that the plans
15 and specifications are insufficient for the proper protection of fish and game, the
16 deputy commissioner shall notify the person or governmental agency that submitted
17 the plans and specifications of that finding by first class mail. The person or
18 governmental agency may, within 90 days of receiving the notice, initiate a hearing
19 under AS 44.62.370. The hearing is subject to AS 44.62.330 - 44.62.630.

20 **Sec. 41.14.880. Construction without approval prohibited.** If a person or
21 governmental agency begins construction on a work or project or use for which notice
22 is required by AS 41.14.870 without first providing plans and specifications subject to
23 the approval of the deputy commissioner for the proper protection of fish and game,
24 and without first having obtained written approval of the deputy commissioner as to
25 the adequacy of the plans and specifications submitted for the protection of fish and
26 game, the person or agency is guilty of a misdemeanor. If a person or governmental
27 agency is convicted of violating AS 41.14.870 - 41.14.895 or continues a use, work, or
28 project without fully complying with AS 41.14.870 - 41.14.895, the use, work, or
29 project is a public nuisance and is subject to abatement. The cost of restoring a
30 specified river, lake, or stream to its original condition shall be borne by the violator
31 and shall be in addition to the penalty imposed by the court.

1 **Sec. 41.14.890. Exemption for emergency situations.** In an emergency
 2 arising from weather or stream flow conditions, the deputy commissioner, through
 3 authorized representatives, shall issue oral permits to a riparian owner for removing
 4 obstructions or for repairing existing structures without the necessity of submitting
 5 prepared plans and specifications as required by AS 41.14.870.

6 **Sec. 41.14.895. Penalty for causing material damage.** If a person or
 7 governmental agency fails to notify the deputy commissioner of any construction or
 8 use that causes material damage to the spawning beds or prevents or interferes with
 9 the migration of anadromous fish, or by neglect or noncompliance with plans and
 10 specifications required and approved by the deputy commissioner causes material
 11 damage to the spawning beds or prevents or interferes with the migration of
 12 anadromous fish, the person or governmental agency shall be guilty of a misdemeanor.

13 **Sec. 41.14.900. Penalty for violations of AS 41.14.870 - 41.14.895.** (a) A
 14 person who violates AS 41.14.870 - 41.14.895 is guilty of a class A misdemeanor.

15 (b) The court shall transmit the proceeds of all fines to the proper state officer
 16 for deposit in the general fund of the state.

17 **Sec. 41.14.990. Definitions.** In this chapter, unless the context otherwise
 18 requires,

- 19 (1) "commissioner" means the commissioner of natural resources;
 20 (2) "department" means the Department of Natural Resources;
 21 (3) "deputy commissioner" means the deputy commissioner of natural
 22 resources appointed under AS 44.37.055;
 23 (4) "fish" has the meaning given in AS 16.05.940;
 24 (5) "game" has the meaning given in AS 16.05.940;
 25 (6) "take" has the meaning given in AS 16.05.940.

26 * **Sec. 6.** AS 41.17.010 is amended to read:

27 **Sec. 41.17.010. Declaration of intent.** The legislature declares that

- 28 (1) the forest resources of Alaska are among the most valuable natural
 29 resources of the state, and furnish timber and wood products, fish and wildlife,
 30 tourism, outdoor recreation, water, soil, air, minerals, and general health and welfare;
 31 (2) economic enterprises and other activities and pursuits derived from

1 forest resources warrant the continuing recognition and support of the state;

2 (3) the state has a fundamental obligation to ensure that management
3 of forest resources guarantees perpetual supplies of renewable resources, provides
4 nonrenewable resources in a manner consistent with that obligation, and serves the
5 needs of all Alaska for the many products, benefits, and services obtained from them;

6 (4) government administration of forest resources should combine
7 professional management services, regulatory measures, and economic incentives in a
8 complementary fashion, and should draw upon the expertise of professional foresters
9 in conjunction with other disciplines;

10 (5) under the leadership of the Department of Environmental
11 Conservation as lead agency, the state should exercise its full responsibility and
12 authority for control of nonpoint source pollution with respect to the Federal Water
13 Pollution Control Act, as amended;

14 (6) subject to AS 41.17.098(c), the provisions of this chapter, and
15 regulations adopted under this chapter, with the approval of the Department of
16 Environmental Conservation, establish the nonpoint source pollution requirements
17 under state law and sec. 319 of the Clean Water Act for activities subject to this
18 chapter;

19 (7) except for activities subject to AS 41.14.840 or 41.14.870
20 [AS 16.05.840 OR 16.05.870] and regulations authorized by those sections, this
21 chapter and regulations adopted under this chapter establish the fish habitat protection
22 standards, policies, and review processes under state law.

23 * Sec. 7. AS 41.17.041(e) is amended to read:

24 (e) The division shall serve as staff to the board. The department, the deputy
25 commissioner [DEPARTMENT OF FISH AND GAME], and the Department of
26 Environmental Conservation shall provide technical staffing and information as
27 needed by the board.

28 * Sec. 8. AS 41.17.047(c) is amended to read:

29 (c) The board, working with the division [DEPARTMENT], the Department
30 of Environmental Conservation, the deputy commissioner [DEPARTMENT OF
31 FISH AND GAME], other affected agencies and parties, and the forest-dependent

1 industries, shall conduct an annual survey of research needs related to forest practices.
2 The board shall review research proposals and shall make recommendations to
3 promote research projects that would address these needs to the governor and the
4 legislature.

5 * Sec. 9. AS 41.17.047(d) is amended to read:

6 (d) The board shall coordinate the monitoring of the implementation and
7 effectiveness of this chapter, the regulations, and best management practices adopted
8 under this chapter in meeting state water quality standards, fish and wildlife habitat
9 requirements, and other forestry objectives. The board shall report annually to the
10 governor on the effectiveness of this chapter and regulations adopted under it, with its
11 recommendations for changes and for needed research and monitoring. The board
12 shall notify the legislature that the annual report is available. The state forester, the
13 deputy commissioner [DEPARTMENT OF FISH AND GAME], and the Department
14 of Environmental Conservation shall each present an annual report, independently, to
15 the board on the effectiveness of this chapter, the regulations, and best management
16 practices adopted under this chapter that protect the resources for which they have
17 statutory responsibility, and shall make recommendations for changes to correct
18 procedural or substantive problems. The board shall include the reports as part of its
19 annual report. The board shall hold hearings at least once annually in southeast,
20 southcentral, and interior Alaska for purposes of taking public testimony on the
21 subjects.

22 * Sec. 10. AS 41.17.055 is amended to read:

23 Sec. 41.17.055. Powers and duties of the state forester
24 [COMMISSIONER]. (a) The state forester [COMMISSIONER] may designate
25 and operate experimental and research forests on state land consistent with the
26 limitations of AS 38.05.300. Laboratories and other facilities may be employed in
27 conjunction with those forests.

28 (b) The state forester [COMMISSIONER] may establish and maintain forest
29 vegetation nurseries and greenhouses for planting stock to be made available, with or
30 without charge, to organizations, institutions, government agencies, individuals, and
31 businesses for reforestation, afforestation, and related purposes.

1 (c) The state forester [COMMISSIONER] is authorized to undertake
2 cooperative forestry programs, extension services, and education programs, and to
3 otherwise offer a full range of professional management services to the interested
4 public. When the state forester [COMMISSIONER] considers it beneficial, the state
5 forester [COMMISSIONER] may participate in federal assistance programs by
6 accepting assistance in whatever form offered.

7 (d) The state forester [COMMISSIONER] may develop regulations under
8 this chapter as part of the state program for control of nonpoint source pollution under
9 the Federal Water Pollution Control Act, as amended. However, the Department of
10 Environmental Conservation is the lead agency for water quality and control of
11 nonpoint source pollution under that Act, and the regulations are therefore subject to
12 the approval of the commissioner of environmental conservation.

13 (e) In the administration of this chapter, the state forester
14 [COMMISSIONER] shall consult with and draw upon the expertise of interested
15 organizations, enterprises, individuals, government agencies, educational institutions,
16 and landowners. The state forester [COMMISSIONER] may enter into cooperative
17 agreements and contracts with them to carry out this chapter.

18 (f) The state forester [COMMISSIONER] shall locate department personnel
19 with forestry expertise throughout the state to facilitate public access to professional
20 management services and other forest resources programs.

21 (g) The state forester [COMMISSIONER] may take other actions necessary
22 and proper for the administration of this chapter, including the adoption of regulations
23 under AS 44.62 (Administrative Procedure Act) and AS 41.17.047.

24 * Sec. 11. AS 41.17.070(a) is amended to read:

25 (a) The state forester [COMMISSIONER] shall develop and continually
26 maintain a long-range plan for the administration of this chapter that demonstrates that
27 the provisions of AS 41.17.010 are being recognized and that the standards of
28 AS 41.17.060 are being met. The state forester [COMMISSIONER] shall maintain a
29 current inventory or assessment of timber on forest land to assist in meeting the
30 requirements of this section.

31 * Sec. 12. AS 41.17.070(b) is amended to read:

(b) To maintain a record of division decision making for public and agency review, the state forester [COMMISSIONER] shall compile and index each decision made under this chapter regarding directives, stop work orders, waivers from requirements, decisions of hearing officers, and decisions on appeals. The state forester [COMMISSIONER] shall submit a summary of this record annually to the board.

* Sec. 13. AS 41.17.080 is amended to read:

Sec. 41.17.080. Regulations. (a) The state forester [COMMISSIONER] may adopt regulations necessary to accomplish the purposes of this chapter under AS 44.62 (Administrative Procedure Act) regarding forest practices such as

(1) road construction and maintenance, including

(A) road location, construction, maintenance, and post-operation management or removal;

(B) landing location and construction;

(C) drainage structures;

(D) material sources and spoil disposal sites;

(2) timber harvesting, including

(A) timber harvest unit planning and design;

(B) felling and bucking;

(C) cable yarding, shovel, tractor, and wheeled skidder systems;

(D) landing clean-up;

(E) slash disposal;

(3) log transfer, sort yards, and storage facilities, including

(A) location, design, and construction;

(B) maintenance;

(C) closure;

(D) log storage, rafting, and identification;

(4) reforestation, including

(A) site preparation and rehabilitation;

(B) prescribed burning;

(C) exemptions from reforestation requirements;

(5) prevention and suppression of forest insects and diseases;

(6) salvage logging;

(7) vegetative management; and

(8) fire and flood hazard management.

(b) The state forester [COMMISSIONER] shall adopt regulations specifying the information to be submitted under AS 41.17.090(c) in the detailed plan of operations to enable the division to determine whether the activities comply with the requirements of this chapter.

(c) The state forester [COMMISSIONER] may establish regions, districts, or other subdivisions of forest land in the state in which different regulations apply to reflect varying conditions in the state or to facilitate administration. In adopting regulations, the state forester [COMMISSIONER] shall make appropriate distinctions between public and private land.

(d) The state forester [COMMISSIONER] shall adopt only those regulations necessary to accomplish the purposes of this chapter and shall avoid regulations that increase operating costs without yielding significant benefits to public resources.

* Sec. 14. AS 41.17.085(a) is amended to read:

(a) An operator may apply through the state forester [COMMISSIONER] for permits required by other state agencies to operate on forest land, which applications may be forwarded to the commissioner of environmental conservation for procedures under AS 46.35. The state forester [COMMISSIONER] shall notify the operator of the action taken.

* Sec. 15. AS 41.17.087(b) is amended to read:

(b) The state forester [COMMISSIONER] shall adopt regulations that specify the standards under which a variation will be granted for harvesting timber within the riparian area of

(1) a low gradient Type A water body with a width of five feet or less;

and

(2) other appropriate water body types.

* Sec. 16. AS 41.17.087(c) is amended to read:

(c) A determination by the state forester under (a) of this section and regulations by the state forester [COMMISSIONER] under (b) of this section shall give due deference under AS 41.17.098.

* Sec. 17. AS 41.17.090(b) is amended to read:

(b) A forest landowner, timber owner, or operator may provide to the state forester [COMMISSIONER] a voluntary plan of operations that describes the long-term plans for timber harvesting. The purpose of a voluntary plan is to give the division and the public an early opportunity to review plans, to identify areas of concern, and to allow the agencies and the public to provide local knowledge and early notice of potential problems to the forest landowner, timber owner, or operator.

* Sec. 18. AS 41.17.090(d) is amended to read:

(d) Within five days after receipt of a detailed plan of operations under (c) of this section, the state forester shall distribute the information received under (c) of this section to the deputy commissioner, affected state agencies, and coastal districts, and shall distribute the information received under (c)(1) of this section to each member of the public who has asked to receive copies of notifications for the affected area.

* Sec. 19. AS 41.17.090(e) is amended to read:

(e) Within 30 days after receipt of a detailed plan of operations, the state forester shall review the plan to determine if the operations are consistent with this chapter and regulations adopted under this chapter. Operations may begin under the plan upon the expiration of the 30-day period or upon notice from the state forester that the review has been completed, whichever occurs first, unless the division has issued a stop work order for a particular portion of the plan or has notified the operator that a one-time, 10-day extension is necessary for agency review under AS 41.17.098(f). The operator may proceed with operations not covered by the stop work order, notice of field inspection, or the agency review. During the review of a detailed plan of operations, if a question arises concerning the proper classification of water body type for purposes of the standards in AS 41.17.116(a), the deputy commissioner [DEPARTMENT OF FISH AND GAME] may resolve the question.

* Sec. 20. AS 41.17.098(a) is amended to read:

(a) In administering this chapter, the state forester [COMMISSIONER] shall

1 coordinate with other agencies, the deputy commissioner, and affected coastal
2 districts that have jurisdiction over activities subject to regulation under this chapter.

3 * Sec. 21. AS 41.17.098(b) is amended to read:

4 (b) In a review or implementation of a detailed plan of operations under
5 AS 41.17.090 and in a decision on a proposed variation from requirements under
6 AS 41.17.087, the state forester [COMMISSIONER] shall consider the comments of
7 the deputy commissioner, each affected state agency and, where applicable, coastal
8 districts.

9 * Sec. 22. AS 41.17.098(c) is amended to read:

10 (c) The state forester [COMMISSIONER] shall give due deference to the
11 Department of Environmental Conservation in decisions concerning water quality.
12 The commissioner of environmental conservation retains the authority to adopt
13 nonpoint source pollution regulations for activities subject to this chapter to the extent
14 that regulations are not adopted by the state forester [COMMISSIONER OF
15 NATURAL RESOURCES] and approved by the commissioner of environmental
16 conservation under this chapter. The commissioner of environmental conservation
17 may withdraw approval of regulations adopted by the state forester
18 [COMMISSIONER OF NATURAL RESOURCES] under this chapter by following
19 the procedure for the adoption, amendment, and repeal of regulations under
20 AS 44.62.180 - 44.62.290.

21 * Sec. 23. AS 41.17.098(d) is amended to read:

22 (d) The state forester [COMMISSIONER] shall recognize the expertise of the
23 deputy commissioner [DEPARTMENT OF FISH AND GAME] with regard to fish
24 and wildlife habitat. On private land, the state forester [COMMISSIONER] shall
25 give due deference to the deputy commissioner [DEPARTMENT OF FISH AND
26 GAME] regarding effects on fish habitat from timber operations including variations
27 to riparian standards, designation of alternative site-specific riparian protection plans,
28 and road location decisions within riparian areas. On public land, the state forester
29 [COMMISSIONER] shall give due deference to the deputy commissioner
30 [DEPARTMENT OF FISH AND GAME] regarding effects on fish and wildlife
31 habitat from timber operations including timber harvest in riparian areas, variations to

1 riparian standards, and road location decisions within riparian areas. In making
 2 decisions under AS 41.17.087, the state forester [COMMISSIONER] shall recognize
 3 fish habitat as the primary value in riparian areas.

4 * Sec. 24. AS 41.17.098(e) is amended to read:

5 (e) In this section, "due deference" means that deference that is appropriate in
 6 the context of the agency's or deputy commissioner's expertise and area of
 7 responsibility and all the evidence available to support a factual assertion. Where due
 8 deference is given, if the state forester [COMMISSIONER] does not agree with a
 9 commenting agency or the deputy commissioner, the state forester
 10 [COMMISSIONER] shall prepare a written statement of the reasons for the
 11 disagreement.

12 * Sec. 25. AS 41.17.110 is amended to read:

13 Sec. 41.17.110. Conversion of forest land to other uses. An intention to
 14 convert forest land to other uses after timber harvesting may be stated in the
 15 notification submitted under AS 41.17.090. In that event, reforestation requirements
 16 adopted under this chapter do not apply, except that conversion shall be completed
 17 during the time set by regulation for minimum reforestation of the land, and other
 18 requirements for revegetation may be imposed to the extent permitted by law. If the
 19 state forester [COMMISSIONER] finds at any time that the responsible party has
 20 failed to conform to the intent to convert as stated in the notification, the state
 21 forester [COMMISSIONER] shall revoke approval of the conversion and require full
 22 compliance with reforestation requirements.

23 * Sec. 26. AS 41.17.115 is amended to read:

24 Sec. 41.17.115. Management of riparian areas; regulations. (a) The state
 25 forester [COMMISSIONER] shall protect riparian areas from the significant adverse
 26 effects of timber harvest activities on fish habitat and water quality. The management
 27 intent for riparian areas is the adequate preservation of fish habitat by maintaining a
 28 short- and long-term source of large woody debris, stream bank stability, channel
 29 morphology, water temperatures, stream flows, water quality, adequate nutrient
 30 cycling, food sources, clean spawning gravels, and sunlight.

31 (b) The state forester [COMMISSIONER] shall adopt regulations for the

1 protection of riparian areas; the regulations may include higher standards of protection
 2 for fish and other public resources on land managed by the department than on other
 3 public land or private land. The regulations may vary by region of the state and must
 4 take into consideration reasonable classification of water bodies and the economic
 5 feasibility of timber operations.

6 * Sec. 27. AS 41.17.116(b) is amended to read:

7 (b) The state forester [COMMISSIONER] shall adopt regulations for private
 8 land outside of the coastal forest of spruce or hemlock that designate the riparian areas
 9 to be protected and the restrictions on timber harvesting operations within the areas
 10 that are necessary for their protection under the management goals established in
 11 AS 41.17.115.

12 * Sec. 28. AS 41.17.118(b) is amended to read:

13 (b) The department [COMMISSIONER] may impose additional riparian
 14 protection standards for timber harvest operations through the adoption of land use
 15 plans under AS 38.04.065 and under forest management plans and reports under
 16 AS 38.05.112 and AS 41.17.230.

17 * Sec. 29. AS 41.17.118(c) is amended to read:

18 (c) In the absence of a site-specific determination by the deputy
 19 commissioner [DEPARTMENT OF FISH AND GAME], the state forester
 20 [COMMISSIONER] shall presume for planning purposes that a stream is anadromous
 21 if it is connected to anadromous waters that are without department [DEPARTMENT
 22 OF FISH AND GAME] documentation of a physical blockage and has a stream
 23 gradient of 8 percent or less.

24 * Sec. 30. AS 41.17.119 is amended to read:

25 **Sec. 41.17.119. Minimum riparian standards for other public land.** On
 26 other public land, harvest of timber may not occur

27 (1) within 100 feet from the shore or bank of an anadromous or high
 28 value resident fish water body that is located south of the Alaska Range;

29 (2) within 100 feet immediately adjacent to an anadromous or high
 30 value resident fish water body north of the Alaska Range unless the division
 31 [COMMISSIONER] determines that adequate protection remains for the fish habitat.

1 * Sec. 31. AS 41.17.120 is amended to read:

2 **Sec. 41.17.120. Inspections and investigations.** The state forester
3 [COMMISSIONER] may inspect and investigate forest land and activities on it and
4 may enter upon it in conjunction with any operations as necessary to ensure
5 compliance with applicable regulations and requirements and to otherwise enforce the
6 provisions of this chapter. Other state agencies and the deputy commissioner have
7 this same authority to the extent necessary to enforce their own laws and regulations
8 on forest land. Those agencies, the deputy commissioner, and the state forester
9 [COMMISSIONER] shall coordinate their actions under this section.

10 * Sec. 32. AS 41.17.900(c) is amended to read:

11 (c) The state forester [COMMISSIONER] shall exempt by regulation from
12 the provisions of this chapter

13 (1) minor, small scale, or incidental commercial operations of little
14 significance with respect to the purposes of this chapter, and

15 (2) operations for primarily noncommercial purposes, including but
16 not limited to the harvesting of timber for personal use.

17 * Sec. 33. AS 41.17.900(d) is amended to read:

18 (d) Notwithstanding any other provision of this chapter, the state forester and
19 the commissioner may not employ the authority vested by this chapter so as to
20 duplicate or preempt the statutory authority of other state agencies to adopt regulations
21 or undertake other administrative actions governing resources, values, or activities on
22 forest land except for

23 (1) regulations under the Coastal Management Act; and

24 (2) regulations, if authorized by the commissioner of environmental
25 conservation, relating to control of nonpoint source pollution.

26 * Sec. 34. AS 41.17 is amended by adding a new section to read:

27 **Sec. 41.17.905. Independent authority.** With respect to matters governed by
28 this chapter, the deputy commissioner does not have supervisory authority over the
29 state forester.

30 * Sec. 35. AS 41.17.910(a) is amended to read:

31 (a) The deputy commissioner [DEPARTMENT OF FISH AND GAME] and

1 the state forester [COMMISSIONER] shall work cooperatively with private forest
 2 landowners and timber owners to protect, maintain, and enhance wildlife habitat to the
 3 maximum extent practicable, consistent with the interests of the owners in the use of
 4 their timber resources.

5 * Sec. 36. AS 41.17.910(b) is amended to read:

6 (b) The deputy commissioner [DEPARTMENT OF FISH AND GAME]
 7 shall provide educational and technical assistance and extension services to owners of
 8 private forest land or timber to assist in identifying important wildlife habitat and to
 9 assist in designing voluntary management techniques that minimize adverse effects on
 10 wildlife habitat.

11 * Sec. 37. AS 41.17.910(c) is amended to read:

12 (c) The deputy commissioner [DEPARTMENT OF FISH AND GAME] and
 13 the landowner shall cooperate in identifying areas of important wildlife habitat on
 14 private forest land and in developing methods for their protection. Methods of
 15 protection for wildlife habitat may include, with the agreement of the landowner, the
 16 purchase of fee title, purchase of conservation easements, and land exchanges.

17 * Sec. 38. AS 41.17.950(1) is amended to read:

18 (1) "anadromous water body" means the portion of a fresh water body
 19 or estuarine area that

20 (A) is cataloged under AS 41.14.870 [AS 16.05.870] as
 21 important for anadromous fish; or

22 (B) is not cataloged under AS 41.14.870 [AS 16.05.870] as
 23 important for anadromous fish but has been determined by the deputy
 24 commissioner [DEPARTMENT OF FISH AND GAME] to contain or exhibit
 25 evidence of anadromous fish in which event the anadromous portion of the
 26 stream or waterway extends up to the first point of physical blockage;

27 * Sec. 39. AS 41.17.950 is amended by adding a new paragraph to read:

28 (23) "deputy commissioner" means the deputy commissioner of natural
 29 resources appointed under AS 44.37.055.

30 * Sec. 40. AS 44.37 is amended by adding new sections to read:

31 Sec. 44.37.055. Deputy commissioner. The commissioner of natural

resources shall appoint a deputy commissioner of natural resources.

Sec. 44.37.060. Certain powers and duties of the deputy commissioner.

The deputy commissioner of natural resources appointed under AS 44.37.055 has, but not by way of limitation, the following powers and duties regarding functions under AS 41.14 and AS 41.17:

(1) to adopt regulations to carry out the purposes of AS 41.14.840 - 41.14.900;

(2) to enter into cooperative agreements with agencies of the federal government, educational institutions, or other agencies or organizations, when in the public interest, to carry out the purposes of AS 41.14.840 - 41.14.900;

(3) to initiate or conduct research necessary or advisable to carry out the purposes of AS 41.14.840 - 41.14.900;

(4) to perform the functions assigned in AS 41.17.

* **Sec. 41.** AS 44.62.330(a)(48) is amended to read:

(48) the Department of Natural Resources [FISH AND GAME] as to functions relating to the protection of fish and game under AS 41.14.870 [AS 16.05.870];

* **Sec. 42.** AS 46.15.020(b) is amended to read:

(b) The commissioner shall

(1) adopt procedural and substantive regulations to carry out the provisions of this chapter, taking into consideration the responsibilities of the Department of Environmental Conservation under AS 46.03 and the Department of Fish and Game under AS 16;

(2) develop and maintain a standardized procedure for processing applications and the issuance of authorizations, permits, and certifications under this chapter; shall keep a public record of all applications for permits and certificates and other documents filed in the commissioner's office; shall record all permits and certificates and amendments and orders affecting them and shall index them in accordance with the source of the water and the name of the applicant or appropriator; shall require that temporary water use authorizations are valid only to the extent that the water withdrawal and use complies with applicable requirements of AS 41.14.870

1 [AS 16.05.870]; and shall make the record of applications, including temporary water
 2 use applications under AS 46.15.155 that have been accepted as complete,
 3 authorizations, permits, certificates, amendments, and orders affecting them available
 4 to the public on the Internet;

5 (3) cooperate with, assist, advise, and coordinate plans with the
 6 federal, state, and local agencies, including local soil and water conservation districts,
 7 in matters relating to the appropriation, use, conservation, quality, disposal, or control
 8 of waters and activities related thereto;

9 (4) prescribe fees or service charges for any public service rendered
 10 consistent with AS 37.10.050 - 37.10.058, except that the department may charge
 11 under regulations adopted by the department an annual \$50 administrative service fee
 12 to maintain the water management program and a water conservation fee under
 13 AS 46.15.035;

14 (5) before February 1 of each year, prepare a report describing the
 15 activities of the commissioner under AS 46.15.035 and 46.15.037; the commissioner
 16 shall notify the legislature that the report is available; the report must include

17 (A) information on the number of applications and
 18 appropriations for the removal of water from one hydrological unit to another
 19 that were requested and that were granted and on the amounts of water
 20 involved;

21 (B) information on the number and location of sales of water
 22 conducted by the commissioner and on the volume of water sold;

23 (C) recommendations of the commissioner for changes in state
 24 water law; and

25 (D) a description of state revenue and expenses related to
 26 activities under AS 46.15.035 and 46.15.037.

27 * Sec. 43. AS 46.35.200(4) is amended to read:

28 (4) "permit" means each of the following licenses, permits or
 29 authorizations required to be obtained from a state agency before constructing or
 30 operating a project in the state, or any other license, permit or authorization which
 31 may be designated by the commissioner:

- 1 (A) emission control permit - AS 46.14, 18 AAC 50.120;
- 2 (B) open burning permit - AS 46.03.020, 18 AAC 50.120;
- 3 (C) burning permit during fire season - AS 41.15.050, 11 AAC
- 4 92.010;
- 5 (D) waste water disposal permit - AS 46.03.100, 18 AAC 72;
- 6 (E) solid waste disposal permit - AS 46.03.100, 18 AAC 60;
- 7 (F) brine or other salt water waste disposal permit -
- 8 AS 31.05.030, 11 AAC 22.250;
- 9 (G) tidelands permit - AS 38.05.820, 11 AAC 62.710;
- 10 (H) tidelands right-of-way or easement permit - AS 38.05.820,
- 11 11 AAC 62.810;
- 12 (I) authorization for tidelands transportation - AS 38.05.110,
- 13 11 AAC 76.205;
- 14 (J) tide and submerged lands prospecting permit -
- 15 AS 38.05.250;
- 16 (K) mineral and geothermal prospecting permits -
- 17 AS 38.05.145;
- 18 (L) coal development permit - AS 27.20.010, 11 AAC 46.010;
- 19 (M) dam construction permit - AS 46.15.040, 11 AAC 72.060;
- 20 (N) water well permit - AS 31.05.030, 11 AAC 22.140;
- 21 (O) permit to appropriate water - AS 46.15.040, 11 AAC
- 22 72.050;
- 23 (P) permit for use of timber or materials - AS 38.05.110,
- 24 11 AAC 76.185;
- 25 (Q) special material use permit - AS 38.05.115, 11 AAC
- 26 76.540;
- 27 (R) special land use permit - AS 38.05.035, 11 AAC 58.210;
- 28 (S) limited personal use permit - AS 38.05.820, 11 AAC
- 29 62.820;
- 30 (T) preferred use permit - AS 46.15.040, 11 AAC 72.160;
- 31 (U) surface use permit - AS 38.05.255, 11 AAC 86.600;

(V) miscellaneous state land use permit - AS 38.05.035,
11 AAC 96.010;

(W) anadromous fish protection permit - former AS 16.05.870,
5 AAC 95.100, AS 41.14.870, and regulations adopted under those
statutes;

(X) critical habitat area permit - AS 16.20.520 - 16.20.530;

(Y) state game refuge land permit - AS 16.20.050 - 16.20.060;

(Z) state park incompatible use permit - AS 41.21.020, 11 AAC
18.010;

(AA) pesticides permit - AS 46.03.320, 18 AAC 90;

(BB) surface oiling permit - AS 46.03.740, 18 AAC 75;

(CC) encroachment permit - AS 19.25.200;

(DD) utility permit - AS 19.25.010;

(EE) driveway permit - AS 19.05.020, 17 AAC 10.020;

(FF) access roads permit - AS 41.21.020, 11 AAC 18.020;

(GG) right-of-way and easement permits - AS 38.05.850,
11 AAC 58.200;

(HH) right-of-way permit - AS 38.05.850;

* Sec. 44. AS 16.05.840, 16.05.850, 16.05.860, 16.05.870, 16.05.880, 16.05.890,
16.05.895, and 16.05.900 are repealed.

* Sec. 45. The uncoded law of the State of Alaska is amended by adding a new section to
read:

RETIREMENT SYSTEM STATUS OF CERTAIN TRANSFERRED EMPLOYEES.

(a) Notwithstanding sec. 4, ch. 27, SLA 1983, an employee of the Department of Fish and
Game who, on the day before the effective date of this Order, as authorized by sec. 4, ch. 27,
SLA 1983 is accruing service credit as a peace officer under AS 39.35 by virtue of having
been, on June 23, 1983, in a position as a "qualified employee of the Department of Fish and
Game," and whose position is transferred to the Department of Natural Resources as a result
of this Order, continues to accrue service credit as a peace officer under AS 39.35 after the
transfer as long as the employee remains in a position described in this subsection, in the
Department of Natural Resources.

1 (b) Nothing in this section may be construed as guaranteeing continued employment
2 rights to any state employee.

3 (c) In this section, "qualified employee of the Department of Fish and Game" has the
4 meaning given in AS 39.35.680 as that statute existed on June 22, 1983.

5 * Sec. 46. The uncoded law of the State of Alaska is amended by adding a new section to
6 read:

7 TRANSITION. (a) Litigation, hearings, investigations, and other proceedings
8 pending under a law repealed by this Order, or in connection with functions transferred by
9 this Order, continue in effect and may be continued and completed notwithstanding a transfer
10 or repeal provided in this Order.

11 (b) Regulations adopted to implement former AS 16.05.840 - 16.05.860 and former
12 AS 16.05.870 - 16.05.895 and to implement AS 41.17 and in effect on April 14, 2003, remain
13 in effect and may continue to be implemented and enforced, consistent with the changes made
14 by this Order, until amended or repealed.

15 (c) Contracts, rights, liabilities, and obligations created by or under a law repealed by
16 this Order, and in effect on April 14, 2003, remain in effect notwithstanding this Order's
17 taking effect. Records, equipment, appropriations, and other property of an agency of the
18 state whose functions are transferred under this Order shall be transferred to implement the
19 provisions of this Order.

20 * Sec. 47. This Order takes effect April 15, 2003.

DATED: _____

Frank H. Murkowski
Governor

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:

Bill Version:

EO 107

() Publish Date:

Revision Date/Time (Note if correction):

Dept. Affected:

Natural Resources

Title

Transfer certain Habitat functions from

BRU

Management & Administration

Fish & Game to Natural Resources

Component

Office of Habitat Mgt & Permitting

Sponsor

Requester Governor

Component No.

2682

Expenditures/Revenues

(Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES

CHANGE IN REVENUES ()

FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost:

0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

X

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Funding for this Executive Order has been included in the FY04 Governor's operating budget request, as a transfer from the Department of Fish & Game to the Department of Natural Resources.

Prepared by: Nico Bus, Admin Svcs Manager

Division: Support Services

Approved by: Tom Irwin, Commissioner

Agency: Natural Resources

Phone 907-465-2406

Date/Time 3/10/2003

Date 3/10/2003

MEMORANDUM

State of Alaska
Department of Law

To: Michael A. Tibbles
Legislative Director

Date: March 14, 2003

Tel. No.: 269-5280

From: Chris Kennedy
Assistant Attorney General

Subject: Legislative Counsel's Comments on
EO 107

You have asked me to review Legislative Counsel George Utermohle's February 26, 2003 evaluation of Executive Order 107, transferring certain Department of Fish and Game functions relating to habitat to the Department of Natural Resources.

In general, Mr. Utermohle is supportive of the Governor's power to take the actions set out in the executive order. In his paragraph ten, he rejects the idea that has been advanced by some that E.O. 107 creates a conflict of interest in the Department of Natural Resources.

On pages 8 and 9 of his memorandum, the Legislative Counsel identifies three problems he sees in E.O. 107. He does not suggest that these problems call the overall validity of the order into question. He simply raises them as concerns and suggests that they might be repaired, after the Executive Order becomes effective, by parallel legislation.

Imposition of duties on judicial and legislative branches. Mr. Utermohle calls attention to section 5 of the Executive Order, where a new AS 41.14.165 is created regarding peace officer citations to enforce the anadromous stream and fishway permitting requirements. He is concerned about a provision in that section that requires the Alaska Supreme Court to "specify by rule or order those misdemeanors that are appropriate for disposition without court appearance, and [to] establish a schedule of bail amounts" in consultation with an advisory committee that would include specified judicial, executive, and legislative branch members. Mr. Utermohle points out, correctly, that the Governor cannot by executive order place new duties on other branches of government. He opines that the Supreme Court and the Legislature could "ignore the requirements imposed by this section."

Mr. Utermohle does not mention, and may not have realized in the limited time he had to conduct his review, that the new AS 41.14.165 is merely a repetition of statutory language already on the books, creating no new duties. Presently, AS 16.05.165 requires the very same procedure for creation of a bail schedule covering broad range of Title 16 violations, including anadromous stream and fishway permitting. When the Governor moved anadromous stream and fishway permitting to Title 41, he had to do so without disturbing any aspect of the enforcement structure the Legislature had created for those requirements. Accordingly, the order creates a mirror image of AS 16.05.165 in Title 41, with applicability limited to the few provisions that have been moved. The enforcement duties that go with anadromous stream and fishway permitting—and only those duties—have been moved to Title 41. At the same time, because of the removal of the underlying permitting provisions from Title 16, the scope of the duties imposed by AS 16.05.165 (which will continue to exist) has been reduced because that section will no longer impose enforcement duties on the Commissioner of Fish and Game with respect to anadromous stream and fishway permitting. When all of the provisions are read together, there is no net change in the number and scope of the duties assigned by statute. The Supreme Court and the designated judicial and legislative officers will be doing nothing more, or less, than they are already required to do by Legislatively-enacted statute.

Peace officer retirement provisions. Mr. Utermohle is concerned that the uncodified law provision in section 45 of EO 107, preserving the peace officer retirement status of certain pre-1983 Fish & Game employees, exceeds the Governor's executive order authority. He suggests that, to avoid legal uncertainty, it would be best for the Legislature to enact the provision in section 45 as parallel legislation.

We believe that section 45 is a legitimate, appropriate transition section attendant to the transfer of a portion of the Division of Habitat and Restoration. Section 45 provides, in relevant part:

RETIREMENT SYSTEM STATUS OF CERTAIN TRANSFERRED EMPLOYEES. (a) Notwithstanding sec. 4, ch. 27, SLA 1983, an employee of the Department of Fish and Game who, on the day before the effective date of this Order, as authorized by sec. 4, ch. 27, SLA 1983 is accruing service credit as a peace officer under AS 39.35 by virtue of having been, on June 23, 1983, in a position as a "qualified employee of the Department of Fish and Game," and whose position is transferred to the Department of Natural Resources as a result of this Order, continues to accrue service credit as a peace officer under AS 39.35 after the transfer as long as the employee remains in a position described in this subsection, in the Department of Natural Resources.

E.O. 107, sec. 45. This section is designed to allow employees who are eligible for "peace officer" retirement to retain their ability to accrue retirement under that category. Employees with "peace officer" status are permitted to retire after 20 years of service, and contribute accordingly. "Peace officer" status for ADF&G biologists was repealed in 1983. Ch. 27, SLA 1983. However, it is anticipated that a small number of employees who may be subject to transfer under this executive order might retain this status.

Under sec. 4, ch. 27, SLA 1983, termination of employment from ADF&G terminates the accrual of peace officer credit. The transfers called for under E.O. 107 could be legitimately accomplished without section 45: the retirement statutes do not guarantee continued employment in a particular department or retirement status. AS 39.35.660. However, it seems fair and reasonable to permit transferred individuals to continue to accrue peace officer service, and to accomplish this a change of law is required. We believe that this section, while not mandated by contract or law, is a legitimate transition provision, as it is directly related to moving units of employees from one department to another. Article III, section 23, is permissive, allowing the governor may make organizational changes he considers necessary for efficient administration. A decision to maintain existing employment and retirement status is a legitimate element of efficient administration. Because the retirement provision requires a change in the law, it must be in the executive order rather than in associated administrative orders.

Failure to amend AS 46.15.035 and AS 46.15.037. On the final page of his memorandum, Mr. Utermohle identifies what he believes to be a technical oversight. AS 46.15 governs water use rights. It contains two cross-references to AS 16.05.870. The E.O. did not change these cross-references. Mr. Utermohle notes that AS 16.05.870 is to be repealed and replaced with AS 41.14.870; he contends that the two cross references in AS 46.15 should therefore be changed to refer to AS 41.14.870.

The two references to AS 16.05.870 in AS 46.15 are actually historical references. In each case, they refer to the status of water bodies under that statute as of a fixed date in the past, July 1, 1992. Since AS 41.14.870 did not exist on July 1, 1992, it would be a mistake to change these references to AS 41.14.870.

The question remains whether leaving these references to a repealed statute, without explanation, may create some confusion. In my view, the confusion will only be momentary, since the code books will continue to reference AS 16.05.870 as a repealed statute, showing the date and manner of its repeal. However, if the Revisor of Statutes feels the reference to a repealed statute without explanation is an error, he can, under AS 01.05.031(b)(8), insert the word "former" before each of the references to AS 16.05.870 in AS 46.15. Alternatively, he can insert an appropriate revisor's note following AS 46.15.035 and 037.

Alaska State Legislature

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House Special Committee on Fisheries

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LEGAL SERVICES

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MEMORANDUM

February 26, 2003

SUBJECT: Executive Order 107 (Work Order No. 23-GS1071\A)

TO: Representative Paul Seaton
Attn: Cameron Yourkowski

FROM: George Utermohle *GU*
Legislative Counsel

This memorandum is in response to your request for information regarding Executive Order 107 (cited herein as EO 107).

BACKGROUND. Executive Order 107 provides for the transfer of certain permitting functions from the Department of Fish and Game to the Department of Natural Resources and for the transfer of certain functions within the Department of Natural Resources.

The authority of Governor Frank Murkowski to issue EO 107 arises from art. III, sec. 23, Constitution of the State of Alaska. Article III, sec. 23, of the Alaska Constitution states:

Reorganization. The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

The executive order power of the governor is discussed in the Alaska Constitutional Convention Proceedings (pages 2226-2229) and it appears clear that the delegates viewed it as providing the governor the power, as an administrative matter, to reorganize the functions of the executive branch, but not to enlarge, diminish, or otherwise alter those functions.

The power of the governor to amend statutes as necessary to reorganize the executive branch is a legislative power that is conferred on the governor by the Alaska Constitution. The power to pass laws is conferred upon the legislature by the Alaska Constitution art. II, sec. 1 which states: "The legislative power of the State is vested in a legislature

consisting of a senate with a membership of twenty and a house of representatives with a membership of forty." As a consequence of the doctrine of separation of powers which is inherent in the Alaska Constitution (Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947 (Alaska 1975)), one branch of government is prohibited from encroaching upon and exercising the powers of another branch. The blending of governmental powers is permitted only to the extent granted by the constitution and will not be inferred. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976). Just as the legislature's power over executive branch appointments is limited to the confirmation of certain appointments as expressly provided by the constitution (Id.), and just as the governor's power to veto appropriations made by the legislature is limited to that provided by the constitution (See, Alaska Legislative Council v. Knowles, 21 P.3d 687 (Alaska 2001)), the governor's executive order power is limited to that expressly set out in art. III, sec. 23. The governor's executive order power will be narrowly construed and will be confined within the bounds expressed in the constitution.

SPECIFIC QUESTIONS. You have asked a number of questions regarding the effect of EO 107 on the role of the Department of Fish and Game in issuing permits for fishways (AS 16.05.840) and anadromous fish streams (AS 16.05.870) and in regard to forest resources and forest practices under the proposed amendments to AS 41.17. The best way to address your questions is to answer each one separately.

ONE: *Can the legislature amend EO 107 or can it only disapprove the executive order?*

The legislature has only two options in regard to an executive order. Either the legislature accepts the executive order as the governor presented it, or the legislature may disapprove the executive order. The state constitution contains the requirement that disapproval of an executive order is accomplished "... by resolution concurred in by a majority of the members in joint session . . ." (Article III, Section 23) This requirement must be complied with or any attempt by the legislature to disapprove an executive order will probably be held invalid by the court. The legislature has no power to amend an executive order directly, although it may seek to enact legislation that amends statutes affected by an executive order.

In addition to the procedure set out in the constitution, Uniform Rule 49(a)(4) provides

A special concurrent resolution is employed to consider disapproval of an executive order of the governor laid before the legislature under provisions of Sec. 23, Art. III, of the State Constitution. This resolution must be considered by a standing committee of each house and may be adopted by a majority vote of the full membership of the legislature in joint session without recourse to three readings.

TWO: *Will the Department of Fish and Game have any legal authority over what is now Title 16 permitting for anadromous fish streams under AS 16.05.870 or fishways under AS 16.05.840?*

EO 107 transfers all authority currently exercised by the commissioner of fish and game over permitting for anadromous fish streams and fishways to a newly created deputy commissioner of natural resources. The deputy commissioner of natural resources will exercise all of the authority formerly exercised by the commissioner of fish and game. The executive order does not expressly provide any role for the Department of Fish and Game in permitting for anadromous fish streams or fishways.

THREE: Is there any legal responsibility for the Department of Natural Resources to ask for the opinion of the Department of Fish and Game on anadromous fish stream permits or fishway permits? Is the Department of Natural Resources under any legal obligation to follow recommendations of the Department of Fish and Game? Is the Department of Natural Resources under any obligation to inform the Department of Fish and Game of applications for anadromous fish stream permits or fishway permits?

The answer to all three questions is no. The Department of Natural Resources is not required to consult with the Department of Fish and Game regarding anadromous fish stream and fishway permits. The Department of Fish and Game may still provide advice to the deputy commissioner of natural resources, regardless of whether it is solicited or not by the deputy commissioner, but the deputy commissioner is not required to follow that advice. There is no provision of the executive order that requires the Department of Natural Resources to inform the Department of Fish and Game of applications for or the issuance of anadromous fish stream permits or fishway permits, though the Department of Natural Resources could provide such information to the Department of Fish and Game if it chose to do so.

FOUR: Under the statutory changes made by EO 107, will the Department of Fish and Game have any legal responsibility for monitoring, enforcing, requiring compliance, and evaluating anadromous fish stream permits or fishway permits?

The answer is no. The statutory changes made by EO 107 repeal the permitting function for anadromous fish streams and fishways from AS 16. Once those provisions are removed from AS 16, the Department of Fish and Game is no longer responsible for monitoring, enforcing, or otherwise implementing those provisions unless the new provisions added to AS 41.14 authorize the department to provide those functions. The new statutory provisions regarding anadromous fish stream permits and fishway permits do not give any responsibility for implementing any of those provisions to the Department of Fish and Game.

FIVE: What is the role of the commissioner of natural resources in the issuance of anadromous fish stream permits and fishway permits under EO 107? The executive order appears to vest the deputy commissioner of natural resources with authority to issue the permits. Is this authority delegated to the deputy commissioner by the commissioner of natural resources?

The responsibility for issuance of anadromous fish stream permits and fishway permits is assigned by law to the deputy commissioner. There is no delegation of authority from the commissioner to the deputy commissioner. The commissioner is still the chief executive officer of the Department of Natural Resources and supervises the deputy commissioner of natural resources, however the deputy commissioner, not the commissioner, has the legal responsibility for issuing anadromous fish stream permits and fishway permits.

SIX: Under EO 107, what would be the appeals process for anadromous fish stream permits and fishway permits and how would it differ from the present process of the Department of Fish and Game?

An appeal of the decision of the commissioner of fish and game in regard to an application for an anadromous fish stream permit under AS 16.05.870 is subject to the administrative adjudication provisions of AS 44.62.330 - 44.62.630 which provides for appeal procedures, a hearing before a hearing officer, and judicial review of the agency decision. An appeal of the decision of the deputy commissioner of natural resources in regard to an anadromous fish stream permit would be made to the commissioner of natural resources under AS 44.37.011(b). An appeal of the decision of the commissioner is then reviewable in the courts. Section 41 of the executive order provides that functions of the Department of Natural Resources relating to the protection of fish and game under AS 41.14.870 (anadromous fish stream permits) are subject to the administrative adjudication provisions of AS 44.62.330 - 44.62.630. An appeal of a decision to the commissioner of natural resources under AS 44.37.011 would also be subject to administrative adjudication procedures of AS 44.62.330 - 44.62.630.

There are no formally established appeal procedures regarding fishway permits under AS 16.05.840. Appeals under AS 16.05.840 are not subject to the administrative adjudication provisions of AS 44.62.330 - 44.62.630 and the commissioner of fish and game has not adopted any regulation specifically relating to such appeals. Upon the transfer of responsibility for fishway permits to the Department of Natural Resources, an appeal of the decision of the deputy commissioner may be made to the commissioner, and then to the courts under AS 44.37.011(b). The department may adopt appeal procedures that it considers necessary by regulation.

SEVEN: Will the Department of Natural Resources public notice requirements apply to anadromous fish stream permits and fishway permits issued by the department?

The new provisions regarding anadromous fish stream permits and fishway permits added by EO 107 do not require public notice of applications for or issuance of those permits.

The public notice provisions of AS 38.05.945 do not apply to anadromous fish stream permits and fishway permits. However those permits could, through the enactment of separate legislation, be added to the list of items under AS 38.05.945 for which the Department of Natural Resources must provide public notice.

EIGHT: AS 16.05.870(d) says the Department Fish and Game must provide for "proper protection." Is there any legal definition for "proper protection"? If not, how will "proper protection" be defined under EO 107?

There is no legal definition of "proper protection." Proper protection is whatever protection is appropriate under the circumstances. The commissioner of fish and game has never defined "proper protection", though the term is used in numerous fish and game statutes and regulations. The commissioner of fish and game determines what constitutes proper protection on a case by case basis. Under EO 107, the deputy commissioner of natural resources may exercise his/her discretion to determine what constitutes proper protection in each case. The deputy commissioner may adopt regulations as necessary to define "proper protection" if he/she so chooses.

NINE: Under AS 16.05.840 a fishway must be provided only when the commissioner of fish and game determines that a fishway is necessary. Is there any legal standard for determining when a fishway or other device is necessary? Under the statutory changes made by EO 107, will the determination of when it is necessary to provide for fish passage be exclusively within the discretion of the deputy commissioner of natural resources?

There is no standard for determining when a fishway or other device is necessary for fish passage. The commissioner of fish and game exercises his/her discretion in making that determination. Even if the commissioner makes the determination that a fishway or other device would be necessary to provide for fish passage, the commissioner has the authority under AS 16.05.850 to waive the requirement for a fishway in favor of a hatchery if the cost of a fishway is too great. If EO 107 takes effect, then the deputy commissioner of natural resources will have the same discretion that is currently exercised by the commissioner of fish and game in regard to fishways around or over dams and other obstructions to fish passage.

TEN: When EO 107 takes effect, will the Department of Natural Resources have a broader mandate giving it permitting authority over all lands? If so is there a conflict legal or otherwise with the department's more limited mandate for state lands?

When EO 107 takes effect the Department of Natural Resources will be responsible for issuing anadromous fish stream permits and fishway permits. The requirements for these permits will apply throughout the state on state, private, and other government land¹.

¹ The applicability of the permit requirements of the current AS 16.05.840 and 16.05.870 and the proposed AS 41.14.840 and 41.14.870 to federal land depends on the nature of the federal land involved. In some cases, the state will not be able to require the federal government or its agents or contractors to comply with the permits if the requirements interferes with a federal program. The supremacy clause of the federal constitution

One of the major responsibilities of the Department of Natural Resources is for the management of state lands. There is no conflict between the responsibilities of the department for the management of state lands and the regulation of private, state, or other government activities in the waters of the state. The legislature may assign any functions it considers appropriate to the Department of Natural Resources. Likewise, the governor by executive order may transfer any function currently assigned to another state agency to the Department of Natural Resources. There are virtually no constitutional limits on the types of functions that can be assigned to the department. If, for policy reasons, the legislature determines that the scope of the Department of Natural Resources should be limited to matters directly related to state lands then it can limit the functions of the department accordingly by law.

ELEVEN: Will federal agencies have to go to the Department of Natural Resources for their in-stream permitting rather than the Department of Fish and Game?

To the extent that the federal government is subject to, or submits itself, to the state permitting process for anadromous fish streams and fishways, the federal government will have to apply for those permits through the Department of Natural Resources. The Department of Fish and Game will no longer have any responsibility for those permits after EO 107 takes effect.

TWELVE: Under EO 107, what happens to the due deference currently accorded to the Department of Fish and Game under AS 41.17 in regard to streamside buffer areas?

Under AS 41.17 (commonly referred to as the Forest Resources and Practices Act) buffer areas must be established around an anadromous water body on private land under AS 41.17.116, around an anadromous or high value resident fish water body on state lands under AS 41.17.118, and around an anadromous or high value resident fish water body on state lands not managed by either the Department of Natural Resources or the University of Alaska under AS 41.17.119. The Department of Fish and Game is responsible for cataloging anadromous fish streams and for identifying uncatalogued streams that exhibit evidence of anadromous fish. The Department of Fish and Game is also responsible for identifying water bodies containing high value resident fish.

Under AS 41.17.098(d) the commissioner of natural resources must give due deference to the Department of Fish and Game in regard to the effects of timber operations on fish habitat, including the effects of variations from the riparian standards established under AS 41.17.117 - .119.

When EO 107 takes effect, the expertise and views of the Department of Fish and Game are no longer entitled to deference under AS 41.17. Section 23 of the executive order provides that the deputy commissioner of natural resources is the expert on fish and

protects the federal government from having to comply with state regulations that interfere with the mission of federal agencies.

wildlife habitat for purposes of AS 41.17. All deference formerly accorded to the Department of Fish and Game in regard to the effects of timber operations on fish habitat must now be accorded to the expertise of the deputy commissioner of natural resources. Responsibility for identifying anadromous fish streams will also pass to the deputy commissioner of natural resources.

THIRTEEN: *Is the due deference currently accorded to the Department of Fish and Game under AS 41.17.098(d) equivalent to the authority of the Department of Fish and Game to issue anadromous fish stream permits and fishway permits?*

Due deference accorded to the Department of Fish and Game under AS 41.17 is completely separate and distinct from the authority of the department to issue anadromous fish stream permits. The due deference requirement provides that the Department of Natural Resources is to defer to the advice given by the Department of Fish and Game in regard to the effect of timber operations on fish habitat. The due deference provisions give the Department of Fish and Game much more input into the timber management process than does the anadromous fish stream permits. The anadromous fish stream permits relate mostly to activities occurring in the stream bed, while the due deference provision gives the department an opportunity to address timber operations occurring above the stream that may affect fish habitat.

FOURTEEN: *Is the requirement for due deference to the expertise to the Department of Fish and Game more effective than providing an opportunity to review and consult?*

The "due deference" provision gives the Department of Fish and Game a much more effective means to affect timber operations as necessary to protect fish and wildlife habitat than would the opportunity to consult. Under AS 41.17.098(e) and (f), "'due deference' means that deference that is appropriate in the context of the agency's expertise and area of responsibility and all the evidence available to support a factual assertion. Where due deference is given, if the commissioner [of natural resources] does not agree with a commenting agency, the commissioner shall prepare a written statement of the reasons for the disagreement. . . . If a disagreement [between the agency and the commissioner] . . . exists, an officer of an agency may require reevaluation of the disagreement at a higher level within the agencies, or by the governor if necessary, before a decision is made by the commissioner."

An opportunity to consult would provide the Department of Fish and Game with the ability to provide advice and insight into fish and wildlife habitat issues, but the responsibility for matters affecting fish and wildlife habitat under AS 41.17 would lie solely with the Department of Natural Resources.

FIFTEEN: *Under EO 107 does the Department of Natural Resources have an obligation to give due deference to the Department of Fish and Game?*

None of the provisions of the executive order provide that the Department of Natural Resources must give due deference to the Department of Fish and Game in regard to anadromous fish stream permits, fishway permits, or fish and wildlife habitat matters under AS 41.17.

* * *

There are two provisions of EO 107 where the governor appears to have exceeded his authority.

First, in sec. 5 of the executive order, a new sec. 41.14.165 is added to provide that a peace officer may issue a citation for violations of the requirements of the fish passage and anadromous fish stream permits. Included in the new sec. 41.14.165 is a requirement that the Alaska Supreme Court determine which misdemeanors under the new AS 41.14 are appropriate for disposition without court appearance. Also included in that section is a requirement that the court establish an advisory committee consisting of certain members, including judges and the chairs of the House and Senate judiciary committees. The governor's executive order authority is a limited authority to restructure the executive branch of state government. That authority does not allow the governor to place duties on either the legislative or judicial branch of government. In this case, both the Alaska Supreme Court and the legislature could completely ignore the requirements imposed by this section because the governor does not have the authority to impose any duty on them through an executive order.

Second, in sec. 45 of the executive order, a provision is added to protect certain Department of Fish and Game employees from losing their "police officers retirement benefits" if they are transferred to the Department of Natural Resources by the order. This section does not involve a reorganization of functions of the executive branch. Instead, it relates to the retirement benefits accorded to state employees under law. No matter how well intentioned the purpose of this section may be, the governor does not have the power under an executive order to change laws regarding employee retirement benefits.

In both instances, the change the governor sought to make may be necessary and appropriate to fully achieve the intent of the executive order. However, the changes cannot be made in an executive order. In the event that the executive order does take effect, it would be advisable that the legislature enact these provisions in legislation so that there would be no legal uncertainty as to the duty of the Alaska Supreme Court in regard to bailable offenses and bail schedules for offenses under AS 41.14 and as to the status of retirement benefits for certain employees who are transferred to the Department of Natural Resources under the executive order.

* * *

Representative Paul Seaton

February 26, 2003

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EO 107 makes a number of technical conforming amendments to the numerous statutes that must be changed to conform to the transfer of responsibility from the commissioner of fish and game under AS 16.05.870 to the deputy commissioner of natural resources under AS 41.14.870. However, the executive order fails to contain two statutes that should be amended to eliminate soon to be obsolete references to AS 16.05.870. AS 46.15.035(c) and 46.15.037(c) provide for the reservation of a volume of water necessary to protect fish habitat in anadromous fish streams identified by the Department of Fish and Game under AS 16.05.870 when the state approves the transfer of water from one hydrologic unit to another, or when the state sells water from a hydrologic unit. Both of these statutes should be amended to replace the reference to "AS 16.05.870" with "AS 41.14.870". The executive order cannot be amended, so these changes must be made in a separate bill.

* * *

If I may be of further assistance, please advise.

GU:lmb

03-046.lmb

LEGAL SERVICES

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MEMORANDUM

February 19, 2003

SUBJECT: Sectional Summary of Executive Order 107
(Work Order No. 23-GS1071\A)

TO: Representative Paul Seaton

FROM: George Utermohle *GU*
Legislative Counsel

You have requested a sectional summary of Executive Order 107. Executive Order 107 provides for the transfer of certain permitting functions from the Department of Fish and Game to the Department of Natural Resources and the transfer of certain functions within the Department of Natural Resources.

As a preliminary matter, note that a sectional summary of the Executive Order is not an authoritative interpretation of the Order. The Executive Order itself is the best statement of its contents.

Section 1 of the Order sets out the findings of the governor in regard to the transfer of certain permit functions from the Department of Fish and Game to the Department of Natural Resources and of certain functions within the Department of Natural Resources.

Section 2 of the Order amends AS 16.05.920(a) in order to allow the taking, possessing, transporting, selling, etc. of fish, game, or marine aquatic plants if the taking, possessing, transporting, selling, etc. is permitted under AS 41.14 or under regulations adopted under AS 41.14.

Section 3 of the Order makes a technical conforming amendment to AS 16.05.925(a) by deleting the reference to AS 16.05.860 in order to conform to the repeal of AS 16.05.860 by sec. 44 of the Order.

The amendment also adds "AS 41.14.860" to the list of statute sections that establish specific penalties for certain fish and game crimes that are not covered by the penalty described in AS 16.05.925(a). This change to AS 16.05.925(a) appears to be an error. There is no provision of AS 16.05 or AS 16.20 that would impose a penalty for violation of AS 41.14, so there is no reason to make an exception for AS 41.14.860 in AS 16.05.925(a).

Section 4 of the Order makes a technical change to AS 16.20.070 in order to replace the old statutory reference to the anadromous fish stream permits under AS 16.05.870 - .890 with the new statutory cite for those permits under AS 41.14.870 - .890.

Section 5 of the Order adds a new chapter to AS 41. This new chapter contains those permitting statutes that are transferred from the Department of Fish and Game to Department of Natural Resources. Other provisions of AS 16.05 that may be relevant to the enforcement of the permit functions transferred by the Order are also included in this chapter.

Sec. 41.14.150 sets out who is or may be authorized to enforce AS 41.14. This provision is a copy of AS 16.05.150.

Sec. 41.14.160 sets out the duty of peace officers described in AS 41.14.150 to arrest persons who violate AS 41.14. This provision is a copy of AS 16.05.160.

Sec. 41.14.165 sets out the form and disposition of citations issued for violations of AS 41.14. This provision is a copy of AS 16.05.165.

Sec. 41.14.170 sets out the power of a peace officer to execute a warrant or other process to enforce AS 41.14. This provision is a copy of AS 16.05.170.

Sec. 41.14.180 sets out the power of a peace officer to conduct a search without a search warrant. This provision is a copy of AS 16.05.180.

Sec. 41.14.190 provides for the seizure and subsequent disposition of boats, aircraft, automobiles, and other property used in a violation of AS 41.14. This provision is a copy of AS 16.05.190.

Sec. 41.14.195 provides for the forfeiture of boats, aircraft, automobiles, and other equipment used to violate the provisions of AS 41.14 or regulations adopted under AS 41.14. This provision is a copy of AS 16.05.195.

Sec. 41.14.200 authorizes peace officers to administer oaths or to take depositions for use in enforcing AS 41.14. This provision is a copy of AS 16.05.200.

Sec. 41.14.840 provides that if the deputy commissioner of natural resources considers it necessary, a person who builds a dam or obstruction across a stream frequented by fish shall provide a fishway and a device for passage of downstream migrants. The deputy commissioner shall approve the plans and specifications for the fishway and device. The fishway and device shall be kept open and provided with enough water to allow passage of fish through them. This provision is a copy of AS 16.05.840.

Sec. 41.14.850 provides that if a fishway over a dam or obstruction is determined not to be practicable by the deputy commission of natural resources because of cost, the owner of the dam shall compensate for losses resulting from the dam by paying a lump sum to the fish and game fund, providing a fish hatchery and related facilities, or paying money to the fish and game fund to expand, maintain, and operate an existing fish hatchery near the site of the dam or obstruction. This provision is a copy of AS 16.05.850.

Sec. 41.14.860 sets out the penalty for violating the requirement for a fishway or hatchery. This provision is a copy of AS 16.05.860.

Sec. 41.14.870 provides that the deputy commissioner of natural resources shall specify which waters of the State are important for spawning, rearing, or migration of anadromous fish. A person or governmental agency that wishes to construct a hydraulic project or use, divert, obstruct, pollute or change the natural flow of a body of water identified under this section or to use a vehicle in the bed of a body of water identified under this section must notify the deputy commissioner in advance and obtain prior approval from the deputy commissioner. If the deputy commissioner determines that the information provided is insufficient for protection of fish and game, the deputy commissioner shall notify the person or agency of that finding by first class mail. The person or agency may appeal the decision of the deputy commission within 90 days. This provision is a copy of AS 16.05.870.

Sec. 41.14.880 prohibits the construction on a work or project subject to AS 41.14.870 without first providing plans and specifications to the deputy commissioner of natural resources and without first obtaining approval from the deputy commissioner. Violation of this section is a misdemeanor. The cost of restoring a body of water is to be borne by the violator. This provision is a copy of AS 16.05.880.

Sec. 41.14.890 provides a limited exemption from AS 41.14.870 in the event of an emergency arising from weather or stream flow conditions. This provision is a copy of AS 16.05.890.

Sec. 41.14.895 provides that a person or governmental agency who fails to notify the commissioner of natural resources of any construction that causes material damage to the spawning beds or interferes with the migration of anadromous fish, or by neglect or noncompliance with plans and specifications required and approved by the deputy commissioner causes material damage to the spawning beds or prevents or interferes with the migration of anadromous fish shall be guilty of a misdemeanor. This provision is a copy of AS 16.05.895.

Sec. 41.14.900 provides that violations of AS 41.14.895 are a class A misdemeanor. The court shall deposit any fines collected into the general fund. This provision is a copy of AS 16.05.900.

Sec. 41.14.990 sets out the definitions for "commissioner", "department", "deputy commissioner", "fish", "game", and "take".

Sections 6 through 39 of the Order make numerous technical and conforming (and some substantive) changes to AS 41.17, commonly referred to as the Forest Resources and Practices Act, to transfer certain functions from the Department of Fish and Game to the deputy commissioner of natural resources and certain other functions from the commissioner of natural resources to the state forester.

Section 6 of the Order amends AS 41.17.010 by making a technical change to replace "AS 16.05.840 or 16.05.870" with "AS 41.14.840 or 41.14.870" in order to conform to secs. 5 and 44 of the Order.

Section 7 of the Order amends AS 41.17.041(e), relating to staff of the Board of Forestry, by replacing the reference to the Department of Fish and Game with a reference to the deputy commissioner of natural resources.

Section 8 of the Order amends AS 41.17.047(c), relating to an annual survey of research needs related to forest practices, by replacing a reference to the Department of Natural Resources with a reference to the division of forestry and by replacing a reference to the Department of Fish and Game with a reference to the deputy commissioner of natural resources.

Section 9 of the Order amends AS 41.17.047(d), relating to reports on the effectiveness of AS 41.17 in protecting certain resources, by replacing a reference to the Department of Fish and Game with a reference to the deputy commissioner of natural resources.

Section 10 of the Order amends AS 41.17.055 by transferring certain powers and duties regarding forestry matters from the commissioner of natural resources to the state forester.

Section 11 of the Order amends AS 41.17.070(a) by transferring certain planning functions under AS 41.17 from the commissioner of natural resources to the state forester.

Section 12 of the Order amends AS 41.17.070(b) by transferring certain record keeping functions under AS 41.17 from the commissioner of natural resources to the state forester.

Section 13 of the Order amends AS 41.17.080 by transferring rule making authority under AS 41.17 from the commissioner of natural resources to the state forester.

Section 14 of the Order amends AS 41.17.085(a) by transferring responsibility for accepting applications for permits required by other state agencies to operate on forest land from the commissioner of natural resources to the state forester.

Section 15 of the Order amends AS 41.17.087(b) by transferring responsibility for adopting regulations establishing standards for variations for harvesting timber in riparian areas from the commissioner of natural resources to the state forester.

Section 16 of the Order amends AS 41.14.087(c) to make a technical change in order to conform to the transfer of regulatory authority under sec. 15 of the Order from the commissioner of natural resources to the state forester.

Section 17 of the Order amends AS 41.17.090(b) by transferring certain duties of the commissioner of natural resources under AS 41.17 to the state forester.

Section 18 of the Order amends AS 41.17.090(d) by providing that the state forester provide a plan of operation submitted under AS 41.17.090(b) to the deputy commissioner of natural resources.

Section 19 of the Order amends AS 41.17.090(e) by transferring responsibility for determining the proper classification of a water body for purposes of AS 41.17.116(a) from the Department of Fish and Game to the deputy commissioner of natural resources.

Section 20 of the Order amends AS 41.17.098(a) by transferring responsibilities of the commissioner of natural resources to coordinate with other state agencies and with the deputy commissioner of natural resources to the state forester.

Section 21 of the Order amends AS 41.17.098(b) transferring the duties of the commissioner of natural resources to consider comments of state agencies and coastal districts on plans of operations under AS 41.17.090 to the state forester. The state forester is also required to consider the comments of the deputy commissioner of natural resources.

Section 22 of the Order amends AS 41.17.098(c) to transfer responsibilities of the commissioner of natural resources regarding due deference to the Department of Environmental Conservation to the state forester.

Section 23 of the Order amends AS 41.17.098(d) to transfer duties of the commissioner of natural resources concerning deference in regard to fish and wildlife habitat to the state forester. Responsibility for making determinations regarding fish and wildlife habitat is transferred from the Department of Fish and Game to the deputy commissioner of natural resources.

Section 24 of the Order amends AS 41.17.098(e) by making technical changes to the definition of "due deference" in order to conform to the transfer of functions from the commissioner of natural resources to the state forester under secs. 20 - 23 of the Order and to assignment of duties regarding fish and wildlife habitat to the deputy commissioner of natural resources under sec. 23 of the Order.

Sections 25 - 27 of the Order make technical changes to AS 41.17.110, 41.17.115, and 41.17.116(b) in order to conform the transfer of functions of the commissioner of natural resources under AS 41.17 to the state forester.

Section 28 of the Order amends AS 41.17.118(b) by substituting "department" for "commissioner" in order to provide that the Department of Natural Resources may impose additional riparian protection standards for timber harvest operations through the adoption of land use plans and forest management plans and reports.

Section 29 of the Order amends AS 41.17.118(c) to provide that in the absence of a site-specific determination by the deputy commissioner of natural resources, the state forester is to presume that a stream is anadromous if it is connected to anadromous waters that do not have a physical blockage documented by the Department of Natural Resources and has a stream gradient of 8 percent or less. Responsibility for determining the existence of a physical blockage of a stream is transferred from the Department of Fish and Game to the Department of Natural Resources.

Section 30 of the Order amends AS 41.17.119, relating to minimum riparian standards for certain state land, by transferring certain responsibility from the commissioner of natural resources to the division of forestry.

Section 31 of the Order amends AS 41.17.120 by transferring the authority to inspect and investigate forest land from the commissioner of natural resources to the state forester. AS 41.17.120 is also amended to provide that the deputy commissioner of natural resources has authority to enforce laws and regulations on forest land and that the deputy commissioner shall coordinate his/her actions with other state agencies and the state forester.

Section 32 of the Order amends AS 41.17.900(c) by transferring authority to exempt small scale and noncommercial operations from provisions of AS 41.17 from the commissioner of natural resources to the state forester.

Section 33 of the Order amends AS 41.17.900(d) to provide that the state forester may not duplicate or preempt the authority of state agencies regarding forest land except for regulations adopted under the Coastal Management Act or regulations adopted by the Department of Environmental Conservation in regard to control of nonpoint source pollution.

Section 34 of the Order amends AS 41.17 by adding a new section to provide that in respect to matters governed by AS 41.17, the deputy commissioner of natural resources does not have supervisory authority over the state forester.

Sections 35 - 37 of the Order amend AS 41.17.910 to provide that the deputy commissioner of natural resources shall assume the duties of the Department of Fish and

Game in regard to providing assistance, education, and cooperation to private landowners in regard to wildlife habitat.

Section 38 of the Order amends AS 41.17.950(1), definition of "anadromous water body", to substitute a reference to the Department of Fish and Game with a reference to the deputy commissioner of natural resources and references to AS 16.05.870 with references to AS 41.17.870.

Section 39 of the Order amends AS 41.17.950 by adding a definition of "deputy commissioner".

Section 40 of the Order amends AS 44.37 by adding new sections providing for the appointment of a deputy commissioner of natural resources and providing for certain powers and duties of the deputy commissioner of natural resources.

Section 41 of the Order makes a technical, conforming change to AS 44.62.330(a)(4), relating to administrative adjudications under the Administrative Procedure Act, by substituting references to the Department of Natural Resources and AS 41.14.870 for references to Department of Fish and Game and AS 16.05.870, respectively.

Section 42 of the Order makes a technical, conforming change to AS 46.15.020(b) by substituting a reference to AS 41.14.870 for a reference to AS 16.05.870.

Section 43 of the Order makes technical, conforming changes to AS 46.35.200(4)(W) by adding a reference to AS 41.14.870 and to regulations adopted under that statute.

Section 44 of the Order repeals AS 16.05.840 - .860, which provide for regulation of dams and obstructions to passage of fish, and AS 16.05.870 - .900, which provide for regulation of activities that affect anadromous fish streams. The provisions of the repealed statutes are reenacted as part of AS 41.14 in sec. 5 of the Order.

Section 45 of the Order provides that employees of the Department of Fish and Game who are in the "peace officer retirement program" and whose positions are transferred to the Department of Natural Resources as a result of this Executive Order may continue to accrue service credit as a peace officer under AS 39.35 as long as they remain in those positions.

Section 46 of the Order is the savings clause. Litigation and other proceedings pending under a law repealed or amended by this Order are to continue. Regulations adopted to implement a statute repealed or amended by the Order are to remain in effect until they are repealed. Contracts, rights, liabilities, and obligations created by or under a law repealed or amended by the Order that are in effect on the effective date of the Order remain in effect. Records, equipment, appropriations, and other property of an agency whose functions are transferred by the Order are transferred to the new agency to implement the Order.

Representative Paul Seaton
February 20, 2003
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Section 47 of the Order provides that the Order takes effect April 15, 2003.

GU:med
03-168.med

February 25, 2003

The Honorable Les Gara
Alaska State Legislature
State Capitol, Room 422
Juneau, AK 99801

Dear Representative Gara:

You asked for my perspective on the effect of Governor Frank Murkowski's Executive Order 107 on Alaska's fish resources. This order transfers responsibility for protection of fish habitat, specifically in-stream permitting authority for anadromous and resident fish habitat and joint authority on logging within the 66-foot riparian buffers on private timberland in the coastal forest, from the commissioner of the Alaska Department of Fish and Game (ADF&G) to a deputy commissioner in the Department of Natural Resources (DNR).

My perspective on this issue may be unique. I worked as a resource manager and supervisor in DNR for nine years, was Habitat Director at ADF&G for seven years, and served as Commissioner of Fish and Game for eight years. I know and understand the statutory missions of both departments, and have worked with and appreciate the capable, professional staff in both departments.

I believe that moving ADF&G's in-stream permitting authority and ADF&G's responsibility for stream buffers to DNR will be bad for fish and for Alaskans who depend on wild fish for their jobs, recreation, or subsistence.

Executive Order 107 proposes a radical change to the way Alaska's wild fish have been managed since before statehood. At statehood, the Alaska Legislature decided to create two separate resource agencies, and purposefully assigned ADF&G responsibility for managing Alaska's fish and wildlife and protecting its habitat. The continued strength of Alaska's wild fish resources is testament that ADF&G has done its job well for the past 43 years.

In 1989, the legislature amended the state's Forest Resources and Practices Act, and after numerous hearings and vigorous debate and analysis, it once again decided to maintain authority for in-stream permitting within ADF&G despite pressure from the timber industry to move that authority to DNR. The legislature even went further and gave ADF&G deference on whether or not DNR should allow logging within the 66-foot buffers along salmon streams on private land in the coastal forest of Alaska. The order transfers ADF&G's responsibilities for

buffers to DNR. As a result, salmon streams in the coastal forest will now be at far greater risk of harm.

You asked: ***"Why will implementation of the Anadromous Fish Act, the Fishway Act, and the Forest Resources and Practices Act be less protective of salmon and trout if they are housed in DNR?"***

Anadromous Fish Act

First, and most important, the Anadromous Fish Act gives broad discretion to the commissioner of ADF&G. The commissioner, and now the deputy commissioner of DNR, can be either rigorous or lax in the implementation of this broad discretion.

For example, the Anadromous Fish Act presently requires the ADF&G commissioner to **"determine the waters in the state that are important for the rearing, spawning and migration of anadromous fish."** Under the order, this discretion will move from the agency with the scientific expertise to make the determination, to a deputy commissioner of DNR who now will decide what constitutes **"important habitat."** If DNR decides a stream is not **"important"** it will not receive protection under the Anadromous Fish Act. People will be able to mine, drive equipment through, or dig up spawning beds without a permit.

The Anadromous Fish Act also gives the ADF&G commissioner broad discretion to determine what constitutes **"proper protection"** for the rearing, spawning and migration of anadromous fish in **"important"** streams. Again, implementation can be either lax or rigorous. The level of rigor and care will now be in the hands of a deputy commissioner in DNR, not the commissioner of ADF&G.

There are no hard and fast standards of protection in the Anadromous Fish Act. It made sense to Alaska's first legislature to give ADF&G biologists the broad discretion and flexibility to decide what is important habitat using their expertise and professional judgment, and to make field determinations of what protections are needed given the fish resources present and the proposed development. That system has worked successfully to protect Alaska's fish habitat even as Alaska developed its lands and resources over the last four decades.

Fishway Act

The Fishway Act also gives broad discretion to the commissioner of ADF&G. It says: **"if the commissioner considers it necessary, every dam or other obstruction built by any person across a stream frequented by salmon or other fish**

shall be provided by that person with a durable and efficient fishway...." Since statehood it has been the responsibility of the commissioner of ADF&G to determine when it is necessary to provide fish passage. Under this order, a deputy commissioner in DNR will judge when it is necessary to provide fish passage. Again, there is no definitive standard of protection; protection depends on the expertise and commitment of the responsible agency.

Frankly, I do not believe a DNR deputy commissioner will implement this statutory discretion over the fate of anadromous and resident fish species with the same expertise and commitment that commissioners of ADF&G have exercised for the last 43 years. DNR statutes say nothing about managing, protecting, maintaining, enhancing and extending the fish and wildlife of Alaska. Their mission is not to protect and manage these stocks for the commercial, recreational, and subsistence needs of Alaskans; it is to develop Alaska's other natural resources.

I have been part of cabinet-level decisions, both as the director of the Habitat Division and as commissioner of ADF&G, that would have resulted in the unnecessary loss of salmon and trout if ADF&G had not been present as the agency with the statutory authority to protect fish habitat. Without ADF&G commissioner level responsibility the fish, and people dependent on them, will suffer--plain and simple.

Second, location of habitat biologists in DNR will effectively sever their daily access to other ADF&G staff and expertise. Permit decisions are not made in isolation by the Habitat Division. Professional biologists in the Sport Fish, Commercial Fisheries, and Wildlife divisions of ADF&G also bring their expertise to permit decisions. Habitat division staff rely on their knowledge about what fish live in a stretch of stream, and the life stage and sensitivity of a species at the time of proposed development. This collaboration will not occur as easily, if at all, between departments.

Third, I understand the administration has indicated that only between eight and 12 of the 20 habitat permitters will move to DNR. If this is correct, fewer habitat biologists will mean project reviews will either be slower, made with less knowledge of field conditions, or merely a rubber stamp of whatever is proposed.

Currently most projects, and all major projects, get a pre- and post-construction site visit by ADF&G staff. This allows ADF&G to work directly with developers to design project-specific steps to address the needs of the specific species and habitat. Grayling over-wintering habitat in a North Slope oil field requires different approaches to habitat protection than bank stabilization to protect a private home on the Kenai River. Good decisions about such diverse development

in such diverse fish habitat cannot be made from a desk with a rubber stamp. And while each individual decision may appear insignificant, it is the cumulative impact of all these decisions over 43 years that has protected the integrity of Alaska's fish habitat.

You asked for: *"an example that illustrates the difference between the ADF&G and DNR approaches to in-stream fish habitat protection."*

One example that illustrates the different approach I think you will see to in-stream salmon and trout habitat permitting involved the Unuk River near Ketchikan.

The Unuk River produces great king and coho salmon runs valued by sport and commercial users. It also supports other salmon species, char and trout. Years ago, DNR approved a log salvage operation that allowed an amphibious vehicle to operate in the streambed to remove trees that had washed into the river. At the time, ADF&G was concerned about the loss of wood in the river, but did not have good enough information about its role as fish habitat to support an objection.

ADF&G researched the fish habitat function of trees that wash into the Unuk River and found that deep scour pools form along the huge trunks and provide critical over-wintering habitat for thousands of juvenile king and coho salmon as well as trout. The trees form logjams that, in turn, form pools that aid adult salmon migration and provide summer rearing habitat for juvenile king and coho salmon. Logs that jam side channels of this glacial river turn turbid channels into clear water rearing areas for juvenile coho.

When the log salvage license came up for renewal it was denied, because the ADF&G commissioner had good science to support his strong objections to the operation. These logs were, and still are, more valuable in the river. If not for ADF&G's authority, science, and adamant opposition, DNR would have again allowed logging in the Unuk River, thus destroying valuable fish habitat. **The executive order effectively removes ADF&G from these types of decisions.** Next time, only the DNR State Forester and deputy commissioner will have authority over the outcome of logs and fish in the Unuk and every other river in Alaska.

Stream Buffers

Executive Order 107 removes any role for ADF&G in approving or denying the harvest of trees from within the 66-foot stream buffers along salmon streams on private land in the coastal forest of Alaska. These trees are critical

to the health of salmon streams. Research done by the National Marine Fisheries Service, Auke Bay Lab, and others throughout the northwest, has shown that fish streams need a minimum of 100-foot buffers to protect fish habitat. That is why Alaska law requires mandatory 100-foot no cut buffers on public lands in the coastal forest. The politics of creating buffers on private lands required compromising this 100-foot standard and adopting a 56-foot standard on private lands. The 66-foot buffer is not a "no cut" buffer. Trees can be removed if the DNR forester agrees. ADF&G is supposed to get deference, but not a veto, on whether to cut in the buffer.

DNR has ignored ADF&G on many occasions and allowed cutting in the 66-foot buffers. In fact, DNR accepted a "formula variation" request from Koncor Forest Products on Afognak Island that proposed removing every tree larger than a certain diameter from the buffer, regardless of their value for fish habitat protection. ADF&G objected and eventually its objection and public pressure forced DNR to deny the request.

ADF&G currently has some influence over DNR's decision on whether to cut trees in the buffers. That will change under the order. The DNR State Forester will now make the decision whether to log the buffers after giving due deference to his deputy commissioner. **ADF&G will have no voice in whether these trees stay in the buffer and continue to provide fish habitat.** Far more trees will be removed from these protective buffers without ADF&G participating in the decision.

Under Executive Order 107, habitat biologists and the many Alaskans who depend on salmon, trout, char, and grayling won't have the weight and stature of the commissioner of ADF&G looking out for the health of the habitat that produces these fish. Instead, the care of Alaska's fish will be relegated to a deputy commissioner in DNR. Anyone who believes this will lead to equivalent protection for Alaska's salmon and trout is sadly mistaken.

Lastly, I question why some feel this order is necessary. ADF&G routinely reviews some 2,000 permit requests every year (38,000 in the last twenty years) and 99 percent are granted within 15 days. Sure, some developers complain. Any agency that brings the fish and wildlife issues to the table when mining, oil and gas, roads, timber and other development projects are reviewed is bound to have its critics. I don't believe this warrants having ADF&G's authority to protect salmon and trout streams stripped and permitting development with no input from the department that knows best what is needed for fish and has the courage to say it.

If you look closely into the concerns Governor Murkowski has raised you will find ADF&G staff are doing their job. Are Alaska's oil, transportation, mining, and timber resources being developed? Yes. Does the public trust that a permit issued by ADF&G will protect fish? Yes. Will this same trust exist if DNR is issuing the permit? No. Are well-designed projects unreasonably delayed by the in-stream permitting requirements of ADF&G? No. Are poorly designed projects improved by having ADF&G approve their in-stream components? Yes. And are the fish and wildlife of Alaska still the envy of the world in large part because ADF&G has consistently brought good science and a strong commitment to fish and wildlife resources to the table? A resounding Yes.

If this or any future administration thinks the policies of ADF&G are unnecessarily protective of fish habitat for certain development projects, it can adopt different implementation policies without destroying the checks and balances that have served Alaska well for 43 years.

The executive order is bad public policy and will be bad for Alaska's fish and wildlife. The process for making this radical change denies Alaskans the chance to understand its meaning and voice their opinion. I hope the legislature will hold enough hearings to understand the long-term effects of this move and listen to the people of Alaska. I hope the administration allows biologists to be heard without fear of reprisal.

I have not addressed the impact of Executive Order 106, however, this too will lead to great loss of Alaska's fish and wildlife. I hope the legislature takes the time to listen to all sides on these issues and seriously considers the long-term ramifications of these proposals. The health of Alaska's world-class fish resources deserve the time and attention of the legislature.

If you have further questions please don't hesitate to ask.

Sincerely,

/s/

Frank Rue

cc: Representative Paul Seaton, Chair, Fisheries Committee

*** Sec. 74. DF&G - Division of Habitat and Restoration.** (a) The mission of the Division of Habitat and Restoration is to protect, maintain, enhance, and restore habitat for fish and wildlife consistent with sound conservation and sustained yield principles.

(b) The legislature intends to measure the success of the division in achieving its mission by considering **as compared to each of the previous 5 years**, whether at least

(1) 95 percent of the Title 16 (anadromous waters) applications are approved or modified to protect, minimize, or mitigate habitat damage within an average of 20 days after receipt;

(2) 80 percent of the land use plans reviewed result in consensus on habitat-related issues;

(3) 95 percent of the project reviews for industrial development, road construction, and timber harvest are completed within an average of 25 days or less or within the scheduled time frame for complex projects.

Adds trending language

**FY00 - FY02
Missions & Measures**

SB169

SB281

HB250

HB515

Data Summary - See Dept's Performance Measures Report for more Detail.

Sec. 107. Department of Natural Resources. The mission of the Department of Natural Resources is to develop, conserve, and maximize the use of Alaska's natural resources consistent with the public interest.				
Sec. 108. Office of the Commissioner. The mission of the Office of the Commissioner is to provide support and policy direction to each of the divisions within the department to achieve the department's mission.				
108.(1). The percentage of divisions that meet the assigned performance measures.	FY 00	FY 01	FY 02	FY03
	96%	97.70%	97%	
108.(2). The percentage of maintained daily entry and weekly verification of the online grantor/grantee and location indexing process for all documents accepted in the recorders' offices.	FY 00	FY 01	FY 02	FY03
FY00 Daily Indexing Completion - FY 01 4th quarter Daily Input Performed	%	%	%	
Anchorage	9	27	35	
Bethel	98	92	98	
Fairbanks	77	95	96	
Homer	98	97	94	
Juneau	66	100	85	
Kenai	44	97	95	
Ketchikan	95	92	97	
Kodiak	91	100	99	
Nome	97	100	100	
Palmer	62	86	84	
Sitka	100	98	100	
UCC Central		97	98	
Weekly Verification Completion	%	%	%	
Anchorage	new	98	64	
Bethel	new	98	99	
Fairbanks	new	100	100	
Homer	new	100	100	
Juneau	new	100	94	
Kenai	new	100	100	
Ketchikan	new	100	91	
Kodiak	new	100	100	
Nome	new	97	100	
Palmer	new	100	80	
Sitka	new	100	96	
UCC Central	new	100	100	
	FY 00	FY 01	FY 02	FY03

108.(3). The percent of time the computer systems are able to support the annual volume of land and records transactions.	99%	99.75%	99.7	
	FY 00	FY 01	FY 02	FY03
108.(4). The revenue generated by the development and sale of natural resources.	1.0 billion	1.1 billion	\$816 million	
	FY 00	FY 01	FY 02	FY03
108.(5). The average time taken to respond to complaints and questions that have been elevated to the commissioner's office.	new FY01	15 days	14 days	
	FY 00	FY 01	FY 02	FY03
108.(6). The average time taken to respond to appeals and reconsiderations that have been elevated from the divisions to the commissioner's office.	new FY01	29.2 days	28 days	
Sec. 109. Administrative Services. The mission of Administrative Services is to provide support services for departmental programs.				
	FY 00	FY 01	FY 02	FY03
109.(1). The average time taken to pay vendors.	22 days	24.2 days	23.34 days	
	FY 00	FY 01	FY 02	FY03
109.(2). The number of late penalties for payroll or vendor payments	0	0	0	
	FY 00	FY 01	FY 02	FY03
109.(3). The number of audit exceptions.	0	0	0	
	FY 00	FY 01	FY 02	FY03
109.(4). The cost of administrative services as compared to the total personnel costs for the department.	5.00%	4.34%	4.19%	
Sec. 110. Division of Forestry. The mission of the Division of Forestry is to develop, conserve, enhance, and manage the state's forests to provide a sustainable yield of forest resources for Alaska and to manage the wild land fire suppression program.				
	FY 00	FY 01	FY 02	FY03
110.(1). Level of noncompliance with AS 41.17 (Forest Resources and Practices Act) measured by the annual number of field visits and violations.				
Region I			8%	
Region II			7%	
	FY 00	FY 01	FY 02	FY03
110.(2). The annual volume of state timber sold as compared to the amount offered for sale.				
MMBF Offered	35.9	32.5	46.2	
MMBF Sold	20.8	8.9	15.5	
	FY 00	FY 01	FY 02	FY03
110.(3). The acreage of				
A) state forest land with active insect infestations or diseases;	8,799,000	6,988,000	18,200,000	

B) infested or diseased timber offered for sale on state land; and	1256	1855	3,388.3	
C) infested or diseased timber sold on state land.	480	48	139.4	
	FY 00	FY 01	FY 02	FY03
110.(4). The annual volume of state timber offered for in-state companies and converted to value-added products.				
MMBF Offered	35.9	32.5	15.5	
MMBF Sold	20.4	8.8	15.5	
110.(5). The number of fires that result from human actions, whether as a function of population growth or other causes.	FY 00	FY 01	FY 02	FY03
Total Fires	324	299	336	
Human Causes	269	280	278	
	FY 00	FY 01	FY 02	FY03
110.(6). The percentage of fires in full and critical protection categories that are held to less than 10 acres.	98%	98%	96%	
Sec. 111. Division of Oil & Gas. The mission of the Division of Oil and Gas is to maximize responsible oil and gas exploration and development.	FY 00	FY 01	FY 02	FY03
111.(1). Compliance with the area wide leasing plan and exploration licensing.	100%	100%	100%	
111.(2). The amount of available state acreage offered for oil and gas leasing or for exploration that is:	FY 00	FY 01	FY 02	FY03
licensed for exploration	none	318,756	0	
leased for oil and gas development	none	1,740,009	1,673,189	
leased for shallow natural gas development	none	23,040	452,188	
	FY 00	FY 01	FY 02	FY03
111.(3). The non-tax revenue received for total state production of oil and gas.	1.0 billion	1.15 billion	\$816 million	
	FY 00	FY 01	FY 02	FY03
111.(4). The number of resident and nonresident private-sector jobs in the o&g industry in the state.	11,123	13,100	9100	
residents	8,380	9,496		
non-residents	2,743	3,604		
111.(5). The number of new and assigned oil & gas rights, plans and units.	FY 00	FY 01	FY 02	FY03
Assignments	904	1070	912	
Units	112	158	5	
111.(6). The total amount of oil and gas acreage	FY 00	FY 01	FY 02	FY03
under lease			5,373,474	
under license			801,698	new

	within oil and gas units			1,078,239	new
	within participating areas and non-unitized producing acreage			615,325	new
Sec. 112. Division of Mining, Land and Water. The mission of the Division of Mining, Land and Water is to encourage the use and development of Alaska's land mineral and water resources.					
		FY 00	FY 01	FY 02	FY03
• 112.(1). The number of leases and permits issued for public and private use of State Land.		513	417	273	
		FY 00	FY 01	FY 02	FY03
• 112.(2). The number of private-sector jobs in mining compared to the prior fiscal year		3166	3183	2882	
		FY 00	FY 01	FY 02	FY03
• 112.(3). The number of acres of land conveyed to municipalities compared to total municipal entitlement.		12,000	16,677	14,418	
	Entitlement	1,375,836	1,375,836	1,375,386	
• 112.(4). Percentage change in the number of acres of land sold and amounts of revenue generated from land sales and leases.		FY 00	FY 01	FY 02	FY03
	acres sold	1,500	2,100	4,723	
	revenues increased	N/A	\$2.0 million	\$3 million	
• 112.(5). Number of water right files processed compared to the number of water rights applied for.		FY 00	FY 01	FY 02	FY03
	applied for	250	250	97	
	processed	104	97	168	
	backlog	500	653	710	
		FY 00	FY 01	FY 02	FY03
• 112.(6). The percentage change in the number of periodic dam safety inspections.		12	7	11	
• 112.(7). Number and change in the number of active placer, lode, and coal mines permitted and the number of mining locations staked and processed.		FY 00	FY 01	FY 02	FY03
	Placer mines permitted	360	301	291	
	Mining claims staked and processed	12,555	2,851	1,594	
Sec. 113. Division of Geological and Geophysical Surveys. The mission of the Division of Geological and Geophysical Surveys is to determine: 1) the potential of Alaska land for production of metals, mineral's fuels and geothermal resources, 2) the locations and supplies of groundwater and construction material, and 3) the potential hazards to buildings, roads, bridges, and other installations and structures.					
		FY 00	FY 01	FY 02	FY03
• 113.(1). The total value of Alaska's mineral industry.		1.28 billion	~1 billion	~1 billion	
		FY 00	FY 01	FY 02	FY03
• 113.(2). Total state revenue generated by Alaska's mineral industry.		new in FY03	new in FY03	new in FY03	

	FY 00	FY 01	FY 02	FY03
113.(3). The number of acres of ground under private-sector exploration.	3,301,880	3,100,000	2,663,620	
	FY 00	FY 01	FY 02	FY03
113.(4). Number of the square miles included in completed geophysical/geological mineral surveys of at least 1000 square miles of Alaska land.	1,032 sq. mi	1,240 sq mi	931 sq mi	
	FY 00	FY 01	FY 02	FY03
113.(5). The number of users requesting information on the geology of Alaska from the DGGs Web site.	21,737	27,731	31,952	
	FY 00	FY 01	FY 02	FY03
113.(6). The number of responses made by the division to the requests for information or assistance relating to engineering geology or hazards issues in Alaska.	320	365	360	
Sec. 114. Division of Parks and Outdoor Recreation. The mission of the Division of Parks and Outdoor Recreation is to: 1) provide outdoor recreation opportunities, 2) conserve, interpret and preserve natural, cultural, and historic resources and services and 3) encourage the development of local park and recreation facilities and programs.				
	FY 00	FY 01	FY 02	FY03
114.(1). The percentage of park facilities open.	99%	100%	93% ?	
114.(2). The number of visits by site and type of visit.	FY 00	FY 01	FY 02	FY03
Northern	663,235	644,717	593,819	
Mat-Su/CB	886,844	972,253	964,233	
Chugach	938,790	965,658	1,099,500	
Kenai/PWS	677,378	807,761	945,126	
Kodiak	150,165	192,394	196,175	
Wood Tikchik	94,652	102,468	107,960	
Southeast	476,636	476,224	475,957	
resident	2,925,900	3,177,323	3,308,147	
nonresident	961,800	984,153	1,074,623	
	FY 00	FY 01	FY 02	FY03
114.(3). The percentage of newly identified historic properties entered on the statewide inventory.	1009	908	1147	
	74%	73%	127%	
	FY 00	FY 01	FY 02	FY03
114.(4). The amount of dollars generated from sources other than state government for trail maintenance and site development.	857,000	946,000	1,333,000	
	FY 00	FY 01	FY 02	FY03

**FY00 - FY02
Missions & Measures**

SB169

SB281

HB250

HB515

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Nome	97	100	100	
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	within oil and gas units			1,078,239	new
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		FY 00	FY 01	FY 02	FY03
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112.(2). The number of private-sector jobs in mining compared to the prior fiscal year		3166	3183	2882	
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112.(3). The number of acres of land conveyed to municipalities compared to total municipal entitlement.		12,000	16,677	14,418	
	Entitlement	1,375,836	1,375,836	1,375,386	
112.(4). Percentage change in the number of acres of land sold and amounts of revenue generated from land sales and leases.		FY 00	FY 01	FY 02	FY03
	acres sold	1,500	2,100	4,723	
	revenues increased	N/A	\$2.0 million	\$3 million	
112.(5). Number of water right files processed compared to the number of water rights applied for.		FY 00	FY 01	FY 02	FY03
	applied for	250	250	97	
	processed	104	97	168	
	backlog	500	653	710	
		FY 00	FY 01	FY 02	FY03
112.(6). The percentage change in the number of periodic dam safety inspections.		12	7	11	
112.(7). Number and change in the number of active placer, lode, and coal mines permitted and the number of mining locations staked and processed.		FY 00	FY 01	FY 02	FY03
	Placer mines permitted	360	301	291	
	Mining claims staked and processed	12,555	2,851	1,594	
Sec. 113. Division of Geological and Geophysical Surveys. The mission of the Division of Geological and Geophysical Surveys is to determine: 1) the potential of Alaska land for production of metals, mineral's fuels and geothermal resources, 2) the locations and supplies of groundwater and construction material, and 3) the potential hazards to buildings, roads, bridges, and other installations and structures.					
		FY 00	FY 01	FY 02	FY03
113.(1). The total value of Alaska's mineral industry.		1.28 billion	~1 billion	~1 billion	
		FY 00	FY 01	FY 02	FY03
113.(2). Total state revenue generated by Alaska's mineral industry.		new in FY03	new in FY03	new in FY03	

	FY 00	FY 01	FY 02	FY03
113.(3). The number of acres of ground under private-sector exploration.	3,301,880	3,100,000	2,663,620	
	FY 00	FY 01	FY 02	FY03
113.(4). Number of the square miles included in completed geophysical/geological mineral surveys of at least 1000 square miles of Alaska land.	1,032 sq. mi	1,240 sq mi	931 sq mi	
	FY 00	FY 01	FY 02	FY03
113.(5). The number of users requesting information on the geology of Alaska from the DGGS Web site.	21,737	27,731	31,952	
	FY 00	FY 01	FY 02	FY03
113.(6). The number of responses made by the division to the requests for information or assistance relating to engineering geology or hazards issues in Alaska.	320	365	360	
Sec. 114. Division of Parks and Outdoor Recreation. The mission of the Division of Parks and Outdoor Recreation is to: 1) provide outdoor recreation opportunities, 2) conserve, interpret and preserve natural, cultural, and historic resources and services and 3) encourage the development of local park and recreation facilities and programs.				
	FY 00	FY 01	FY 02	FY03
114.(1). The percentage of park facilities open.	99%	100%	93% ?	
	FY 00	FY 01	FY 02	FY03
114.(2). The number of visits by site and type of visit.				
Northern	663,235	644,717	593,819	
Mat-Su/CB	886,844	972,253	964,233	
Chugach	938,790	965,658	1,099,500	
Kenai/PWS	677,378	807,761	945,126	
Kodiak	150,165	192,394	196,175	
Wood Tikchik	94,652	102,468	107,960	
Southeast	476,636	476,224	475,957	
resident	2,925,900	3,177,323	3,308,147	
nonresident	961,800	984,153	1,074,623	
	FY 00	FY 01	FY 02	FY03
114.(3). The percentage of newly identified historic properties entered on the statewide inventory.	1009	908	1147	
	74%	73%	127%	
	FY 00	FY 01	FY 02	FY03
114.(4). The amount of dollars generated from sources other than state government for trail maintenance and site development.	857,000	946,000	1,383,000	
	FY 00	FY 01	FY 02	FY03

• 114.(5). The level of deferred maintenance in state parks.	\$39.5 million	\$42 million	\$42.3 million	
• 114.(6). Annual dollars applied to deferred maintenance in state parks	new in FY03	new in FY03	new in FY03	
• Sec. 115. Division of Agriculture. The mission of the Division of Agriculture is to promote and encourage the development of an agricultural industry in the state.				
	FY 00	FY 01	FY 02	FY03
• 115.(1). The loan to equity ratio in the Agricultural Revolving Loan Fund.	28.90%	27.95%	27.70%	
	FY 00	FY 01	FY 02	FY03
• 115.(2). The number of improved crop accessions produced by the plant material center and grown in the state.	316	314	922	
	FY 00	FY 01	FY 02	FY03
• 115.(3). The percentage change in agricultural acreage compared to the prior year	0	0	1%	
	FY 00	FY 01	FY 02	FY03
• 115.(4). The monetary value of agricultural products grown in the state that are sold domestically or exported.	28.3 million	26.5 million	30.2 million	

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House Special Committee on Fisheries

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- 2) Former ADF&G Commissioners; Frank Rue, Carl Rosier, Don Collinsworth, Jim Brooks, Ron Skoog.
- 3) Letter From Frank Rue to Rep. Les Gara.
- 4) Anchorage ADF&G Advisory Committee
- 5) Cooper Landing ADF&G Advisory Committee.
- 6) Paxson ADF&G Advisory Committee.
- 7) American Fisheries Society; Alaska Chapter, and Western Division.
- 8) Association of Village Council Presidents.
- 9) Alaska Public Waters Coalition.
- 10) ADF&G Habitat Div. Region 1 & 2.

COPIES OF THESE LETTERS
AND DOCUMENTS ARE AVAILABLE FROM THE
FISHERIES COMMITTEE

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- 11) Jerry Schaffer; Western Anglers Fly Shop, Grand Junction, CO.
- 12) Justin Stauffer; Student, PSU.
- 13) Bear Creek Outfitters; Juneau.
- 14) Native Village of Eklutna.
- 15) Celia Rozen, Anchorage.
- 16) Douglas Hill, Anchorage
- 17) William R. Betchtol, Anchorage.
- 18) Peninsula Forestry INC. Homer
- 19) Mindy Baum, Anchorage
- 20) Eban P. Stone, Homer
- 21) Bill Stockwell, Cooper Landing.
- 22) Robin Collman, Seward.
- 23) Linda C. Vollersten, Anchorage.
- 24) Kenai River Special Management Area, KPB.
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- 26) Richard F. Listowski
- 27) Alaska Longline Fishermen's Association.
- 28) Sitka Charter Boat Operators Association.
- 29) Mim McConnell, Sitka.
- 30) Yakutat ADF&G Advisory Committee.

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31) Willy Dunne, Fritz Creek.

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33) Rigina Fiske, Homer.

34) Milli Martin, Homer.

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House Special Committee on Fisheries

MEMORANDUM

TO: All Fisheries Committee Members

FM: Representative Paul Seaton, Chair
House Fisheries Committee

DATE: March 17th, 2003

RE: Add to EO 107 file

Please add this to your EO 107 file.

Contents

Revised Questions and hearing structure submitted to DNR.

Please feel free to contact me with questions anytime x2689, or you can contact my Committee Aide, Cameron Yourkowski, x3306. Thank you.

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House Special Committee on Fisheries

March 15, 2003

Tom Irwin, Commissioner
Department of Natural Resources
400 Willoughby Ave. 5th Flr
Juneau, Ak 99801-1724

A handwritten signature in cursive script, likely belonging to Rep. Paul Seaton.

Dear Commissioner Irwin,

The House Special Committee on Fisheries will be holding a hearing on EO 107 on Tuesday, March 18th, 2003, in Room #519, from 7:00P.M. to 10:00P.M.

The purpose of this hearing will be to determine, in detail, how the new DNR Division of Habitat Management and Permitting (DHMP) will provide sufficient protection to fisheries habitat and will increase permitting efficiency.

The House Fisheries Committee respectfully requests the presence of DNR Commissioner Irwin, the Deputy Commissioner of the Division of Habitat Management and Permitting, and any assistants necessary for answering detailed questions (Chris Kennedy, Nancy Welch). The Committee asks that these public servants be available to answer questions for the duration of the meeting.

Specific questions that we will focus on in the Committee are listed below; Most of these questions refer to the structure, mission, and regulations of the new DHMP. Please come prepared to answer these questions to the best of the Departments ability.

Sincerely,
(email)

Rep. Paul Seaton, Chair
House Fisheries Committee

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House Special Committee on Fisheries

QUESTIONS TO DNR FROM THE HOUSE FISHERIES COMMITTEE

Who will the Deputy Director be?

How many Habitat biologists are being lost. How will the remaining biologists be organized around the state?

Specifically, how will permitting be expedited and maintain standards with less biologists? Will biologists visit each stream site before permitting Title 16 permits?

How does funding for the new DHMP compare to past Habitat Div. Funding levels?

Commissioner Irwin has stated that agencies work together more efficiently when they are housed under the same departmental structure. Specifically, how will the DHMP issue permits more efficiently? How will this intra-agency efficiency between DNR and DHMP be superior to the efficiencies experienced between DNR, ADF&G, and the Habitat and Restoration Division?

There has been a great deal of talk about the slow turnover time for permits when multiple agencies are involved. Can you explain the different procedural approach DNR will take with respect to single agency and multiple-agency projects?

Why is there such a time delay in issuing water usage permits by DNR? Specifically, what procedures will ensure that Title 16 permits are free from similar delays?

Will the new DHMP and the Deputy Director have a separate and different mission statement than the Department of Natural resources? What is the mission statement?

AS 16.05.870 says the Department of Fish and Game must provide for "proper protection" of fish streams. Will the Deputy Commissioner define "proper protection?" If so, how?

Considering the mission statements of DNR and the new DHMP will federal agencies (EPA, Dep. Of Interior) accept the DHMP permits without additional federal permitting?

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House Special Committee on Fisheries

What is the legal relationship between the Deputy Director and the Commissioner in reference to the permit appeals process? Will DNR develop appeals regulations with respect to in-stream permits? What will those regulations include?

Considering the potential passage of HB 86 (see attached) would there be any appeals process without "new scientific information or newly recognized local traditional knowledge."

Since the Commissioner is a part of the appeals process for permits issued by the Deputy Commissioner, is the commissioner effectively eliminated as arbitrator between DHMP and the Chief Forester?

Will public notices be required for all of the new permits now issued by DNR? Will DNR include the in-stream permits under the public notice provisions of AS 38.05.945?

Because the Forest Practices Act only applies to state lands, will there continue to be any authority for salmon stream buffers on federal lands?

What is the Memorandum of Understanding between DNR DHMP and ADF&G?

Would the DNR Commissioner continue the historical practice of the Fish and Game Commissioner to delegate the authority for making the initial permitting decisions to the habitat biologists? Would these decisions therefore become subject to the process for appeals to the DNR Commissioner?

Under EO 107, the DNR Commissioner would have broad discretion to interpret the Anadromous Fish Act. For example, the Commissioner would "determine the waters in the state that are important for the rearing, spawning, and migration of anadromous fish," and the DNR Commissioner would decide what constitutes "important habitat," and what constitutes "proper protection" for the rearing, spawning and migration of anadromous fish in "important" streams. Similar discretion is afforded under the Fishway Act.

Given the differing mandates of the Department of Natural Resources and the Department of Fish and Game, what safeguards would prevent this discretion from becoming unduly conflicted or compromised because it would now reside with the DNR Commissioner?

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The National Oceanic and Atmospheric Administration (NOAA) under the Department of Commerce has a similar structure as is being proposed by EO 107. For example, NOAA Fisheries is responsible for both the promotion of fisheries in federal waters and the protection of fisheries resources. This has caused increased litigation, introduced costly delays, and contributed to agency gridlock. How would DNR avoid similar problems?

The Governor and the Acting Commissioner of Fish and Game and the Commissioner of the Department of Natural Resources have assured the public on several occasions that "the same level of environmental protection will continue to be provided for Alaska's fish and wildlife." Under EO 107, the Habitat Division authority for issuing permits and for the monitoring, compliance and enforcement of these permits would now be the responsibility of DNR, with fewer biologists.

Is there commitment by the Governor that the habitat biologists who are being transferred from the Alaska Department of Fish and Game would be "housed" in the newly formed Office of Habitat Management and Permitting?

Is there a commitment by the Governor that, under this reorganization, the DNR Commissioner would delegate the authority for issuing and signing the Anadromous Fish and Fishway Act permits to the habitat biologists who have been transferred from Fish and Game?

Is there a commitment by the Department of Natural Resources to require the State Forester to grant "due deference" under the Forest Practices Act to the Office of Habitat Management and Permitting on issues relating to the harvest of trees from within the 66 foot stream buffers on salmon streams on private land? The inclusion in the Forest Practices Act of this "due deference" to ADF&G was key to the fishing industry's support for the Forest Practices Act.

Is there a commitment by the Department of Natural Resources that there would continue to be the same level of permit monitoring, compliance and enforcement as previously existed under ADF&G?

Can DNR use federal Dingle-Johnson monies or only Fish and Game?

Within DNR how will positions be filled once a biologist leaves the position and how do we guarantee that biologist will be hired to fill vacant positions?

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Presently, personnel in ADF&G have Position Control Numbers (PCN) and Personnel Description Questionnaires (PDQ) that define the requirements for the position and the duties of the job. When a vacant position becomes available the PCN hiring requirements and PDQ responsibilities can be rewritten. Therefore, DNR can, after a period of time, rewrite these positions to have non-biologist (environmental engineers, foresters, or water quality backgrounds) fill them. After a period of time, biologist could represent a small group in DNR as opposed to the 20-30 some biologist who are being transferred today. What assurances can we have that prohibits this long term reduction in force of people who care about the resources and are knowledgeable about them?

How will the structure of DNR be formed to avoid targeted budget reductions? In executive order 107 it appears these people will be like a separate Division of DNR but that is not clear. Being in their own Habitat Division of ADF&G, lawmakers could target the Division for budget cuts and this became punitive in nature. It kept, in some cases, the Division from doing its job because of these targeted budget reductions. The fear of the layoff and reorganization made the Division impotent in some cases. How will the reorganization in DNR stop these punitive actions? Budget cuts are a fact but targeted cuts for punitive reasons are not acceptable. Next year the Governor could eliminate the whole DNR budget for biologists if Executive Order 107 creates a separate layoff structure in DNR. Again, biologist would be reduced in number and after a number of years duties would be transferred to people in other Divisions of DNR who are less qualified.

A number of habitat biologist positions have been incorporated into Sport Fish Division of ADF&G. This Division has a historically poor record of habitat protection and studies. They have suppressed information to the Board of Fish, altered reports to minimize public knowledge, been in a conflict of interest when they promote fishing opportunity over habitat protection, etc. In addition, habitat deals with ecosystem structure and function. Sport Fish Division does not do ecosystem studies or have the experts to conduct ecosystem studies.

Thank you for your attention to these important questions. If you have any questions, please feel free to contact my Committee Aide, Cameron Yourkowski, 465-3306.

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House Special Committee on Fisheries

MEMORANDUM

TO: The House Fisheries Committee

FM: Representative Paul Seaton, Chair
House Fisheries Committee

DATE: March 14th, 2003

RE: EO 107 Hearing

The purpose for this hearing is for the House Special Committee on Fisheries to gain information to help determine if the structure and function of Executive Order (EO 107) will continue to protect the State's fish habitat, thereby insuring the best opportunity for sustainable fisheries, and maximizing benefit for the people of the State.

To accomplish this goal, the Fisheries Committee has submitted a series of detailed questions for the Department of Natural Resources (DNR) to respond to at the hearing.

To date, the Senate Resource Committee held a four-hour hearing and the House State Affairs Committee held two hearings, each lasting 2.5 hours. The format of these hearings promoted public testimony and were beneficial in getting the breadth of public comment and sentiment, but testimonies limited to 2-minutes did not allow for in-depth follow-up questions by the Committee members.

To accomplish the purpose of the hearing, the Fisheries Committee will follow an invitational panel format, like the one used by the US Senate and House Committees. Before the weekend, the Committee will receive written testimony from the House State Affairs Committee (with permission from STA Chair Weyhrauch), as well as the comments that have been submitted to the Fisheries Committee. This will allow time for the Committee members to review the individual concerns raised by Alaskans.

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- 1] The first panel will be composed of DNR and other members of the administration to respond to the submitted questions. There will also be time for Committee member's questions.
- 2] There will be two or three public / industry panels, each with a 5 minute presentation and time for follow-up questioning.
- 3] DNR will return for a final round of Committee questions.

The purpose of this format is to shed the most possible light on EO 107's effects on habitat. All people testifying, including Committee members, are reminded to focus on EO 107 impacts, not on past disputes, which range from justification or non-justification of EO's to the validity of press releases. Please keep in mind that this hearing is about the ability of EO 107 to protect the State's fish habitats.

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Panelists (subject to change)

Department of Natural Resources

Commissioner Irwin and Staff

Department of Fish and Game

Kevin Duffy, Acting Commissioner

Kevin Brooks, Director of Administrative Services

ADF&G Habitat Division,

Kerry Howard, Director

Industry

Alaska Trollers Assoc; Dale Kelly

Kenai Peninsula Fishermen's Assoc; Paul Shadura

Former State Officials and Experts

Frank Rue, Former ADF&G Commissioner

Public Interest Groups

Trout Unlimited; Jeff Parker, Jan Konigsberg

AK Marine Conservation Council; Paula Terrel

AK Center for the Environment; Seth Little

SE AK Conservation Council, Aura Landow

Please feel free to contact me with questions anytime x2689, or you can contact my Committee Aide, Cameron Yourkowski, x3306. Thank you.