

ALABAMA LEGISLATIVE COMMISSION ON GOVERNMENT REFORM

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MEMORANDUM

State of Alaska

TO: Richard Logan
Chief
Habitat Protection
Department of Fish and Game

FROM: *D.M. for*
Glenn Akins
Director
Environmental Quality Management
Department of Environmental
Conservation

DATE: March 23, 1981

FILE NO:

TELEPHONE NO: 465-2640, ext. 63

SUBJECT: Proposed Habitat
Protection
Regulations

This Department has reviewed the second draft of the proposed regulations governing fish and wildlife habitat protection and submits the following comments:

1. We endorse the concept of standardizing procedures to increase predictability and consistency in the department's permitting role. Substantive concerns and editorial changes to the preliminary draft were provided to the Department of Fish and Game at our January meeting. Many of those points remain unaddressed in the current draft. In those instances, we have indicated directly on the draft copy our recollection of the content of those comments.
2. The authorities under which these regulations are promulgated are often very broad and general and thus open to interpretation. We understand an Attorney General's opinion has been issued which clarifies the authority of the Commissioner of the Department of Fish and Game to cover any impeding activities for all lakes, streams and rivers frequented by non-anadromous fish. We have attempted to clarify 5 AAC 95.020 to eliminate any confusion that may be caused on whether the section applies to non-impeding activities.
3. We understand that a fiscal note will be submitted with the uniform procedures regulations covering notification and appeal requirements listed in the proposed habitat regulations. Should other incremented costs result from implementing these regulations, a fiscal note should be attached.
4. Coordination of the Department of Environmental Conservation's 401 certification process with the habitat protection permit process is essential to clarify responsibilities for water quality and ensure that both agencies issue their respective authorizations with non-conflicting conditions for activities in waterbodies covered under Title 16. Both agencies need to work on this mechanism.

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5. The general permit provisions (Section 070 (2)) should include a mechanism to allow crossings established at a later date to fall under the general scheme. This would avoid the need to formally amend the regulations if and when such areas are designated.
6. "Hazardous chemicals" should be included in the definition section and should be defined to mean those wastes and substances listed in the Federal Solid Waste Disposal Act (PL 94-580).

We appreciate this opportunity to comment on the proposed regulations and we hope that consideration will be given to our recommendations.

Enclosures

cc: C. Deming Cowles, Dep. Com., DEC
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March 24, 1981

The Honorable Bettye Fahrenkamp
Chairman Senate Natural Resources Committee
Pouch V
Juneau, Alaska 99811

Dear Senator Fahrenkamp:

The Alaska Loggers Association (ALA) recommends that you consider making certain changes to the Alaska Forest Practices Act and the authority of the Alaska Department of Fish and Game (ADF&G) and the Boards of Fish and Game. The proposed changes effect the regulation of timber harvest activities upland of the natural flow and beds of streams, lakes and rivers

ADF&G's authority to regulate timber harvest or other activities is limited to that set forth AS 16.05.870(b) which provides as follows:

"If a person or governmental agency desires to construct a hydraulic project or use, divert, obstruct, pollute, or change the natural flow or bed of a specified river, lake or stream, or to use wheels, tracted, or excavating equipment or log dragging equipment in the bed of a specified river, lake or stream, the person or governmental agency shall notify the commissioner of this intention before the beginning of the construction or use."

As can be seen, ADF&G's authority is limited to streams specified under AS 16.05.870(a). This authority is further limited to situations where a person or governmental agency "desires" to "use, divert, obstruct, pollute or change" the "natural flow or bed" of a "specified river, lake, or stream." As can be seen, no authority whatsoever has been given to ADF&G upland of the "natural flow or bed" of a

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specified river, lake or stream. The issue arises as a result of ADF&G's on-going attempt to promulgate habitat regulations which are presently in draft. These regulations would require a habitat permit for activities within the flood plain of rivers, lakes and streams frequented by fish as well as the tributaries of such streams. In other words, ADF&G is attempting to use AS 16.05.870(b) as authority to regulate upland of "the natural flow or bed" and is attempting to extend its control beyond specified streams to streams frequented by fish. (Enclosed as Exhibit A is our response to the draft regulations.)

We accept the proposition that ADF&G should have authority to protect fish and game from problems which may be caused by timber harvest activities. Using a professional management approach, which maximizes use of the expertise of our operators, ADF&G's biologists and other experts, we have done a good job of resource protection. What we object to is the change in management direction which the habitat regulations reflects. For reasons which we do not understand, ADF&G is seeking to move to a highly prescriptive approach designed to spell out in cookbook-fashion how each aspect of industrial activities should take place on lands extending to the flood plain. We object to this change and to the unnecessary bureaucratic requirement that we obtain a habitat permit from ADF&G for each aspect of our operations. Such an approach by ADF&G runs directly counter to the Governor's regulatory reform effort.

Furthermore, the Alaska Legislature specifically rejected the prior approval system proposed by the Hammond Administration for Forest Practices in favor of a notification system. In other words, under the Legislature's approach, an operator simply has to notify the agencies 30 days in advance of his operations in order to undertake them. Under the habitat regulations, a habitat permit will be required of an operator when he or she seeks to harvest timber in Southeast Alaska, since so much of this area is within the flood plain. This habitat permit requires prior approval by ADF&G before operations can begin. Accordingly, contrary to the intent of the Legislature as expressed in the Alaska Forest Practices Act, ADF&G, through its regulatory authority alone, is creating a prior approval system.

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It has been a cardinal principle of the ALA and others with whom we have been working on the Forest Practice Act to set up one comprehensive set of regulations such that an operator will have to look at only one set of regulations to know what is required of him or her. DNR and DEC have cooperated with us in this regard by jointly promulgating regulations with respect to timber harvest. The Coastal Management Act regulations regarding forestry have been preempting DNR's forest practice regulations as is required by the Forest Practices Act. Thus, ADF&G by its regulations will be the only non-cooperative agency. A situation which requires the timber operator to look at several sets of regulations to determine what the requirements are will only create confusion in the operators and in fact prevent us all from obtaining the protection we want for the various other resources.

We recommend that there be changes made to AS 41.17.010 et. seq. (the Forest Practices Act) and to AS 16.05.870 (ADF&G's authority) which would, on the one hand, give ADF&G the authority protect fish and game habitat. On the other hand, to the extent its regulations impact timber harvest activities, ADF&G should be required to coordinate its regulations into one comprehensive set of regulations (as the other State regulatory agencies have done in response to the legislative mandate set forth in the Forest Practices Act).

To effect this compromise we propose the following changes to the law:

1. AS 16.05.870(b) would be amended to read as follows: "With the exception of person or governmental agency subject to AS 41.17.010 et. seq. ..." (everything else in subsection (b) would remain the same).

This change would except those involved in the forest industry from whatever rulemaking authority ADF&G might have under AS 16.05.870. The following changes in AS 41.17.010 would be designed to allow regulation of the forest industry by ADF&G through the provisions of the Forest Practices Act. This will cause all regulations concerning timber harvest to be put in one comprehensive set of regulations.

2. A new subsection to AS 41.17.010 "Declaration of Intent" would be put in as subsection 5 and present subsections 5 and 6 would be renumbered as subsections 6 and 7 respectively. The new subsection would read as follows:

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"Government administration of timber harvest activities should combine the regulatory measures of all agencies concerned with timber harvest activities into one comprehensive regulatory scheme which includes regulations under this chapter, Title 15, and other agency authorizing statutes as provided herein;"

3. AS 41.17.020. "Division of Forest Land and Water Management Established" would be amended to include a new subsection (h) and present subsection (h), (j), (k), and (l) would be relettered as subsections (i), (j), (k) and (l) respectively. The new subsection (h) would read as follows:

"The commissioner and the commissioner of Fish and Game shall work cooperatively to protect the fish and wildlife resources of the state from the adverse consequences of activities under this chapter. All regulations concerning the protection of fish and wildlife on forest land shall be in accordance with the concept of professional management as opposed to management by prescriptions and shall be promulgated under and in accordance with the provisions of this chapter."

4. The present subsection (j) (which shall be relettered as subsection (k) in accordance with the change requested in number 3) shall be amended to read as follows:

"Notwithstanding any other provision of this chapter, the commissioner may not employ the authority vested by this chapter so as to duplicate or preempt the statutory authority of other agencies to adopt regulations or undertake other administrative actions governing resources, values, or activities on forest land except for (1) regulations under the Coastal Zone Management Act, (2) regulations protecting fish and game prepared in cooperation with the commissioner of Fish and Game, and (3) if authorized by the commissioner of Environmental Conservation, regulations relating to control of non-point source pollution."

5. AS 41.17.080 would be amended by adding a new paragraph (a)(7) which would read as follows:

"Protection of fish and game as determined in cooperation with the commissioner of Fish and Game."

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Conclusion.

Thank you very much for the opportunity to offer these amendments. We intend to use all lawful measures to prevent implementation of the habitat regulations promulgated by ADF&G under AS 16.05.870 for the reasons set forth in the attached letter to Mr. Dick Logan. However, we join with the habitat section of ADF&G in seeking to assure that there is adequate protection for fish and game resources of the State. We think the proposals made herein will allow reasonable coordination of the two activities within a single comprehensive set of regulations for forestry. We would like to meet with you on this as soon as possible.

Very truly yours,

James F. Clark

JFC:sd

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March 24, 1981

Chief Richard Logan
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Dear Dick:

This is in behalf of the Alaska Loggers Association (ALA) in response to the proposed regulations governing fish and game habitat protection. We are extremely disappointed with the draft regulations. For years we have had a good working relationship with you, have maintained high environmental standards in our industry, and have protected other resources by relying upon the application of professional management (yours, ours and others) of on the ground decisions. You are now assaulting this working system with a complete turn-about in management philosophy: you are seeking to replace professional management with a new system of complex and burdensome prescriptions. Why? We feel that these regulations as applied to timber harvesting violate the Forest Practices Act and in any event go far beyond the authority which the Legislature gave the Alaska Department of Fish and Game (ADF&G) and the Boards of Fish and Game in Title 16.

As we mentioned to you in our letter of January 6, 1981, in response to the preliminary draft, it is ALA policy that forest practice regulations, such as these, be one comprehensive set of regulations coordinated through one state agency. This principle was recognized in the State Forest Practices Act wherein Coastal Zone Management Act regulations impacting forestry and the non-point pollution authority of the Department of Environmental Conservation (DEC), as found in Section 208 of the Federal Water Pollution Control Act, were integrated into the rulemaking process which resulted in State Forest Practice Act regu-

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lations. We believe that as a policy matter these regulations should also be integrated with the Forest Practices Act regulations promulgated by the Department of Natural Resources (DNR). This will provide timber operators, regulating agencies and the public with only one set of regulations regarding forest practices. In this way, the timber operator, the regulating agency and the public will know what is required of the operator. Such integration can be accomplished either through cooperation with the Department of Environmental Conservation (DEC), in utilizing the provisions of Section 208(b) of the Water Pollution Control Act discussed below, or through amendments to the State Forest Practices Act attached hereto as Exhibit A.

Secondly, these regulations, as written, violate the Forest Practices Act. The Forest Practices Act as originally proposed by the Governor was a prior approval system, i.e., DNR had to approve the timber harvest plan before operations could commence. The Legislature specifically changed this to a notification system, i.e., the operator merely had to notify DNR that it would begin operations in thirty days. The law provides standards and guidelines which anyone desiring to harvest timber has to obey, but as stated, the Legislature specifically rejected the permit approach.

There is no way under these draft regulations that timber harvesting activities could be undertaken without obtaining a habitat protection permit. Such a permit requires ADF&G approval. Accordingly, by converting the notification system into a prior approval system, the proposed regulations are contrary to the letter and spirit of the Forest Practices Act.

The primary authority upon which ADF&G is relying (notwithstanding the overly extensive citation of sections of Title 16 as authority for the various regulations) is AS 16.05.370(b) and (c). These sections call for a modified notification, rather than a prior approval, system. Subsection (b) states that if a person or governmental agency desires to undertake certain activities with respect to a "specified river, lake or stream", the person or government agency "shall notify the Commissioner of this intention before the beginning of the construction or use." (emphasis added). Subsection (c) provides that the Commissioner should acknowledge receipt of the notice and

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can require submittal of full plans and specifications and written approval "if the Commissioner determines to do so." In other words, the statutory scheme requires notice in the first instance, with the Commissioner having authority to require prior approval for certain projects. The statute certainly did not contemplate the requirement of obtaining a habitat protection permit in every instance as the regulations have done. It seems to us that further clarification of AS 16.05.970(c), specifying in what specific cases prior approval needs to be obtained, would help clarify the original and obvious statutory scheme which the Legislature sought to implement.

Since the legislative intent of the Forest Practices Act clearly favors a notification, not a prior approval system; and since the Forest Practices Act came after ADF&G's Title 16 authority; and since the Legislature is presumed to have been aware of Title 16 when it passed the Forest Practices Act (and thus is presumed to have believed that the Forest Practices Act and Title 16 are consistent); and since Title 16 as described above is itself a modified notification system; it follows that the proposed regulations violate the Forest Practices Act. We therefore ask that these regulations be withdrawn and redone in cooperation with DEC through DEC's Section 208 authority or pursuant to the attached legislation which we are proposing.

Assuming for purposes of argument that the proposed regulations do not violate the Forest Practices Act, they clearly exceed ADF&G's authority under AS 16.05.970 - the only arguable authority ADF&G has with respect to non-point pollution under Title 16. AS 16.05.970(b) only requires notice with respect to actions in "a specified river, lake or stream." (emphasis added). Thus, the authority extends only to rivers, lakes, or streams specified under AS 16.05.970(a): the habitat regulations purport to also extend this authority to unspecified tributaries of a specified stream (5 AAC 95.970).

Furthermore, the regulations purport to control activities upon the banks of rivers, lakes and streams as well as land based activities beyond them. AS 16.05.970(b) only requires notice to ADF&G where one "desires to construct a hydraulic project, or use, divert, obstruct, pollute or change the natural flow or bed of a specified river, lake, and stream. There is no authority in ADF&G

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under this section to regulate the "desire" to use, divert, obstruct, pollute or change" beyond the "natural flow or bed" of a specified river, lake or stream. The Legislature simply did not provide for ADF&G to regulate the banks or land based activities beyond them. These regulations are therefore ultra vires to the extent they seek to regulate such activity.

Authority does exist for the State to regulate non-point pollution of streams. It is found in Section 208(b)(2)(F) of the Federal Water Pollution Control Act which is administered by DEC. We have no philosophic problem with ADF&G seeking to protect streams by protecting banks and land based activities beyond the banks. Our objective is to cause the state agencies concerned about forest practices to coordinate forest management through one comprehensive set of regulations. If ADF&G will cooperate with DEC and exercise its regulatory actions through Section 208, there will be only one set of comprehensive regulations because DEC has coordinated its Section 208 authority with DNR through a Memorandum of Understanding.

It is also clear to us that the Boards of Fish & Game should not have authority to promulgate habitat regulations. The boards lack the expertise to write regulations concerning forest habitat. Accordingly, we will be seeking to delete whatever authority they may have under AS 16.05.251(a)(7) to write regulations regarding habitat.

Furthermore, the Boards' statutory authority simply does not extend to making regulations of the type promulgated here. Whereas the Commissioner of ADF&G is given authority to require written approval of plans and specifications, the authority of the Board of Fisheries in AS 16.05.251(a)(7) and the Board of Game in AS 16.05.255(a)(7) is limited to regulations "for engaging in ... watershed and habitat improvement". Notice that this is not watershed and habitat protection, but rather watershed and habitat improvement. Thus, what this section contemplates are regulations leading to watershed and habitat enhancement programs. Given the vast difference in the authority afforded the Commissioner in AS 16.05.870(b) and the very limited type of authority given to the Boards of Fish and Game in AS 16.05.251(a)(7) and 255(a)(7), it is clear that they lack authority to participate in the promulgation of these habitat regulations.

We have raised a series of legal objections to the regulations. We hope that you will submit these issues to the Department of Law for its consideration.

Third, these regulations are too long and complex. When it is considered that the timber operator must also comply with DNR's forest practice regulations (which incorporate DEC's best management practices), it will be most difficult to meet the detailed, cookbook-type prescriptions set forth in these regulations. Thus, the complexity of the regulations in conjunction with other regulations will be confusing to both operator and regulator alike.

What is needed is a written description of the system under which we have been operating. Field biologists have been using their professional discretion to insure stream protection. We submit that the detailed prescriptions which comprise these regulations, particularly Sections 190 through 260, will hinder ADF&G's professional biologists as they seek to deal with site specific problems. It would be simpler and wiser to set forth goals in the forest practice regulations and allow timber operators and biologists to find ways to meet those goals on the ground. This is the permit by regulation technique which we have discussed with you orally.

Fourth, ADF&G does not now have the personnel to administer these intricate regulations. How many additional positions will be needed to administer and interpret them on the ground? How many people will be needed to deal with the administrative appeals and litigation which are likely to follow in the wake of this most complicated set of regulations?

Fifth. Please be advised of our most strenuous objection to Section 260, which in effect calls for buffer strips on all streams. This is environmentally indefensible and will place an incredible burden on timber harvest operations. Its impact on the potential yield of the Tongass National Forest and state and private forest is incalculable given the intermesh of streams on the best timber growing lands. We believe it is safe to say that ADF&G has no notion whatsoever of the adverse job impact of this particular section.

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Sixth. We believe it inappropriate for these regulations to be promulgated prior to the time that the regulatory reform regulations are completed. The regulatory reform regulations (which are presently in draft and upon which public comment is still being received) are the umbrella regulations under which the habitat regulations will be included. To attempt to draft these subordinate regulations before the umbrella regulations are completed will simply mean that ADF&G will have to go back later and amend these regulations to conform to the regulatory reform regulations. To make the process work in an orderly manner, we recommend that you suspend this rulemaking process until such time as the regulatory reform regulations are completed.

We have the following specific comments regarding the various sections of the proposed regulations:

1. 5 AAC 95.001. Findings.

A. Subsection (b) states that the Legislature has set aside "various land and water areas of the State" where fish and game is entitled to a higher degree of protection than afforded other areas. The next sentence states that among legislatively designated areas are "specified fish streams." AS 16.05.870(a) provides for specification by the Commissioner of ADF&G of "the various rivers, lakes and streams or parts of them that are important for the spawning or migration of anadromous fish." Thus, it is incorrect to say that specified streams are legislatively designated: the Legislature has set up a mechanism by which the Commissioner may designate streams.

More important, the authority with respect to specified streams is limited in AS 16.05.870(b) to activities within the "natural flow or bed" of a specified river, lake or stream. Accordingly, the findings are incorrect in stating that the Legislature has set aside land areas by providing for the specification of fish streams. Therefore, we challenge every attempt in the habitat regulations to prescribe ADF&G management of banks and land based activities beyond the banks whether or not we have made specific reference to the Sections in which the prescriptions appear.

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B. We challenge the statement of subsection (f) of .001 that "the susceptibility of fish and game to damage requires the promulgation of uniform standards." The very next sentence states that "because of the wide variation in habitats, there must be a means for accommodating unique individual circumstances." We agree with the latter sentence and disagree with the former. What should be maintained is maximum flexibility for ADF&G professionals to determine what is needed on the ground.

Even though ADF&G does not have the authority to require anything on the banks or surrounding riparian land, we in the timber industry have always reached agreement with ADF&G with respect to activities in these areas. This clearly shows that there is no need for uniform procedures - we have been working with the fish and game managers on banks and riparian lands without any requirement that we do so for a long time. What is needed is professionally determined site specific determinations of how operations could best take place with minimum impact on the surrounding environment. Accordingly, we recommend striking the first sentence of subsection (f).

C. We disagree entirely with the last sentence of subsection (g) of .001 which makes the Orwellian statement that a permit system is best for providing flexibility. As stated, without ADF&G having any authority whatsoever, we have worked with the department to protect site specific environments as requested by ADF&G biologists. It is my understanding that your department thinks that we have done a good job in protecting the environment. Accordingly, this belies the statement that a permit system is needed at all. It boggles the mind to read that a permit system would provide flexibility. The long and complicated regulations set forth in this chapter make it clear that that is not the case. These regulations will make it impossible for operators and biologists to know what to do. We submit that these regulations will therefore harm, not help, the environment.

D. Subsection (h) is a hive of inconsistencies. On the one hand, the first sentence talks about minor impacts and the second sentence talks about general permits to accommodate and minor impacts. On the other hand, the third sentence seems to take the opportunity to obtain general permits by calling for individual permits on a case-by-case basis. We recommend the deletion of subsection (h) entirely.

2. 5 AAC 95.002. Purposes.

A. We object to the use of the phrase "land and water use" as found in subsections 1 and 2. As previously stated, ADF&G does not have such extensive authority.

B. Subsection 2(A) says that the regulations must provide for "unobstructed passage of fish". Use of absolute words like "unobstructed" are unwise, since theoretically anything could be considered an obstruction. The word should be deleted.

C. Subsections 2(B) and (D) state that there should be uniform standards dealing with certain land-based activities. Again, ADF&G does not have authority to make regulations in this regard.

3. 5AAC 95.020. Activities in Streams and Rivers Frequented by Fish.

A. This subsection and .030 require plans to be approved by the department if certain listed activities are undertaken. It is a mechanical system: the sole issue being whether or not the proposed activity is covered in the lists of activities set forth in the subsections.

In fact, AS 16.05.870(c) states that "[I]f the Commissioner determines to do so, he shall in the letter of acknowledgement, require the person or governmental agency to submit to him full plans and specifications of the proposed construction or work" Accordingly, it is inappropriate to use a mechanical system. The regulations should contain a section describing under what circumstances the commissioner will "determine" that the plans and specifications for the activities listed in this subsection and subsection .030 are needed. It is all right to have a mechanical system to describe what activities will trigger the notice requirement. However, these regulations are insufficient and illegal to the extent they seek to make mechanical a situation in which the law requires the commissioner to exercise his discretion.

B. This section provides that certain activities in streams or rivers "frequented by fish" cannot take place without plan approval. In 5 AAC 95.990(3), "frequented by fish" is defined to mean "at any time in the determination

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of the department, containing resident or migratory fish." A stream must be specified under AS 16.05.870(a), in order for it to be subject to AS 16.05.870(b) and thus subject, to these regulations. It is our recommendation, therefore, that the term "frequented by fish" be stricken and that the words "specified" be placed in front of the word "stream or river" in the third line of this section.

C. This section also states that activities cannot take place in "portion of the flood plain which is covered by the mean annual flood." Again, the Department does not have authority under the cited statutes to control land based activity.

Even if there were such authority, how is a timber operator on the ground to determine what portion of the flood plain is covered by the mean annual flood? Viewed from this perspective, the regulation simply is impractical.

D. Subparagraph 2 of 95.020 states that plans need to be submitted in order to build certain cross channel structures. We submit that a Corps of Engineers permit would be needed for any of these structures in navigable waters. ADF&G would have a right to comment upon the proposed plans within the Corps of Engineers permitting process and could certainly disapprove them if they were unsatisfactory. What thought has been given to coordinating the need for Corps permits with these requirements in order to eliminate duplication? This issue would be easier to address if consideration of the draft of these regulations were held off until such time as the regulatory reform regulations were promulgated.

4. 5 AAC 95.030. Activities in or Affecting Anadromous Fish Streams.

A. This section precludes certain activities from taking place without a permit "in water specified as important to anadromous fish." Does this mean waters specified in accordance with AS 16.05.870(a)? We would submit that the only legal way to bring waters within the regulations is to specify them as required by AS 16.05.870(a).

Furthermore, to do otherwise would leave it to the timber operator to determine what streams are important to

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anadromous fish and which are not. There is no way that this burden should or can legally be shifted to the timber operator inasmuch as he or she does not have the expertise to make this determination as AS 16.05.870(b) only authorizes regulation of specified streams.

B. This section includes tributaries of anadromous fish streams within the definition of waters important to anadromous fish. There is no authority whatsoever in Title 16 to require a timber operator to guess which streams are tributary to an anadromous fish stream. Under AS 16.05.870(a), ADF&G has the right to specify tributaries as waters important for the spawning or migration of anadromous fish. Such designation causes tributaries to become specified streams and thus, subject to your regulatory authority. Anything short of specification as provided in AS 16.05.870(a) would fail to make that stream subject to these regulations.

C. Section 95.030 provides that certain activities in waters important to anadromous fish cannot take place without a permit if those activities "may result in pollution or a change in the natural flow or bed of the anadromous fish stream." The addition of the word "may" goes far beyond the authorization of the regulatory power found in AS 16.05.870(b). That section states that notification must be given if a person "desires to pollute." In other words, it requires a much closer nexus between the activity and pollution than the word "may" provides. Use of the word "may" requires the timber operator to speculate as to what may or may not result from a particular activity.

Usually such determinations are made by biologists on the ground who work with the operators to make certain that their activities do not have adverse consequences. This is the existing situation which we are trying to maintain. We do not intend to allow the ADF&G to switch the burden of making such determinations to the timber operators who lack the necessary expertise. Determining under what circumstances pollution may or may not occur, is simply not within their ability to do. It is ADF&G's job and can only be carried out by professional managers making on the ground decisions.

D. Under subsection 2, a permit is needed if activities are going to take place within the annual flood plane. As previously stated, ADF&G lacks the authority under the law to regulate land based activities.

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Furthermore, the state has certification authority under section 404 of the Federal Water Pollution Control Act to control such dredging and filling. Accordingly, it appears that this provision will result in duplication of regulatory control.

E. Subsection 5 requires submission of plans and specifications for "use of any log dragging equipment." As written, this would seem to mean that any time an operator intended to use log dragging equipment anywhere on the operation, submission of plans would have to be submitted. Again, this is a land based activity outside ADF&G's legal authority to regulate.

F. Subsection 7 requires submission of plans and specifications for construction "at the bank of the stream, river or lake." Again, you do not have authority to regulate activity on the bank of the stream, river or lake. Furthermore, even if you did have such authority, the word "bank" is an extremely vague term. It could, theoretically, extend to all riparian uplands. Would it not be better to specify a zone alongside the stream in which activity would be regulated?

G. Subsections 9, 10, 11, 12, 13 and 14 are objected to as attempts to regulate land based activity which ADF&G is not authorized to do under AS 16.05.870 or any of the other listed statutes.

5. 5 AAC 95.070. General Permits.

This section provides for general permits with respect to certain named areas. However, the criteria for obtaining a general permit is not spelled out. It would seem that general permits could be issued on a "logging show" basis. This would save biologists the necessity of stream by stream analysis for habitat protection. Instead, a series of rules for an area could be decided upon and set forth in a general permit. Where special streams need special protection, they could be looked at by ADF&G biologists apart from the general permit. We believe that this section should be written to so provide.

6. 5 AAC 95.90. Uniform Application Procedures.

A. This section provides that if the notice provided to DNR by a timber operator under AS 41.17.090 contains certain information which is specified in subsection (b) of this section, then a timber operator does

not also need to provide notice. As written, this would require the operator to compare the DNR form to subsection (b) of this section in order to make sure that all of the subsection (b) information were included. This results in no time saving for a timber operator at all, and in fact, subjects him or her to sufficient risk that all the important information is not included such that a prudent operator would simply use both forms to apply. The responsibility for making sure that the information provided on each form is sufficient lies with the agencies themselves and not with the timber operator.

B. Subsection 90 is in conflict with sections 20 through 40. The latter subsections state that the proposed activity cannot be undertaken unless there has been prior approval by ADF&G of plans for the proposed activity. Section 90 says that in addition to obtaining plan approval, one must have a permit. Can one assume that by obtaining plan approval, one can receive a permit? Or, are there other things that must be done in addition to submitting the plans and obtaining approval which are necessary to obtain a permit?

7. 5 AAC 95.100. Permit Conditions and Assignments.

This section allows the deciding officer to put terms and conditions which he believes are necessary into the permit. At a minimum, the deciding officer should provide written reasons for adding any such conditions. Otherwise, one could not effectively appeal such a decision.

8. 5 AAC 95.110. Reconsideration of Denials.

This section provides that reconsideration would be allowed if the applicant provides new factual information. We suggest that reconsideration also be allowed where legal reasons are advanced by the applicant.

9. 5 AAC 95.120. Amendments to the Permit.

A. Subsection (a) does not explain when a change is sufficient to require an amendment. There should be language explaining this.

B. The second sentence of subsection (b) is poorly worded. It states that the "Department will require a

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maximum of 30 days to review a request for amendment after receipt of all necessary information in the appropriate regional office." This sentence should be changed to read "The Department will review a request for amendment within 30 days of receipt of all necessary information in the appropriate regional office."

What is all necessary information? It would seem that all necessary information would be provided in a completed application described in 5 AAC 95.90(b).

10. 5 AAC 95.170. Application of Standards.

Subsection (a) makes the standards of Sections 180 through 250 applicable to "rivers, lakes and streams frequented by fish." As stated in our response to 5 AAC 95.020, as found in paragraph 3(a) of our response, "frequented by fish" as defined would have to mean streams specified under AS 16.05.870(a). Since AS 16.05.870(b) limits the authority of the Department to specified streams, if the term "frequented by fish" does not mean what we say, then the Department simply has no authority to extend the regulations as provided in 95.170. In other words, unless "frequented by fish" is defined to mean "specified under AS 16.05.870(a)", then there is no authority in the Department to regulate. For this reason, we would again suggest that the term "frequented by fish" be stricken and that the word "specified" be placed in front of the words "rivers, lakes and streams" in the third line of this section.

11. 5 AAC 95.180. Adherence to Standards.

Subsection (b) as a practical matter, requires the permittee to remove installations not in accordance with the provisions of the permit or this chapter which pre-existed the permit and the chapter. The impact of these regulations should only apply prospectively. We should not be required to remove installations, which although once legal, do not now comply with the regulations. A grandfather clause should be written in.

12. 5 AAC 95.190. Standards for Free Passage and Protection of Fish.

A. Subsection (a) calls for "free passage" and movement of fish. What is the difference between free passage and free movement? "Movement" seems to be simply an added word conveying no discreet meaning. Accordingly, we recommend that it be stricken.

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B. Subsection (b) provides for scheduling of certain "instream" activities. Our experience has been that the building of bridges -- even during spawning periods -- can be accomplished without undue disturbance to the fish. Once a structure such as a bridge, or a wide culvert is in place, we have observed that fish seem to pay very little attention to it.

C. Subsection (c) says that blasting is prohibited within one-eighth of a mile of the water line of any river, lake or stream, unless otherwise permitted in the permit. Section 95.030(8) says that blasting cannot be undertaken unless plans and specifications have been submitted to and approved by the Department. Why is this matter covered twice?

Furthermore, industry experience shows that techniques such as sequential blasting substantially reduce concussion. The Du Pont Company has demonstrated that good practice can reduce the distance between the blasting area and the water. Accordingly, we urge you to reconsider the one-eighth mile distance in favor of result oriented goal statement.

13. 5 AAC 95.200. Culvert Installation Standards.

A. The requirement for the burying of culverts as set forth in Subsection (a) is unnecessary. It is not the present practice to bury culverts to a six inch depth. Such a practice could result in adversely affecting fish habitat. At present, an operator considers the size of the stream bed and specifies a culvert of length and size sufficient for fish passage to occur at a water velocity acceptable except for periods of peak flow. In addition, culverts are presently placed to match natural river or stream flow.

B. Subsection (b) specifies a table to be followed by the field operator. The maximum allowable culvert velocities are much too low, especially when one considers that there are peak flow periods when such velocities are naturally exceeded.

C. Subsection (c) provides that no realignment may occur, even if a stream is not a fish stream. All tributaries and feeder streams should be available for realignment to accommodate installation. In these cases, the water quality is of the highest concern and such realignment, usually, enhances water quality.

D. Subsection (c) simply states that installation of a culvert may not occur if there is a spawning or rearing site through which a road has been designed. Certainly there are situations where such culvert installations would result only in a diminimous reduction of fish habitat. Accordingly, we believe that this section should be qualified.

14. 5 AAC 95.220. Stream, River and Lake Banks Stabilization Standards.

A. Subsection (a) precludes any activities which "may affect" the banks of streams, rivers and lakes. Again, ADF&G does not have authority under AS 16.05.870(b) to regulate activity on banks of streams, rivers, or lakes; particularly on banks of unspecified streams, rivers or lakes.

Furthermore, anything may affect the banks of streams, rivers and lakes. Accordingly, this phrase is overly broad and simply should be deleted.

B. Subsection (d) states that only rocks, cribbing, or material provided by the Department could be used for stream bank stabilization. What about grass seed or vegetation? Why should they not be specified in this section?

15. 5 AAC 95.230. Stream, River and Lake Bed Stabilization Standards.

A. Subsection (a)(2) states that a person has to be in compliance with terms specified in the permit "which the department considers necessary for free passage and protection of fish ..." The underlined phrase should be changed to "which are reasonably necessary." While we have no doubt that the department will act within reason, there is no reason to broaden its discretion beyond that.

B. Subsection (b) flatly states that no person may channelize a stream frequented by fish. Again, to solve a particularly difficult engineering problem, this may be the wisest thing to do. This, of course assumes that environmental standards can be met.

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C. Subsection (d) states that no person may conduct activities which can act to create potential fish entrapment basins within portions of the flood plain. As previously stated, ADF&G lacks the land based authority under AS 16.05.870(b) to regulate actions within the flood plain. Furthermore, even if such authority did exist, this section is too vague and requires too much speculation to be practical.

E. Subsection (e) states "each berm created in an anadromous fish stream must be contoured to the natural slope as it existed prior to the creation of the berm." It is difficult to understand precisely what this means. 5 AAC 95.990(3) defines berm to mean "an artificially raised margin, bar or other deposit composed of earthen materials, which interrupts the natural configuration of the adjacent terrain." Accordingly, it would appear that to the extent there is any raised deposit of material of any kind, whether detrimental or non-detrimental, it must be changed to the pre-existing contours. This, in turn, means that those contours must be charted by a baseline study before operations begin. This is an absurd make-work type result which is simply unconnected to any environmental protection whatsoever. This section should be rewritten to require berms to be eliminated where necessary to protect the environment. Returning to natural contours has been rejected in every rulemaking and legislative process of which we are aware. The reason is that the expense is not related at all to the environmental benefits to be derived.

F. Subsection (g) requires that bridge pilings be cut off level with stream bottoms upon removal. When culverts are removed, channels are to be restored to original configurations. Both of these costly requirements may be necessary in individual instances. However, the goal should be that when an area is left, there will be no environmental damage to the fish. We can foresee any number of instances where meeting the requirements of Subsection (g) would cause more environmental damage than doing nothing. Furthermore, it is impossible to restore a channel to its "original configuration." How is the original configuration to be determined? It may well be that returning to its original configuration provides no environmental advantage whatsoever, yet the operator would still be required to undertake the cost of meeting this requirement.

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16. 5 AAC 95.240. Water Quality Standards.

There is no reason for ADF&G to address itself to water quality standards since this is a function of DEC. Accordingly, we believe this entire section should be deleted.

17. 5 AAC 95.250. Shoreline Standards.

Notwithstanding its confusing language, this section seems to provide for buffer strips along all streams. As a policy matter, the ALA opposes such a standard. We certainly recognize in particular cases buffer strips may be required. However, to require them in all cases is regulatory overkill and cannot be supported on environmental grounds. We think it far better to follow the forest service approach of setting up streamside management zones within which there would be special protection. Therefore, we believe that this section should be rewritten to accord with the Southeast Area Guides.

18. 5 AAC 95.910. Waiver or Alteration of Procedure Standards and Permit Conditions.

Subsection 3 of this section provides that waivers may be granted where the standards set forth in a regulation are not applicable due to unique individual stream or land features. This leaves it up to the operator to prove that the stream or land features are unique. It will be far better to employ the type of system we have talked about throughout this response to the regulations. The biologists and the operators should work out standards which will provide environmental safeguards to specific, on-the-ground situations.

19. 5 AAC 95.930. Retention of Permit for Inspection and Inspection of Permit Sites.

Subsection (b) requires that a permittee must give law enforcement officers free and unobstructed access "at all times" to the permit site. We believe it inappropriate for there to be such access except where the timber operator or its designated representative is available to accompany law enforcement officers around the site.

20. 5 AAC 95.970. Waters Important to Anadromous Fish.

The last sentence of this section attempts to extend the provisions of the chapter to tributaries of anadromous fish streams. As previously stated, there is insufficient authority in law for such an extension to be made. ADF&G is only allowed to regulate streams specified under AS 16.05.870(a). Accordingly, we recommend that the last sentence of this section be deleted.

21. 5 AAC 95.990.

A. Subsection 2 defines an anadromous fish stream as a stream which is or "may at any time be important to the spawning, rearing or migration of anadromous fish, and includes all sloughs and backwaters adjoining the listed waters, and that portion of the flood plain which is covered by the mean annual flood." Section 870(a) makes no provision whatsoever for streams which may become important to spawning, rearing or migration of anadromous fish. The 870(a) list only applies to streams "that are important to the spawning or migration of anadromous fish." (See AS 16.05.870(a)). Thus, the phrase "may at any time" should be deleted as exceeding ADF&G's authority under the law.

Again, the inclusion of sloughs, backwaters, listed waters and the flood plain go way past the legal authority set forth in 870(b) and should therefore be eliminated.

B. Subsection 3 defines "berm" to mean an artificially raised margin, bar, or other deposit composed of earthen materials which interrupts the natural configuration of the adjacent terrain." This definition is going to be truly difficult to apply. What does artificially raised mean? What does interrupts a natural configuration mean? We recommend that this definition be eliminated. (See our other objections to this issue in Paragraph 15 E. of this response.)

C. Completed application is defined to mean "all of the information necessary for the department to issue, condition, or deny permit". How much information this will be or how many exchanges of correspondence or meetings it will take to provide it are anyone's guess. Accordingly, the use of this phrase which puts the burden on the operator

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to determine the information needed, is totally unfair. In the first place, it gives the department the opportunity to hold up processing of any permit for as long as it can conjure up a need for additional information. Furthermore, in 5 AAC 95.090, it stated that "each applicant for habitat protection permit must submit a completed application on a form or in a manner approved by the department. The notion that one can submit all of the information that must be ultimately required is nonsensical. We recommend that the term completed application be defined as "the form provided by the department which is fully answered to the best of the applicant's knowledge." This definition puts the burden on the department to ask the right questions in the first place and provides that the form will be considered to be completed if the applicant has answered all the questions asked.

D. Subsection 8 defines "frequented by fish" to mean "that any time in the determination of the department, containing resident or migratory fish." As we see it, this phrase should only be used in connection with regulations designed to implement AS 16.05.840 which requires construction of fishways where a dam or other structure is built across a stream frequented by salmon or other fish.

CONCLUSION.

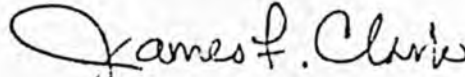
Thank you for the opportunity to respond to the habitat permit regulations. As stated, our major concern is that for no apparent reason, ADF&G is, by these regulations, attempting to exchange a working management system based upon use of professional management for a prescriptive system that is universally opposed by industry and probably by a number of your own biologists. The regulations in their present form violate the Forest Practices Act and go beyond the authority which the legislature gave ADF&G and the Boards of Fish and Game in Title 16. Finally, we believe it inappropriate to promulgate these regulations prior to completion of the umbrella regulations which are

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now in draft in connection with regulatory reform. For all these reasons, we urge you to withdraw these regulations. We will work with you to help obtain the authority and budget you need to protect fish and game resources, but this is not the way to do it.

Very truly yours,



James F. Clark

JFC:sd

ALASKA BOARDS OF FISHERIES AND GAME

AND

ALASKA DEPARTMENT OF FISH AND GAME

PROPOSED REGULATIONS

GOVERNING FISH AND GAME HABITAT PROTECTION

The Alaska Department of Fish and Game and the Alaska Boards of Fisheries and Game are seeking review of and comment on the attached draft of proposed habitat protection regulations.

The Department is proposing these regulations to (1) make explicit the procedures and standards used in issuing habitat protection permits, (2) allow public critique of procedures and standards used in issuing permits, (3) increase predictability of departmental decisions involving issuance of permits, (4) establish statewide consistency in the Department's habitat protection permitting program, (5) avoid litigation over matters of interpretation, (6) increase efficiency of operations, and (7) eliminate permit requirements for certain activities. The proposed regulations are written to implement an existing permitting program. No new permit is being introduced. The time required to obtain permits will not be increased.

The Boards and the Commissioner will meet from April 1 through approximately April 4 at the Captain Cook Hotel in Anchorage, Alaska to consider proposed changes in Departmental regulations. A public hearing on the habitat protection regulations will start at 9:00 a.m. April 2, 1981.

The Boards and the Commissioner may adopt or reject these proposed changes or may develop alternatives on the subject matter contained in the proposed regulations. The Boards and the Commissioner may also consider any additional subject matter set forth in the legal notice published in compliance with the Administrative Procedure Act. Copies of the legal notice may be obtained from regional offices of the Department of Fish and Game.

Pursuant to the Administrative Procedure Act, public comment is invited on the proposed changes. At the public hearing, comments may be offered orally or in writing. Written comments may be submitted in advance of the hearing and should be sent to the Boards of Fisheries and Game, Support Building, Juneau, Alaska 99801 early enough to allow receipt by March 23, 1981. Adherence to the March 23 suggested deadline will assure the Commissioner and Board members of more time for study and, therefore, fuller consideration of comments submitted by the public. The Boards and the Commissioner urge those persons whose interests may be affected by the proposed changes to offer comments.

TITLE 5. FISH AND GAME

PART 6. PROTECTION OF FISH AND GAME HABITAT.

CHAPTER 95. PROTECTION OF FISH AND GAME HABITAT.

ARTICLE 1. PURPOSE OF REGULATIONS.

5 AAC 95.001. FINDINGS. (a) The Boards of Fisheries and Game and the commissioner make the findings set forth in this section.

(b) Lands and waters comprising the natural habitat of fish and game are important to the welfare of fish and game but may also be valuable for other uses which benefit the economy and general welfare of Alaskans. The legislature has set aside various land and water areas of the state where the fish, game and their natural habitat are the primary values, and require a higher degree of protection than afforded to areas not so designated. These legislatively designated areas include specified fish streams, game refuges, game sanctuaries, and fish and game critical habitat areas.

(c) Certain activities on lands and in waters comprising the natural habitat of fish and game resources may create conditions which diminish the values and amenities of that habitat. In areas where fish and game resources are of importance, land and water uses may, if not properly planned, cause unnecessary or undesirable impacts to fish, wildlife and their habitat. For example, land and water modifications can increase erosion or sedimentation, or divert, obstruct or alter water quality, quantity or flow. Water temperature extremes may be aggravated, or populations of animals and vegetation may be altered or destroyed. Land and water development actions may reduce food supplies for fish or game, restrict movement of fish and game, eliminate cover or disturb or destroy spawning, nesting, and breeding areas. Modifications to land or water may change adjacent habitats, or significantly change the capacity of a stream or wetland to store storm and flood waters. Development actions in upstream waters or in tributary streams are potential causes of undesirable changes in downstream habitats of fish and wildlife.

(d) In the legislatively designated areas, regulations governing public uses are necessary to promote planning and secure effective protection of the characteristics and values of the natural habitat of fish and game, and to establish measures and procedures for mitigating adverse effects upon the habitat.

(e) Promulgation of regulations will promote the public interest by providing for the protection of public resources, avoiding conflicts in the use of lands and waters through

public disclosure of development guidelines, and providing for predictability and consistency in regulatory activities.

(f) The susceptibility of fish and game to damage requires the promulgation of uniform standards. However, the wide variation in sensitivity and quality of natural habitat complicates the problem of developing uniform standards, and necessitates a means for accommodating unique individual circumstances.

(g) Flexibility in the implementation of regulations is necessary to ensure that the purposes of uniform regulations are met without undue constraints on the general public, and that the least damaging or least restrictive practical land or water use alternative may be considered in determining whether, and on what terms, approval should be given. This is best accomplished through the use of a permit system which allows for conditioning of permits on the basis of local variations in resources.

(h) It is anticipated that substantial numbers of permit applications will be for minor routine activities that have little potential for significant environmental degradation. For these activities, the public interest is best served by providing a mechanism whereby general permits covering topical uses or area may be issued. However, since cumulative and secondary effects could be significant, and since there exists a multitude of preconceived ideas of what constitutes habitat acceptable to perpetuating fish and game, an individual permit should be issued for conducting any type of land and water development project which poses a threat to the sustained viability of fish and game habitat in special legislatively designated areas and in natural water bodies containing fish.

Authority: AS 16.05.020
AS 16.05.251
AS 16.05.255

5 AAC 95.002. PURPOSES. It is the purpose of these regulations to:

(1) provide land and water use applicants with explicit procedural requirements for project approval and permit issuance;

(2) sanction practical land and water use programs in legislatively designated areas important to fish or game while minimizing adverse disruption of natural fish or game habitat and the resources therein through site-specific permit conditions which protect fish, game, and their habitat, and by uniform standards which;

(A) provide for unobstructed passage of fish in streams, rivers and lakes;

(B) control or prevent erosion, sedimentation, subsidences of land, and construction of fish entrapment basins;

(C) assure protection of fish and their habitat during migration, spawning, incubation, rearing and overwintering;

(D) stabilize or preserve stream, river, and lake beds and banks; and

(E) maintain water quality and quantity acceptable to fish;

(3) ensure that fish and game habitat during and after completion of any alteration or development of it, will be stabilized or restored by the permittee to allow maintenance or recovery of fish and game populations by natural physical and biological processes.

Authority: AS 16.05.020
AS 16.05.251
AS 16.05.255

ARTICLE 2. HABITAT PROTECTION PERMIT SYSTEM.

5 AAC 95.010. LIST OF WATERS IMPORTANT TO ANADROMOUS FISH. Repealed / /81.

5 AAC 95.020. ACTIVITIES IN STREAMS AND RIVERS FREQUENTED BY FISH. No person or governmental agency may undertake any of the following activities in a stream or river frequented by fish, or that portion of the floodplain which is covered by a mean annual flood, unless plans and specifications for that activity sufficient to assure the passage of fish have been submitted to and approved by the department. Activities not listed in this section will not be subject to written approval under AS 16.05.840 and therefore notification of the activity will not be required:

(1) installation of culverts and bridges, including snow and ice bridges;

(2) installation of cross channel structures that increase stream velocity or restrict channel flow including, as applicable;

(A) ford site development involving placement of material instream;

(B) placement of flumes or sluice boxes instream;

(C) instream stilling basins and settling ponds;

- (D) dams;
- (E) impoundments.

Authority: AS 16.05.020(2)
AS 16.05.251(a)(7)
AS 16.05.840

5 AAC 95.030. ACTIVITIES IN OR AFFECTING ANADROMOUS FISH STREAMS. The activities listed in this section necessitate the submission of detailed plans and specifications under AS 16.05.870 before beginning the activity in waters specified as important to anadromous fish, including any activity in a tributary to an anadromous fish stream that may result in the pollution or a change in the natural flow or bed of the anadromous fish stream. Except for emergency permits issued orally pursuant to AS 16.05.890, no person or governmental agency may undertake any of the listed activities unless plans and specifications have been submitted to and approved by the department under this chapter. Activities not listed in this section will not be subject to the written approval requirements of AS 16.05.870(c), and therefore notification of the activity under AS 16.05.870(b) will not be required:

- (1) use of any wheeled or tracked equipment in the water, or use of any wheeled or tracked equipment greater than 2500 pounds gross vehicle weight over ice;
- (2) excavation of material from the stream or lake bed, bank or annual floodplain;
- (3) use of a suction dredge;
- (4) any action which results in a diversion, obstruction, impoundment, fluming or pollution of the natural flow of an anadromous fish stream;
- (5) use of any log dragging equipment;
- (6) construction of any stream, lake, or river crossing, permanent or temporary, including snow ramps, bridges and culverts, low water crossings or constructed fords;
- (7) any construction or development project, including access ramps, at the bank of a stream, river, or lake;
- (8) blasting within 1/8 mile from a natural lake, river, or stream;
- (9) disposal of any materials or any stockpiling of such materials in a lake, river, or stream or its annual floodplain;
- (10) any operation to alter or stabilize the bank or bed of a lake, river, or stream;

(11) construction of river training structures, including spur dikes, revetments, or guidebanks, within the annual floodplain;

(12) construction of any storm drain or drainage ditch into a lake, river, or stream;

(13) use of mechanical water removal equipment for a volume of water greater than 500 gallons per day, or when water is removed from under the ice;

(14) any land clearing or filling of earthen materials within 50 feet from an anadromous fish stream, except that a distance other than 50 feet may be specified for specific streams in sec. 260 (b) of this chapter.

Authority: AS 16.05.020(2)
AS 16.05.251(a)(7)
AS 16.05.870
AS 16.05.890

5 AAC 95.040. ACTIVITIES IN STATE CRITICAL HABITAT AREAS, SANCTUARIES AND REFUGES. (a) The following activities are subject to the requirements of this section:

(1) construction of buildings and cabins in fish and game critical habitat areas;

(2) construction and excavations related to industrial and commercial activities, pipelines and utility systems and corridors, roads, airports and other transportation networks, oil and gas exploration and development, hydroelectric developments, commercial and industrial waste disposal activities, mining and mineral processing, grazing and animal husbandry, dredge or fill activities and water extraction in:

(A) fish and game critical habitat areas, as delineated in AS 16.20.230;

(B) state game refuges, as delineated in AS 16.20.030-16.20.039;

(C) state game sanctuaries, as delineated in AS 16.20.110 and 16.20.160.

(b) In critical habitat areas the activities listed in (a) of this section necessitate approval of detailed plans and specifications under AS 16.20.260. No person or governmental agency may undertake any of the activities listed in (a) of this section within a critical habitat area unless plans and specifications have been submitted to and approved by the department under this chapter. Activities not listed in (a) of this section within critical habitat areas will not be subject to AS 16.20.260, and therefore notification of the activity under AS 16.20.250 will not be required.

(c) In state game refuges the activities listed in (a)(2) of this section necessitate approval of detailed plans and specifications under AS 16.20.060. No person or governmental agency may undertake any of the activities listed in (a)(2) of this section on state-owned land within a state refuge unless plans and specifications have been submitted to and approved by the department under this chapter. Activities not listed in (a) (2) of this section within state refuges will not be subject to AS 16.20.060, and therefore notification of the activity under AS 16.20.050 will not be required.

(d) No person or governmental agency may undertake any activity listed in (a)(2) of this section within a state game sanctuary unless a permit for the activity has been issued by the department under this chapter.

Authority:	AS 16.05.020(2)	AS 16.20.060
	AS 16.05.251(a)(1), (7)	AS 16.20.120
	AS 16.05.255(a)(1), (7)	AS 16.20.170
	AS 16.20.040	AS 16.20.240
	AS 16.20.050	AS 16.20.250
		AS 16.20.260

5 AAC 95.050. PROTECTION OF CRITICAL HABITAT AREAS.
Repealed / /81.

5 AAC 95.060. HABITAT PROTECTION PERMIT REQUIRED. (a) For convenience, the approval of plans and specifications under sec. 20, 30 and 40 (b) - (c) of this chapter, and the permit issued pursuant to sec. 40(d) of this chapter, will be referred to as : "habitat protection permit" throughout this chapter, and the submission of plans and specification will be referred to as an application for a habitat protection permit. Whenever the submission of plans and specifications is required under sec. 20 - 40 of this chapter, the submission of those plans and specifications satisfies any related notification requirement imposed by AS 16.05 or AS 16.20.

(b) A habitat protection permit will be issued for a fixed term not to exceed five years, subject to the provisions of (d) of this section.

(c) A habitat protection permit is a Class I permit and is subject to the procedures set forth in 22 AAC 10.

(d) The term of a habitat protection permit excludes those periods of time identified by the commissioner or his designee under this subsection. If the commissioner or his designee determines that (1) there exist temporary environmental conditions which were reasonably unforeseeable at the time of permit approval which threaten to cause substantial adverse impacts as a result of the activity, or (2) the permittee has failed to implement required mitigating or preventive measures or (3) the permittee has failed to comply with the provisions of this chapter, or the condition of the permit, the commissioner

or his designee will notify the permittee that the term of the permit is or will be interrupted for a period of time which the commissioner or his designee finds necessary for the abatement of the temporary condition, the completion of the delayed measures, or compliance with the provisions of this chapter. Exclusion periods under this subsection will not exceed 30 days in any calendar year, and successive exclusion periods will not be imposed without the consent of the permittee. Exclusion periods will be terminated by notice to the applicant from the department if the applicant demonstrates compliance or implements the mitigating measures. If the commissioner or his designee finds, prior to or during any exclusion period, that the environmental conditions are unlikely to correct themselves within any available exclusion period, he will, in his discretion, initiate revocation proceedings under sec. 150 of this chapter.

Authority:	AS 16.05.020(2)	AS 16.20.040
	AS 16.05.251(a)(1), (7), (12)	AS 16.20.050
	AS 16.05.255(a)(1), (7), (10)	AS 16.20.060
	AS 16.05.840	AS 16.20.120
	AS 16.05.370	AS 16.20.240
	AS 16.05.830	AS 16.20.250
	AS 16.05.890	AS 16.20.260

5AAC 95.065. ADOPTION OF DEPARTMENT OF NATURAL RESOURCE AUTHORIZATIONS. (a) Application to the department for a permit required under sec. 040 (b) or (c) of this chapter need not be made if:

(1) the activity has been authorized by the Department of Natural Resources through a land use permit issued under 11 AAC 65, a disposal of an interest in state land, or a plan of operations approved pursuant to a subsurface lease; and

(2) the authorization under (1) of this subsection has been endorsed in writing by an employee of the department authorized to issue permits under this chapter.

(b) An authorization endorsed under (a)(2) of this chapter constitutes the permit required under sec. 040 (b) and (c) of this chapter, and is enforceable by the department to the same extent as a permit issued under the provisions of this chapter. A violation of a term or condition of the permit constitutes a violation of a permit issued under this chapter, and the permit is subject to secs. 060(d) and 150 of this chapter. Any right of inspection, reporting or entry inuring to the benefit of the Department of Natural Resources under the permit also inures to the benefit of the department.

Authority:	AS 16.05.251(a)(1)(7), (12)
	AS 16.05.255(a)(1)(7), (10)
	AS 16.20.050
	AS 16.20.060
	AS 16.20.250
	AS 16.20.260

5 AAC 95.070. GENERAL PERMITS. Notwithstanding secs. 20 - 60 and 90 of this chapter, the following activities are, upon the effective date of their inclusion in this section, issued a general permit subject to the provisions of secs. 200 - 260 of this chapter, and the activity may occur without the necessity of obtaining a habitat protection permit:

(1) tracked and wheeled vehicles may be used to cross the Little Susitna River at the Edgerton Park junction (Section 34, T19N, R1E, Seward Meridian);

(2) tracked and wheeled vehicles may be used to cross anadromous fish streams at established crossings on the Petersville Road in Game Management Unit 16A;

(3) tracked and wheeled vehicles may be used to cross Russell Creek (Cold Bay) at vehicle ford sites identified as Number 1, Number 2, and Number 3, described as follows and specified on a topographical map available upon request from the Anchorage regional office (Region II):

(A) Number 1 is located approximately one mile upstream from the mouth of Russell Creek and immediately upstream from what is known locally as the "first fishing hole"; a road to this point and across the stream provides a land mark location;

(B) Number 2 is located approximately two miles upstream from the mouth of Russell Creek and near the Russell Creek hatchery; a road on each side of the crossing marks the access point;

(C) Number 3 is positioned approximately one mile upstream from the Russell Creek hatchery; a road is evident on each side of the crossing.

Authority: AS 16.05.020(2)
AS 16.05.251(a)(7)
AS 16.05.255(a)(7)
AS 16.05.870

5 AAC 95.080. EMERGENCY ACTIVITIES EXEMPTED FROM THE PERMIT REQUIREMENTS OF THIS CHAPTER. The permit requirements of secs. 020 - 160 of this chapter do not apply to anything done by an individual in the normal course of firefighting.

Authority: AS 16.05.020(2)
AS 16.05.251(a)(1), (7)
AS 16.05.255(a)(1), (7)

5 AAC 95.90. UNIFORM APPLICATION PROCEDURES. (a) Except for emergency permits issued orally pursuant to AS 16.05.890, each applicant for a habitat protection permit must submit a completed application on a form or in a manner approved by the department. Forms are available from department regional and

area offices in Ketchikan, Sitka, Petersburg, Juneau, Anchorage and Fairbanks, or other locations specified by the department. An application for a permit of another state agency is an acceptable form for applying for a habitat protection permit if the information required by (b) of this section is provided with or on the other agency's form and if the applicant submits a copy of the other agency's application form directly to the appropriate Department of Fish and Game regional or area office. An acceptable means of applying for a habitat protection permit also includes submission to the Department of Natural Resources of a tri-agency placer mining permit application form. The notification to the Department of Natural Resources required by AS 41.17.090 of the Forest Resources and Practices Act is also an acceptable means of applying for a habitat protection permit if the information required by (b) of this section is provided, and if a copy of the notification is given directly to the appropriate Department of Fish and Game regional or area office.

(b) A completed application constitutes plans and specifications for anticipated land or water use or construction work, including plans and specifications which provide for protection of fish and game. The application shall include the anticipated commencement date, duration and area of proposed activity including a scaled map, identification of streams or lakes at the site, description of type of activity, and information necessary for the department to judge whether the applicant will comply with the applicable provisions of secs. 170 - 990 of this chapter. The application may also include other information requested by and necessary for the department to determine the effect of the activity upon fish and game populations and habitat.

(c) Except for the tri-agency placer mining permit application submitted to the Department of Natural Resources pursuant to (a) of this section, a completed application must be submitted to the department regional or area office in the region in which the proposed activity will occur.

Authority:	AS 16.05.020(2)	AS 16.20.040
	AS 16.05.251(a)(7), (12)	AS 16.20.050
	AS 16.05.255(a)(7), (10)	AS 16.20.060
	AS 16.05.840	AS 16.20.120
	AS 16.05.870	AS 16.20.240
	AS 16.05.890	AS 16.20.250
		AS 16.20.260

5AAC 95.100. PERMIT CONDITIONS AND ASSIGNMENT. (a) In addition to the standards in secs. 170 - 260 of this chapter, the deciding officer will attach permit conditions to a habitat protection permit if he determines that terms and conditions are necessary to ensure compliance with the requirements of this chapter, or to otherwise ensure maintenance and protection of fish, game, or their habitat.

(b) Permits may only be assigned upon written consent by the department.

Authority:	AS 16.05.020(2)	AS 16.20.050
	AS 16.05.251(a)(7), (12)	AS 16.20.060
	AS 16.05.255(a)(7), (10)	AS 16.20.120
	AS 16.05.840	AS 16.20.240
	AS 16.05.870	AS 16.20.250
	AS 16.20.040	AS 16.20.260

5 AAC 95.110. RECONSIDERATION OF DENIAL. (a) The deciding officer may reconsider an application denied pursuant to 22 AAC 10 if the applicant submits, to the appropriate regional office, factual information or data which is new or additional to that supplied with the original application. The supplementary evidence may be submitted as an amendment to the original application, or the applicant may submit a new application.

Authority:	AS 16.05.020(2)	AS 16.20.050
	AS 16.05.251(a)(7), (12)	AS 16.20.060
	AS 16.05.255(a)(7), (10)	AS 16.20.120
	AS 16.05.840	AS 16.20.240
	AS 16.05.870	AS 16.20.250
	AS 16.20.040	AS 16.20.260

5 AAC 95.120. AMENDMENTS TO THE PERMIT. (a) A permittee may request amendment of a habitat protection permit by submitting, in writing to the department office where the permit was issued, a complete statement explaining why the amendment is necessary, including the amended plans, the location, commencement time, duration and type of activity requiring amendment.

(b) The deciding officer will issue an amendment to the permit if it is the department's determination that the provisions of this chapter will be met. The department will require a maximum of 30 days to review a request for amendment after receipt of all necessary information in the appropriate regional office.

(c) Amendments approved by the department become effective upon receipt by the permittee, or at a later date as may be specified by the amendment. Amendments remain valid for the duration of the permit or for a lesser duration as may be specified by the department.

Authority:	AS 16.05.020(2)	AS 16.20.050
	AS 16.05.251(a)(7), (12)	AS 16.20.060
	AS 16.05.255(a)(7), (10)	AS 16.20.120
	AS 16.05.840	AS 16.20.240
	AS 16.05.870	AS 16.20.250
	AS 16.20.040	AS 16.20.260

5 AAC 95.130. APPEAL ON A DENIAL OF APPLICATION. (a) Any person aggrieved by a decision on a permit application, amendment, or reconsideration may appeal by taking either a Class A or Class B appeal pursuant to 22 AAC 10.

(b) If an appeal is taken to the Department of Natural Resources of any decision on a permit in a critical habitat area or state game refuge endorsed pursuant to sec. 65(a)(2) of this chapter, the applicant will be notified, within 10 days of service of the notice of appeal, if the portion of the decision being appealed is attributable to the department. If the portion appealed is attributable to the department, the department will hear and decide the appeal under otherwise applicable procedures. If the portion appealed is attributable to both the department and the Department of Natural Resources, the appeal will be heard and decided jointly.

Authority:	AS 16.05.020(2)	AS 16.20.050
	AS 16.05.251(a)(7), (12)	AS 16.20.060
	AS 16.05.255(a)(7), (10)	AS 16.20.120
	AS 16.05.840	AS 16.20.240
	AS 16.05.870	AS 16.20.250
	AS 16.20.040	AS 16.20.260

5 AAC 95.150. REVOCATION OF A PERMIT. (a) The chief of the habitat protection section will serve upon the permittee an accusation under AS 44.62.360 initiating revocation proceedings if the chief finds that:

(1) the activity is causing fish or wildlife habitat impacts which:

(A) were not reasonably foreseeable at the time of permit issuance;

(B) are significantly more adverse in kind or degree from those projected at the time of permit issuance; and

(C) are unlikely to be alleviated within any available exclusion period under sec. 60(d) of this chapter; or

(2) the applicant has violated a term or condition of the permit, and it is unlikely that the violation can or will be cured within any available exclusion period under sec. 60(d) of this chapter.

(b) Hearings held under this section will be held within 30 days of service of the accusation, or 15 days of service of the notice of defense under AS 44.62.390, whichever first occurs. The hearing officer appointed under AS 44.62.350 will preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law. The

commissioner or the deputy commissioner will hear the case for the department, and will issue findings and conclusions within 10 days of the conclusion of the hearing.

(c) The effective date of the decision is as provided in AS 44.62.520.

(d) The permitted activity will be allowed to continue during the pendency of revocation proceedings unless the chief of the habitat protection section finds that continuation of the activity may result in substantial or irreparable harm to important fish or game resources. Any determination of the chief of the habitat protection section will be served with the accusation under (a) of this section. Upon service of the finding under this subsection, the permittee must immediately cease any activity for which the habitat protection permit was issued or required. At any time during the course of revocation proceedings, the permittee may petition the commissioner to stay the chief's order under this subsection. A copy of the petition must be served on the chief, and the chief may respond in writing to the commissioner and the permittee within two working days of receipt of a copy of the petition. The commissioner or the deputy commissioner will rule on the petition within three days of service of the petition on the commissioner and the chief of the habitat protection section.

Authority:	AS 16.05.020(2)	AS 16.20.050
	AS 16.05.251(a)(7), (12)	AS 16.20.060
	AS 16.05.255(a)(7), (10)	AS 16.20.120
	AS 16.05.840	AS 16.20.240
	AS 16.05.870	AS 16.20.250
	AS 16.20.040	AS 16.20.260

5 AAC 95.160. RENEWAL OF PERMIT. Upon expiration or termination of a permit issued under this chapter, a new permit may be obtained only if a new completed application is filed pursuant to sec. 90 of this chapter. A permit may be renewed for the same operation if the permittee requests renewal before the expiration of the permit.

Authority:	AS 16.05.020(2)	AS 16.20.050
	AS 16.05.251(a)(7), (12)	AS 16.20.060
	AS 16.05.255(a)(7), (10)	AS 16.20.120
	AS 16.05.840	AS 16.20.240
	AS 16.05.870	AS 16.20.250
	AS 16.20.040	AS 16.20.260

ARTICLE 3. STANDARDS OF GENERAL APPLICATION TO FISH HABITAT.

5 AAC 95.170. APPLICATION OF STANDARDS. (a) Unless specifically provided otherwise, the standards in secs. 180 - 260 of this chapter apply only to rivers, lakes and streams frequented by fish.

(b) Unless indicated that it applies only to permittees, each standard in secs. 200 - 260 of this chapter applies to all persons regardless of whether a permit is necessary to engage in the activity.

(c) Until the permit expires, the standards in secs. 180 - 260 of this chapter do not apply to any permittee who obtained, prior to the effective date of these regulations, a permit from the department to conduct activities in a river, lake or stream frequented by fish.

Authority: AS 16.05.020(2)
AS 16.05.251(a)(7)
AS 16.05.840
AS 16.05.870

5 AAC 95.180. ADHERENCE TO STANDARDS. (a) Each applicant or permittee must plan for, maintain and comply with the standards of secs. 190 - 260 of this chapter.

(b) The department reserves the right to require the permittee to correct conditions or remove and replace any installation constructed under permit by the permittee and which is not in accordance with provisions of the permit or of this chapter.

Authority: AS 16.05.020(2)
AS 16.05.251(a)(7)
AS 16.05.840
AS 16.05.870

5 AAC 95.190. STANDARDS FOR FREE PASSAGE AND PROTECTION OF FISH. (a) Free passage and movement of fish must be assured both upstream and downstream of the permitted activity or construction as may be provided through conditions of the permit.

(b) Scheduling of instream activities will be determined by the department on a site-specific basis so as to avoid or minimize adverse disturbances to fish during migration, spawning, incubation, rearing or overwintering.

(c) Blasting is prohibited within one-eighth mile of the edge of the water in any river, lake or stream unless a lesser distance is specified by the department on the permit.

Authority: AS 16.05.020(2)
AS 16.05.251(a)(7), (12)
AS 16.20.840
AS 16.20.870 - 890

5 AAC 95.200. CULVERT INSTALLATION STANDARDS. (a) Each culvert placed in a river or stream frequented by fish must be installed so that at least one-fifth of the diameter of each round culvert and at least 6 inches of each elliptical or arch type culvert is set below the lowest elevation of the natural river or stream bottom at the place of installation for the full length of the culvert;

(1) this does not apply to bottomless arch type culverts;

(2) a variance may be granted by the department to avoid solid rock excavation.

(b) Culvert dimensions necessary to pass fish upstream are dependent upon the velocity of the water within the culvert when the fish are present, the time of year at which these velocities occur, the length of the culvert which must be negotiated by the fish, the species of fish present and their upstream swimming capabilities, and the size and/or age class of the fish requiring passage. The table in (1) of this section represents the maximum water velocities through different culvert lengths which can be successfully negotiated by several Alaska fish species.:

(1)

MAXIMUM ALLOWABLE CULVERT VELOCITIES IN FEET/SECOND

Length of culvert in feet	Group I Upstream migrant salmon fry and fingerlings when upstream migration takes place at mean annual flood	Group II Adult spring spawning slow swimmers: grayling longnose suckers	Group III Adult moderate swimmers: pink salmon chum salmon	Group IV Adult high performance swimmers: king salmon coho salmon sockeye salmon steelhead	Group V Juvenile slow swimmers and other adult slow swimmers: grayling, longnose suckers, broad whitefish, burbot, sheefish, humpback whitefish, Northern pike, Dolly Varden/ Arctic Char, upstream migrant salmon fry and fingerlings when migration not at mean annual flood
30	1.0	3.7	6.8	9.9	2.0
40	1.0	3.1	5.8	8.5	1.8
50	1.0	2.6	5.0	7.5	1.7
60	0.9	2.3	4.6	6.6	1.6
70	0.8	2.1	4.2	6.0	1.4
80	0.8	1.9	3.9	5.5	1.3
90	0.7	1.7	3.7	5.1	1.2
100	0.7	1.6	3.4	4.8	1.2
150	0.5	1.5	2.8	3.7	1.2
200	0.5	1.5	2.4	3.1	1.2
>200	0.5	1.5	2.4	3.0	1.2

(2) culvert velocities for Groups I-IV are based on mean annual flood ($Q=2.33$); Group V is based on mean summer flow;

(3) it is the responsibility of the permit applicant to design a culvert to accommodate upstream movement of the slowest swimming fish species or age class using the system; proposed dimensions must be submitted to the department for approval;

(4) alternative drainage structures, other than culverts, must be installed if the requirements of this subsection cannot be met; a waiver may be granted under unusual, site-specific conditions;

(5) the following references can be used to compute culvert diameter when given the known fish passage criteria from (1) of this section, and the stream discharge data for a mean annual flood; these references are available for inspection at state or federal libraries in Juneau, Anchorage, or Fairbanks, or at department regional or area offices:

(A) Evans, W.A. and F.B. Johnston. Fish Migration and Fish Passage - A Practical Guide to Solving Fish Passage Problems. 1980. U.S. Department of Agriculture, Forest Service, Region 5, 63 pp.

(B) Hydraulics Manual. State of Alaska Department of Highways (Alaska Department of Transportation and Public Facilities), Box 1467, Juneau, Alaska 99801.

(C) Lauman, J.E. Salmonid Passage at Stream-Road Crossings; A Report With Department Standards for Passage of Salmonids. 1976. Department of Fish and Wildlife, Environmental Management Section, Portland, Oregon. 78 pp.

(D) McPhee, C. and F. Watts. Swimming Performance of Arctic Graveling in Highway Culverts. 1976. U.S.F.W.S. 41 pp

(E) Roadway Drainage Guide for Installing Culverts to Accommodate Fish. 1979. Engineering and Aviation Management Division, Alaska Region, U.S. Forest Service, Department of Agriculture, Alaska Region, Report No. 42, 120 pp.

(c) Each culvert must be placed in and aligned with the natural stream channel.

(d) All bank cuts, slopes, fills and exposed earth work attributable to culvert installation in streams, rivers or lakes must be stabilized to prevent erosion during and after the project.

(e) If a culvert is proposed for installation at a site which, in the determination of the department, is used for fish spawning or has significant use for rearing, the department will not approve the culvert installation plan. Instead, the department will require that an alternative site be proposed and approved, or that a bridge be installed at the proposed crossing.

Authority: AS 16.05.020(2)
AS 16.05.251(a)(7), (12)
AS 16.05.840
AS 16.05.870 - 890

5 AAC 95.210. DIVERSION CHANNEL STANDARDS. Notwithstanding sec. 230(b) of this chapter, temporary diversion channels in all fish streams, if approved by the department on the permit, must be constructed and controlled in the following manner:

(1) the width and depth of the temporary diversion channel must equal or exceed 75 percent of the width and the depth, respectively, of the diverted stream at mean annual flood at the diversion site, unless a lesser width is specified by the department on the permit for activities undertaken during periods of lower flow;

(2) during excavation or construction, the temporary diversion channel must be isolated from water of the stream to be diverted by natural plugs left in place at the upstream and downstream ends of the diversion channel;

(3) the bed and banks of the diversion channel must be constructed of material that will not significantly erode at expected flows;

(4) diversion of water flow into the temporary diversion channel must be conducted by first removing the downstream plug, then removing the upstream plug, then closing the upstream end and then the downstream end, respectively, of the natural channel of the diverted stream;

(5) redirection of flow into the natural stream must be conducted by removing the downstream plug from the natural channel and then the upstream plug, then closing the upstream end and then the downstream end, respectively, of the diversion channel;

(6) after use, the diversion channel and the natural stream must be stabilized and rehabilitated as may be specified by permit conditions.

Authority: AS 16.05.020(2)
AS 16.05.251(a)(7), (12)
AS 16.05.840
AS 16.05.870-890

5 AAC 95.220. STREAM, RIVER AND LAKE BANK STABILIZATION STANDARDS. (a) No person may conduct activities which affect, or may affect, the banks of streams, rivers and lakes unless:

(1) the requirements of this section are met; and

(2) the person, if a permittee, is in compliance with terms specified on the permit which the department considers necessary to minimize erosion and other results adverse to fish, game and their habitat.

(b) Snow ramps, snow bridges or approved cribbing must be used to provide access across frozen rivers, lakes and streams so as to preclude cutting, eroding or degrading of their banks;

(1) snow ramps and snow bridges must be composed only of snow or ice and must be substantially free of dirt and debris;

(2) snow bridges must be removed or breached, and cribbing must be removed immediately after final use unless otherwise specified on the permit.

(c) Removal of natural snow cover from a river or stream is only prohibited where the waterbody holds overwintering populations of fish, as determined by the department, in the vicinity of the permitted activity.

(d) Only rocks, cribbing or material approved by the department on the permit may be used for stream bank stabilization.

Authority: AS 16.05.020(2)
AS 16.05.251(a)(7), (12)
AS 16.05.840
AS 16.05.870 - 890

5 AAC 95.230. STREAM, RIVER AND LAKE BED STABILIZATION STANDARDS. (a) No person may conduct activities in the bed of a stream, river or lake unless:

(1) the requirements of this section are met; and

(2) the person, if a permittee, is in compliance with terms specified on the permit which the department considers necessary for free passage and protection of fish during spawning, incubation, rearing, migration and overwintering.

(b) No person may channelize an anadromous fish stream.

(c) No person may excavate gravel from any portion of an anadromous fish stream which is used for spawning, or has significant use for rearing.

(d) No person may conduct activities which can act to

create potential fish entrapment basins within any portion of the floodplain which is covered by a mean annual flood.

(e) Before completion of operations, or before a time specified by the department on the permit each berm created in an anadromous fish stream must be contoured to the natural slope as it existed prior to the creation of the berm.

(f) All temporary bridges, culverts and other drainage structures must be removed upon completion of the project, or before a time specified on the permit.

(g) During any drainage structure removal, bridge pilings in streams frequented by fish must be extracted or cut off level with or below the stream bottom. When a culvert is removed, the channel must be restored to its former configuration.

(h) No material of any type, including excavated material, may be placed, stockpiled, discarded or otherwise disposed of in any anadromous fish stream, unless authorized by the department on the permit.

(i) Mining tailings in anadromous fish streams must be periodically graded to conform to the natural terrain. A schedule for grading may be established by the department on the permit.

Authority: AS 16.05.020(2)
AS 16.05.251(a)(7), (12)
AS 16.05.840
AS 16.05.870 - 890

5 AAC 95.240. WATER QUALITY STANDARDS. Nothing in this chapter and no condition to a permit issued under this chapter relieve a person from complying with the water quality standards of the Department of Environmental Conservation as set forth in 18 AAC 70.010 - 110. Additionally, the following provisions are effective:

(1) no person may fuel in excess of 10 gallons, any type of wheeled or tracked equipment, or store any hazardous chemicals or petroleum products in any anadromous fish stream;

(2) no item treated with wood preservative that will, in the determination of the department, result in acute or chronic toxicity to fish may be placed upstream from the limit of salt water intrusion in any freshwater stream, river or lake;

(3) no storm drain or drainage ditch may discharge into the flow of any anadromous fish stream unless authorized by the department on the permit.

Authority: AS 16.05.020(2)
AS 16.05.251(a)(7), (12)
AS 16.05.870 - 890

5 AAC 95.250. WATER REMOVAL STANDARDS. Each water intake equipment structure must be centered and enclosed in a screened box, which must be constructed to prevent fish entrapment, entrainment or injury. Screen mesh may not exceed one-fourth inch.

Authority: AS 16.05.020(2)
AS 16.05.251(a)(7), (12)
AS 16.05.870 - 890

5 AAC 95.260. SHORELINE STANDARDS. (a) The quality of aquatic habitat necessary for the spawning, rearing and migration of anadromous fish is dependent upon the character and quality of the riparian lands. The distance from the shore wherein a riparian disruption may affect the quality of aquatic habitat is dependent on the slope of the shore land, the erosion and percolation potential of riparian soils, the type and amount of riparian vegetation and the type of activity causing the disruption. A habitat protection permit is required for any land clearing or filling with earthen materials within the specified distance of the mean high water line for the anadromous fish streams listed in (b) of this section, and within 50 feet of the mean high water line for anadromous fish streams not listed in (b) of this section. The department will require or approve plans and specifications designed to maintain conditions adjacent to anadromous fish streams so that water quality and spawning habitat is not degraded, canopy cover exists to prevent alteration of the thermal regime in the anadromous fish stream, and hydrological characteristics can provide for the spawning, rearing and migration of anadromous fish. The applicant's plans and specifications will be sufficient if the above conditions are met by at least one of the following:

- (1) revegetation of disturbed areas;
- (2) use of methods to contain sediments and other potential waterborne pollutants;
- (3) use of erosion control methods; or
- (4) retention of natural vegetation between the project site and the anadromous fish stream.

(b) Land clearing or fills involving earthen materials may take place only as provided in (a) of this section within the following distances of the anadromous fish streams set forth:

- (1) in the Northern Region:
 - (A) Yukon River -zero feet;
 - (B) Kuskokwim River and all glacial fed tributaries -zero feet;

(C) Tanana River and all glacial fed tributaries except the lower two miles of the Delta River -zero feet;

(D) Chena River downstream from its confluence with the Little Chena River -zero feet;

(2) in the South Central Region:

(A) Little Campbell Creek - 25 feet - (Sec. 6, T12N, R3W, S.M.);

(B) Eagle River - 25 feet - (Sec. 1, T14N, R3W, S.M.);

(C) Matanuska River - 25 feet - (Sec. 10, T16N, R1E, S.M.);

(D) Susitna River - 25 feet - (Sec. 29, T14N, R7W, S.M.);

(E) Knik River - 25 feet - (Sec. 10, T16N, R1E, S.M.);

(F) Skwenta River - 25 feet - (Sec. 20, T22N, R10W, S.M.);

(G) Copper River -25 feet - (T17S, R2E, CRM);

(H) Yentna River - 25 feet - (Sec 13, T17N, R7W, S.M.);

(I) Kahiltna River - 25 feet - (Sec. 5, T20N, R8W, S.M.);

(J) Beluga River - 25 feet - (Sec. 17, T13N, R9W, S.M.);

(3) in the Southeastern Region:

(A) Carallana Creek - 25 feet, Sec. 23, T75S, R90E, CRM;

(B) Saxman Creek - 25 feet, Sec. 4, T76S, R91E, CRM;

(C) Lemon Creek - zero feet for the lower 1½ miles, then 25 feet, Sec. 34, T40S, R66E, CRM;

(D) Granite Creek (Halibut Pt.) - 25 feet, Sec. 16, T55S, R63E, CRM.

(c) Each riparian vegetation stabilization net in use must be constructed wholly of biodegradable material, except that non - biodegradable nets may be used if authorized by the

department on the permit. Each non-biodegradeable net used must be removed after use.

Authority: AS 16.05.020(2)
AS 16.05.251(a)(7), (12)
AS 16.05.255(a)(7), (10)
AS 16.05.870 - 890

ARTICLE 4. GENERAL PROVISIONS.

5 AAC 95.900. MITIGATION OF DAMAGES. (a) Each permittee is obligated to mitigate the adverse effects upon fish, game or their habitat created by the permittee's operation, and which were a direct result of the permittee's failure to:

(1) comply with permit terms and the provisions of this chapter; or

(2) correct conditions or change methods foreseeably detrimental to fish, game or their habitat.

(b) The obligation to mitigate in (a) of this section does not apply to unavoidable adverse effects upon fish, game or their habitat arising from an overwhelming force of nature with consequences not preventable by any due and reasonable precautions.

(c) The commissioner will specify on the permit, or by letter to the permittee, the provisions for mitigating damage to fish, game or habitat, or he will approve mitigation provisions proposed by the permittee.

(d) Notwithstanding the expiration, revocation or suspension of a permit, each permittee is responsible for his obligations arising under the terms and conditions of the permit, or under the provisions of this chapter.

Authority: AS 16.05.020(2)	AS 16.20.050
AS 16.05.251(a)(7), (12)	AS 16.20.060
AS 16.05.255(a)(7), (10)	AS 16.20.120
AS 16.05.840	AS 16.20.240
AS 16.05.870	AS 16.20.250
AS 16.20.040	AS 16.20.260

5 AAC 95.910. WAIVER OF STANDARDS. The department may waive or alter any of the requirements of secs. 190-260 of this chapter for site-specific instances if there is substantial evidence that:

(1) it is not sound engineering practice to comply with the standard, and any environmental problems that would be caused by the activity are outweighed by the public benefit that will be derived from waiver of the standard;

(2) granting the waiver or alteration will not

adversely affect fish migration, spawning, incubation, rearing, overwintering or survival in the affected system; or

(3) standards provided by regulation are not appropriate due to unique individual stream or land features.

Authority:	AS 16.05.020	AS 16.20.050
	AS 16.05.251(a)(7), (12)	AS 16.20.060
	AS 16.05.255(a)(7), (10)	AS 16.20.120
	AS 16.05.840	AS 16.20.240
	AS 16.05.870	AS 16.20.250
	AS 16.20.040	AS 16.20.260

5 AAC 95.920. NOTIFICATION. (a) When a notification is given to a permittee other than in writing, it will be promptly confirmed in writing by the department.

(b) When mail is used for notification, notification occurs upon post marking for the purpose of the sending party's obligation, and upon receipt for the purpose of commencing time limits upon the receiving party.

Authority:	AS 16.05.020(2)	AS 16.20.050
	AS 16.05.251(a)(7), (12)	AS 16.20.060
	AS 16.05.255(a)(7), (10)	AS 16.20.120
	AS 16.05.840	AS 16.20.240
	AS 16.05.870	AS 16.20.250
	AS 16.20.040	AS 16.20.260

5 AAC 95.930. RETENTION OF PERMIT FOR INSPECTION AND INSPECTION OF PERMIT SITES. (a) After issuance, a copy of the permit, including any amendments, must be retained at the work site until completion of the project, and must be made available for inspection upon request by a representative of the department, or a law enforcement officer of the Department of Public Safety.

(b) For the purposes of inspecting and monitoring compliance with the conditions of the permit or the requirements of this chapter, each permittee must give authorized representatives of the department, and law enforcement officers of the Department of Public Safety, free and unobstructed access at safe and reasonable times to the permit site. Each permittee must give such assistance and furnish such information as the authorized representative or law enforcement officer may reasonably require for monitoring and inspection purposes.

Authority:	AS 16.05.020(2)	AS 16.20.040
	AS 16.05.180	AS 16.20.050
	AS 16.05.251(a)(7), (12)	AS 16.20.060
	AS 16.05.255(a)(7), (10)	AS 16.20.120
	AS 16.05.840	AS 16.20.240
	AS 16.05.870	AS 16.20.250
		AS 16.20.260

5 AAC 95.940. PROGRESS REPORTS. Each permittee, if requested by the department on the permit for the purpose of ascertaining the progress of the permitted operation, must submit reports to the department, in a form and on a date satisfactory to the department.

Authority:	AS 16.05.020(2)	AS 16.20.050
	AS 16.05.251(a)(7), (12)	AS 16.20.060
	AS 16.05.255(a)(7), (10)	AS 16.20.120
	AS 16.05.840	AS 16.20.240
	AS 16.05.870	AS 16.20.250
	AS 16.20.040	AS 16.20.260

5 AAC 95.950. DELEGATION OF AUTHORITY. For the purposes of administering this chapter, the commissioner may delegate his authority to designated employees of the department.

Authority: AS 16.05.020(2), (3)
AS 16.05.270

5 AAC 95.970. WATERS IMPORTANT TO ANADROMOUS FISH. The various rivers, lakes and streams or parts of them that are important for the spawning, rearing or migration of anadromous fish have been specified by the commissioner and filed in the Office of the Lieutenant Governor as the Catalog of Waters Important for Spawning and Migration of Anadromous Fishes, December 1968, as revised March 1975. The list is adopted by reference and is available upon request from department regional offices, or from the Department of Fish and Game, Habitat Protection Section, Support Building, Juneau, Alaska, 99801. All provisions of this chapter are effective for those specified waters. The provisions of this chapter also apply to any action in a tributary of a specified anadromous fish stream that may result in pollution of or a change in the natural flow or bed of the specified anadromous fish stream.

Authority: AS 16.05.251(a)(7)
AS 16.05.870
AS 16.05.880
AS 16.05.890

5 AAC 95.990. DEFINITIONS. In addition to the definitions set forth in AS 01.10.060 and AS 16.05.940, in this chapter:

(1) "anadromous fish" means fish which enter fresh water from the sea for spawning purposes, and includes anadromous Dolly Varden, rainbow trout (steelhead), arctic char, sheefish, smelt, whitefish, coastal cutthroat trout and salmon;

(2) "anadromous fish stream" means a river, lake or stream listed pursuant to sec. 970 of this chapter which is, or may at any time be important to the spawning, rearing or migration of anadromous fish, and includes all sloughs and backwaters adjoining the listed waters, and that portion of the floodplain which is covered by the mean annual flood;

(3) "berm" means an artificially raised margin, bar or other deposit composed of earthen materials, which interrupts the natural configuration of the adjacent terrain;

(4) "channelize" means excavate any course, trench, canal or furrow in or for the bed of a stream or river for the purpose of realignment;

(5) "completed application" means a form, series of forms, letter or other documents which provide all of the information necessary for the department to issue, condition or deny a permit;

(6) "deciding officer" means a habitat protection section regional supervisor, gas pipeline supervisor or their designees;

(7) "fish" means salmon, char, Dolly Varden, rainbow trout, steelhead, cutthroat trout, eastern brook trout, smelt, broad whitefish, burbot, sheefish, humpback whitefish, arctic grayling, longnose sucker, northern pike, lamprey or blackfish, in any life cycle stage;

(8) "frequented by fish" means at any time, in the determination of the department, containing resident or migratory fish;

(9) "incubation" means the life phase of a fish from egg deposition until hatching;

(10) "lake" means a ponded body of inland water that has a restricted outlet or no outlet;

(11) "mean annual flood" means a flood that will be equalled or exceeded on the average, once every 2.3 years;

(12) "mean high water line" means the upper limit of stream bed contacted by the mean annual flood;

(13) "migration" means the predictable, purposeful or seasonal movement of fish, unrestricted by other than natural influences;

(14) "mitigate" means in order of priority:

(A) avoid an impact altogether by not taking a certain action or parts of an action;

(B) minimize an impact by limiting the degree of magnitude of the action;

(C) rectify the impact by repairing, rehabilitating or restoring the affected environment;

(D) reduce or eliminate the impact over time by

preservation and maintenance operations during the life of the action;

(E) compensate for the impact by replacing or providing substitute resources or environments;

(15) "overwintering" means inhabitation by fish of a water body, including its substrate, at any time during October 1 through April 30;

(16) "permit" means a habitat protection permit including any amendment or condition issued or approved by the commissioner or his authorized designee, which has not expired or been suspended, or revoked;

(17) "permittee" means the holder of a permit and includes anyone employed, contracted or assigned by the person to whom the permit was issued to conduct a land or water use operation;

(18) "pollution" means causing alteration of a stream, river or lake to the extent that the water fails to meet the water quality standards of the Department of Environmental Conservation set forth in 18 AAC 70.10 - 110;

(19) "portion of the floodplain which is covered by a mean annual flood" means the stream and the exposed stream bed and banks between the natural vegetation on both banks, except that if the stream is braided, the exposed stream bed and banks are delimited by the natural vegetation bordering the most distant channels;

(20) "rearing" means the life phase of a fish from hatching until spawning, or any portion thereof;

(21) "regional and area office" means the Alaska Department of Fish and Game, Habitat Protection Section offices located as follows:

Region I

230 S. Franklin St., Rm. 301
Juneau, Alaska 99801

P.O. Box 499
Sitka, Alaska 99835

415 Main Street
Ketchikan, Alaska 99901

P.O. Box 667
Petersburg, Alaska 99833

Region II

333 Raspberry Road
Anchorage, Alaska 99501

Region III

1300 College Road
Fairbanks, Alaska 99701

Pipeline Surveillance Office

1001 Noble Street, Suite 450
Fairbanks, Alaska 99701

(22) "spawning" means deposition or fertilization of eggs, including preparation for deposition or fertilization;

(23) "stream bed" means the ground contacted by a stream during a mean annual flood.

Authority:	AS 16.05.020(2)	AS 16.20.050
	AS 16.05.251(a)(7), (12)	AS 16.20.060
	AS 16.05.255(a)(7), (10)	AS 16.20.120
	AS 16.05.840	AS 16.20.240
	AS 16.05.870	AS 16.20.250
	AS 16.20.040	AS 16.20.260

INVOLDERS
BRIEFING

2-11-81

Alaska State Legislature

BETTYE FAHRENKAMP, CHAIRMAN
VIC FISCHER, VICE-CHAIRMAN
BRAD BRADLEY
DICK ELIASON
DON GILMAN
BOB MULCAHY
ARLISS STURGULEWSKI



POUCH V
STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-3834
(907) 465-3835

Senate

Committee on Resources

February 16, 1981
2:30 p.m.

Senate Finance
5th Floor - Capitol

SENATE MEMBERS PRESENT

SENATOR FAHRENKAMP
SENATOR FISCHER
SENATOR STURGULEWSKI
SENATOR GILMAN
SENATOR MULCAHY
SENATOR ELIASON

HOUSE MEMBERS PRESENT

REPRESENTATIVE ZHAROFF
REPRESENTATIVE GARDINER
REPRESENTATIVE SMITH
REPRESENTATIVE CHUCKWUK
REPRESENTATIVE GRUSSENDORF
REPRESENTATIVE BETTISWORTH
REPRESENTATIVE HALFORD
REPRESENTATIVE SUTCLIFF
REPRESENTATIVE VASKA
REPRESENTATIVE BARNES
REPRESENTATIVE MOSS
REPRESENTATIVE FANNING
REPRESENTATIVE MARTIN

The Joint Senate and House Resources Committee hearing on SB 36 and SB 162 was teleconferenced to all sites.

SB 36 An Act establishing the Citizens Advisory Commission
 on federal management areas in Alaska.

Ric Davidge, National Inholders Association, stated that the Alaska Lands Legislation contains some general guidelines for management of lands in Alaska. He indicated that the civil and constitutional rights, and also the lifestyles of the citizens need to be protected since federal managers of the lands are trained only in resource management. He said he supports SB 36 because it establishes an independent state commission to help insure that citizen's rights are protected.

Don Parmeter, Executive Director Citizen's Advisory Commission Voyagers National Park, Minnesota, stated that the Voyagers National Park was established in 1971. When the Park Service started implementing the management plan, it became apparent that tension, hatred and mistrust would be the result of this implementation. In 1975 the Minnesota Legislature established and funded an independent Advisory Commission to investigate all aspects of management in the Park. The Advisory Commission has been able to first, hold the Park Service accountable for their activities, and second, insure effective participation

in the management of the Park by those whose day-to-day lives are effected. He indicated that the Advisory Commission has been able to turn around a bad situation in Voyager National Park. If it had been established when the Park was created they could have avoided the extreme tensions that developed between the citizens and the Park Service.

Paul Barelka, Fairbanks, stated that he supported SB 36 except he did not like the number or people the Governor could appoint to the Commission.

Donald Stein, Fairbanks, Alaska Miners Association, stated that his only problem with SB 36 is the number of appointments by the Governor. He suggested that the Committee find a way to balance the Commission so that industry and environmentalists have an equal voice.

Ray Craig, Anchorage, stated that he was in favor of the concept of SB 36 because it would hold the Park Service accountable and it is an effective way to help the individual inholder.

Skip Elliott, Skagway, City Manager, stated that in 1977 the Klondike National Park was created with the City's full support. As soon as the Park was established communications between the citizens and the Park Service virtually stopped. He indicated there is fear and anger toward the Park Service by the citizens. He stated that the Park Service has used its funding to build employee housing which they rent for \$20.00 per month. He indicated that they are still willing to cooperate with the Park Service but they want it to be on a mutual basis.

Ric Davidge suggested that the Advisory Commission should not be limited to the 31 areas established in the Alaska Lands Bill, but should have authority to help in other areas like Skagway.

Russell Bartoo, Juneau, stated that since there already exists the fish and game advisory committee, the Citizens Advisory Commission could be a duplication.

Donald Logan, Fairbanks Alaskan Alpine Club, stated that he supports SB 36 but the Governor should not be able to appoint eight members to the Commission because it would give him too much power to set policy.

Doug Buchanan, Fairbanks, Alaskan Alpine Club, stated that he supports SB 36 but thought the Governor should not be able to appoint so many people to the Commission. He also said he would forward to the Committee detailed testimony (see attached).

Phil Holdsworth, Juneau, stated that when he served on the Land Use Planning Commission they encountered the similar problem of Federal agencies going beyond the law. He suggested that the Commission could be strengthened by having the authority to have the Attorney General file suit on their behalf.

Roger Allington, Juneau, stated that the Advisory Commission is needed because the Alaska Land Policy Council established by the Alaska Lands legislation is bureaucratically controlled. He further stated that there should be some sort of qualifications placed upon the eight appointees by the Governor to insure that they are representative of the state.

David Finkelstein, Anchorage, Sierra Club, stated that he was in favor of the concept of SB 36, because he has seen the Park Service violate legislative intent and he wants to see the intent of the Alaska Lands Bill carried out.

Ronald Brooks, Fairbanks, stated that the Governor should not be able to appoint more than seven members to the Commission. He also stated he would like to see the Commission have the authority to sue the government.

Ted Dixon, Fairbanks, Tanana Valley Sportsmen, stated that he supports the concept of SB 36. He said he would like to see the Governor limited to appointing only 4 members of the Commission. He said he endorsed the idea of the Attorney General suing at the direction of the Commission and encouraged the Committee to increase the authority of the Commission.

Chip Toma, Juneau, stated that he supported the Citizen Advisory Commission.

SB 162 An act making special appropriations to the Alaska Agricultural Action Council for a small grain marketing system.

Representative Pappy Moss, District 19, stated that the Delta agricultural development project is presently approaching its second year of production. In 1981, with the project on schedule, in-state use of barley will account for approximately 6,000 tons. The state must be prepared to sell 15,000 tons of grain this year on the export market. A tidewater facility for loading grains onto ships, railroad cars to transport the grain to tidewater and a transfer facility in North Pole are necessary. This system is integral to this year's agricultural effort. He stated that he strongly encouraged the Committee to approve SB 162.

Bob Palmer, Governor's Office, Special Projects Coordinator, stated that the funds are needed for the grain exchange. He said the objective has been to create a stable supply of grain for the developing red meat industry. He indicated that the grain products will probably develop more rapidly than the meat industry therefore, the State needs to look to the exporting of grain. He stated that the facilities in SB 162 need to be in operation this season.

In response to the question, does the Governor support SB 162? Mr. Palmer stated yes, and if necessary he could obtain a letter from the Governor to that effect.

In response to the question, should the location of the terminal be written into the bill? Mr. Palmer stated, no, because he would prefer to wait on the judgement of experts on the issue.

Robert Pollock, Fairbanks, Executive Director Agricultural Action Council, stated that passage of SB 162 is necessary for the development of agriculture in the state. He indicated that there would be an 11,000 ton surplus of grain this year making the export terminal necessary.

Greg England, Delta Junction, Alaska Grain Exchange, stated that he was in favor of SB 162 because it is a necessary step to establish a successful agricultural industry. He indicated that the bill needs to pass in a timely fashion for construction to start and for the farmers to make planting decisions.

Doug McClaine, Delta Junction, S and K Farms, stated that he thought that it was the responsibility of the government to take revenues from non-renewable resources and invest into renewable resources. He indicated that agriculture is viable in the state but "agr-business" has not been proven. The next logical step in the process is this facility. He indicated that outside the state's Delta project there are another 100 farms which have had a potential for years but since there was no market they did not go into production. But, now the interest has been sparked and those 100 farms are going into production. He stated that there is a virtual explosion of possibilities in the area; red meat, fish by-products, dairy farming and fish meal - but these are being held up because of the lack of these facilities.

In response to the question, what are the alternatives if the facility is not built? Mr. Palmer stated that there would be chaos. These elevator and port facilities have been part of the whole agricultural program from day one.

Representative Gardiner stated that an alternative is to go back to the way we did it in the past and give land to large multi-national companies and they will build the facilities. If the government steps in, then it needs to follow through to completion of the project. If development is wanted in state by Alaskans, the state will have to come up with the front end money or turn the land over to large companies. The state has to realize agriculture is a long term project and the state is creating a whole new industry.

Bob Palmer stated that the state did receive offers from large companies to purchase 60-70,000 acres of agricultural land, but when the state held hearings the testimony by Alaskans was that agriculture should be developed in state by individual Alaskan farmers.

The Joint Committee hearing adjourned at 5:45 p.m.

Loggers Say Habitat Regulations Not Needed

By Joe La Rocca

Juneau — A spokesman for the Alaska Lumber and Pulp Company told the Senate Resources Committee Wednesday that sweeping new habitat regulation proposed by the Alaska Department of Fish and Game are not needed because they aid to fix "what ain't broke;" go well beyond authority granted to the Department by the legislature; and would require countless new state employees to administer.

Jim Clark, attorney for the pulp company, urged the committee to urge the administration to forestall action on the regulations until it's determined whether the Department has clear statutory authority to adopt them.

Clark told the Resources Committee that the Attorney General's office has provided the Department with a "preliminary opinion" asserting that it does have that authority; but he said loggers disagree.

He also said that the proposed regulations should be held in abeyance pending the completion of the Governor's Regulatory Reform Study currently underway.

The "comment period

on the voluminous regulations, which have been in the drafting stage for about a year, ended this week. They are scheduled to go before the State Boards of Fisheries and Game for consideration and possible action at their April meeting.

The chief of the Department's habitat section, Dick Logan, told the Resources Committee that he initiated the proposed regulations in an attempt to standardize fish and game habitat policies through the state, for which no regulations presently exist.

Asked by Committee Chairman Bettye Fahrenkamp (D-Fairbanks) whether the absence of regulations has posed a problem, Logan replied that while there have been a few complaints due to lack of uniform policy, there have been no serious problems.

The pulp mill attorney agreed saying that any problems that industry has had with habitat policy has been readily resolved with Department biologists on a site specific basis. Clark said it's impractical to write prescriptive regulations covering all habitat industry conflicts.

Moreover, Clark told the committee the proposed regula-

tions assume a broad authority which the legislature expressly refused to give the Department when it enacted "the State Forest Practices Act" several years ago.

For example, as it was introduced by the administration, the Act would have required users to obtain prior approval through a permit system to operate on lands designated as fish and game habitat. But the legislature rejected that provision only requiring users to notify the Department of their plans and if there were no objections to proceed with them. But the proposed regulations would reinstitute the prior approval and permit system rejected by the legislature when it adopted the act, Clark told the committee.

Wednesday's hearing on the regulations drew a standing room only crowd of observers and witnesses, many of whom did not get an opportunity to testify due to time constraints; however, Chairman Fahrenkamp announced that the hearing would be continued Thursday morning.

The word *rascal* originally meant a thin deer, hardly worth hunting.

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Fishermen, Environmentalists Support Fish and Game Regs

By Joe La Rocca

Juneau — The second and final day of hearings before the Senate Resources Committee on proposed new regulations governing activities on state lands designated as fish and game habitat was dominated last week by testimony favoring them, primarily from spokesmen for conservation and fishermen's groups.

The first day of the hearings had drawn heavy opposition from a spokesman for the logging industry.

While the committee also heard strong opposition to the proposed regulations from J.P. Tangen of Juneau, a spokesman for the mining industry, the bulk of the testimony during the second day of hearings came from the southeast Alaska Conservation Council (SEACC), the Alaska Environmental Lobby and the United Fishermen of Alaska.

SEACC Spokesman Jim Stratton of Juneau told the committee that while the proposed regulations may be a burden for one industry, "they are vital to the survival of the several others.

"They are burdensome," Stratton said, "they are merely asking that activities that affect anadromous fish streams be cleared with Fish and Game (Dept.) through the permit process so that they can give their input on mitigating measures to protect anadromous fish and to weed out the projects that are totally destructive." Said Stratton: "These regulations are essential for the protection of the fishing industries."

Pointing out that the fishing industry is Alaska's largest private employer and, unlike mining, a renewable resource, Stratton told the committee that "When the oil is depleted, the hard rock all mined and the forests turned into a monoculture, fishing will be the bread and butter of Alaska and we'd better start protecting it now."

A spokesman for the Alaska Environmental Lobby said that Alaskans hold more sport fishing licenses per capita than residents of any other state, and that 172,000 licenses were issued by the state in 1980. "Since fish are very important to both our economy and re-

gulation," Ronland Shanks told the committee, "it's imperative that we protect our fish; and to do that, we must protect our streams."

Shanks pointed out that the House Resources Committee recently reviewed proposals by the Dept. of Fish and Game which would cost millions of dollars to rehabilitate and enhance Alaska's fisheries. They are needed to "re-create fish habitats that were destroyed," Shanks said, "because regulations like this were not in place."

In addition to testimony taken at public hearings here, the Senate Resources Committee also reviewed voluminous written comments on the proposed habitat regulations which ran overwhelmingly in opposition to them.

Most of the written comments were submitted by placer miners from Interior Alaska, and apparently were orchestrated by the Alaska Miners' Assn., which held a special meeting in Fairbanks recently to marshal mass opposition to the proposed regulations.

There is presently no legislation pending to deal with the regulations, and the hearings were scheduled by Resources Committee Chairman Bettye Fahrenkamp, D-Fairbanks, primarily for informational purposes and to give opponents a forum to express their objections. One of their complaints was that Fish and Game Habitat Chief Dick Logan of Juneau gave them little opportunity to review them or to prepare and submit comments on them.

But Fish and Game Dept. staff disagree, and contend that they have worked closely with mining and logging industry representatives in developing the regulations.

The State Boards of Fisheries and Game are currently meeting in Anchorage, and have scheduled public hearings on the regulations there starting April 1st.

Because the Alaska Miners' Assn. will be meeting in Fairbanks on Wednesday and Thursday of this week, the boards have agreed to hold the Anchorage hearings open for one or two more days later this week

—Continued on page 3

—Continued from page 2
to give members of the miners' group another opportunity to testify before the boards on the proposed regulations.

While the boards would normally be expected to adopt the regulations at their annual spring meeting now underway, the questions which have been raised over them may persuade the boards to deter action.

If the regulations are not adopted this week, they would not be considered by the boards until their next regular meeting in December.

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NOTE REGARDING THE FOLLOWING FRAME ON MICROFILM:

COMPLETE DOCUMENT IS AVAILABLE IN ORIGINAL FILES
IN ALASKA STATE ARCHIVES. TITLE PAGE ONLY HAS
BEEN FILMED.

REPORT BY THE

Comptroller General

OF THE UNITED STATES

The Federal Drive To Acquire Private Lands Should Be Reassessed

The Federal Government owns over one-third of all U.S. land with authorization to acquire up to \$4 billion of private land during the next 11 years.

The National Park, Forest, and Fish and Wildlife Services had been following a general practice of acquiring as much private land as possible regardless of need, alternative land control methods, and impacts on private landowners.

GAO recommends that the Secretaries of Agriculture and the Interior

- jointly establish a policy on when lands should be purchased or when other protection alternatives, such as easements, zoning, and Federal controls, should be used;
- critically evaluate the need to purchase additional lands in existing projects; and
- prepare plans identifying lands needed to achieve project purposes and objectives at every new project before acquiring land.

GAO believes the Congress should oversee the implementation of these recommendations.

This review was made at the request of the Chairman, Subcommittee on National Parks and Insular Affairs, House Committee on Interior and Insular Affairs.



GED-80-14
DECEMBER 14, 1979



NATIONAL ASSOCIATION OF PROPERTY OWNERS

WASHINGTON, D.C.

Ric Davidge, Director of Governmental Affairs for the National Association of Property Owners, is responsible for all consultive and representative services to Congress and the Administration on behalf of the members of NAPO. He monitors all legislation which may have an impact on the human and constitutional right to property, and prepares and presents testimony before congressional committees for the Association. Mr. Davidge maintains close contact with the various federal agencies responsible for the management of federal areas of concern to NAPO.

Prior to joining the staff of NAPO in 1980, he served as assistant to Senator Ted Stevens who is a member of the Senate Committee on Energy and Natural Resources, Ranking Member of the Senate Interior Appropriations Subcommittee, and Minority Whip of the United States Senate.

In his work for Senator Stevens, Mr. Davidge spent over two years in a detailed study and investigation of all federal land acquisition policies and practices. As a result of that work, he has come to be known within the Congress and by federal agency officials as one of the most knowledgeable people outside of government in federal land acquisition policies and practices, as well as many areas of federal land management and its effect on private land.

Mr. Davidge recently completed work as consultant on a new book which addresses the problems of private lands under National Park Service management and will be a guest lecturer at two major law school graduate programs on the east coast later this year. He has over three years of post-graduate study in economics, political science, and public administration and management.

Mr. Davidge also serves as Washington representative for the National Inholders Association, and is contracted by various other groups and individuals as a consultant in negotiations with federal officials to assist in resolving land issues.

As part of his long work in the area of federal land acquisition policies and practices, he is completing a paper for publication on the effects of appointive government on Americans on or adjacent to federally managed lands. This paper also addresses the structural disenfranchisement of citizens placed under the direct management of federal agencies.

What happens when communities, towns, or neighborhoods are placed under the direct management of a federal agency?

The first and most direct impact is the structural disenfranchisement of residents or those with property within the community. The people are, by act of federal law, effectively taken out of local or state jurisdiction and made a federal entity not uncommon to a colony. Their right to participate in the selection of those who govern them has been set aside. They are governed by federal bureaucrats appointed by the Director of a federal agency, himself appointed by the Secretary of a federal department who is appointed by the President of the United States.

Two of our most cherished human and constitutional rights are the rights to self-determination and self-rule. As you can see from the layers of appointed officials governing these federal areas, such rights are structurally blocked. What in fact we have, insofar as a political or governmental structure, is rule by servants of an appointive government which is itself appointed. The only directly elected official is many times removed from the point of governance and even his role is diffused by its generalist nature.

If one looks at the respective political and structural systems question of a sovereign nation with colonies which usurp local government jurisdiction in quasi-sovereign states, one begins to comprehend some of the feelings of fear, frustration, and disillusion experienced by those under such a system. Additionally, one begins to appreciate why this nation revolted from just such a government over 200 years ago and why its constitution and form of government is what it is.

Under this form of federal, feudalistic colonialism, the responsibility and authority for the management of areas within these "colonial" boundaries is delegated to a local individual appointed for such purpose. The personality of that individual is the single most variable factor on the daily lives of those within these federal areas.

This person's tools of authority rest in a mix of two constitutional and sovereign powers. The sovereign power of eminent domain, as defined by our constitution, and the sovereign police power, to provide for the health, safety and general welfare of the people, combine providing local managers significant authority. These two powers, unchallengeable in court, are enabled by congressional act federalizing the area and allow extremely broad discretionary powers for use and interpretation by the local unit manager.

The tools for management within these discretionary and interpretive powers are provided through regulatory action, management directive, and appointment of personnel. This individual is not subject to even the most remote system of representative democracy. Furthermore this program is placed in a governing position for the purpose of managing a resource, not a people. However, as most will agree, the land is the ultimate resource and governance or management of that resource is the fundamental point of decision in determining all activities of man on or adjacent to it. These are the mechanisms of structural disenfranchisement.

Federalization of areas within which there exist no people have generally limited disenfranchisement. The problem is limited to economic factors with respect to removal of assets of local governments and sovereign states which are in fact a loss of wealth to the local citizens. Structural disenfranchisement is a human condition amplified in this country because of its philosophies of self-rule and self-determination.

One solution obviously is to remove man as a resident and property owner from the area. This has been tried causing serious political reevaluation by decision makers who finally refused to pass such a law because of its socic-cultural, economic and political consequences. Another solution is to allow, through some defined governmental structure,

for a reenfranchisement of those within federal areas. This would require significant alteration of domestic executive powers of our President.

One of the problems just now being articulated and investigated is how direct federal management violates the civil rights of those residents and property owners within federal areas. As there is no real system of administrative due process within such areas and as individual federal bureaucrats cannot be brought before the courts for actions taken within the authority of their position, new civil rights laws need to be written.

Under present federal policies and practices, property owners within federal areas suffer major losses of property without just compensation. This is a direct violation of our Constitution. By regulatory taking and under threat of condemnation all landowners under National Park Service, Forest Service and Fish and Wildlife Service management have lost development rights without compensation. In some areas, again by regulatory taking, many have lost additional property rights without compensation due to restrictions on access and egress and federal zoning (in direct violation of constitutional rights reserved to the states). The individuals personal freedoms are also severely restrained by a permit lifestyles unknown by most Americans.

The loss of defensible space when an area is taken out of local and private ownership and placed in national public ownership is another concern. How to encourage the visitor to take responsibility for public space as if it were personal equity is at the heart of major management difficulties faced by agencies such as the U.S. Forest Service and National Park Service. Agency reports, on the dramatic increase in crimes against property within federal areas, are sad reminders of this loss.

In anticipation of ongoing efforts by some within our government to continue designation of these federal colonies, Americans must ask fundamental questions of structure, of participatory democracy, of self determination, of states rights and of individual freedom. We must also ask ourselves, Who is our government?

Alaska State Legislature

BETTYE FAHRENKAMP, CHAIRMAN
VIC FISCHER, VICE-CHAIRMAN
BRAD BRADLEY
DICK ELIASON
DON GILMAN
BOB MULCAHY
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Senate

Committee on Resources

TO: HOUSE RESOURCES COMMITTEE MEMBERS

FROM: BETTYE FAHRENKAMP, CHAIRMAN
SENATE RESOURCES COMMITTEE

DATE: FEBRUARY 10, 1981

RE: JOINT COMMITTEE BRIEFING FEBRUARY 11th.

Attached please find a copy of some materials related to our joint briefing by the National Inholders Association, Wednesday, February 11th, 1:30 p.m., Butro Room.

Zharoff
Gardiner
Chuckwuk
Grussendorf
Hurlbert
Smith
Vaska
Barnes
Bettiswerth
Halford
Sutcliffe

Alaska State Legislature

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Senate

Committee on Resources

TO: SENATE RESOURCES COMMITTEE
FROM: SENATE RESOURCES COMMITTEE STAFF
DATE: February 7, 1981
RE: National Inholders Association
Briefing Wednesday, February 11th.

BRIEFING PAPER

Inholders - their literature states that an inholder is "any person who owns property or other kind of equity interest (lease, permit) within the boundary of a federal or state managed area and who is impacted by the management or access to that area."

Prior to 1977, the Park Service purchased land only if the owners were willing to sell. But in 1977, a directive was issued by the Director of the National Park Service which ordered the discontinuance of "all proposed new construction or substantial alteration of existing structures by inholders." The new attitude stated "the whole principle of inholdings in a National Park is wrong. How can we allow a chosen few to live in the Park when that privilege is denied everyone else?"

The inholders problem is not isolated. As of April 1979, over 20,000 condemnations of property inside National Parks were in progress. Standard condemnations, which allow for due process of law, numbered 10,649. Declarations of Taking, an emergency measure, accounted for 10,158 tracts being taken.

The persons that will be briefing the Committee are: Chuck Cushman, National Inholders Association; Don Parmeter, Executive Director, Citizens Committee, Voyager National Park; and, Ric Davidge, National Inholders Association, Washington, D. C.

Senator Fahrenkamp wishes to particularly bring to your attention the attached article entitled "Death of a Valley."



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What the hell is an inholder? An inholder is any person who owns property or other kind of equity interest (lease, permit) within the boundary of a federal or state managed area or who is impacted by the management or access of that area.

That means any person in or around a National Forest, National Park, Wildlife Refuge or Bureau of Land Management area. We would also now include persons surrounded by state parks and other state projects.

For nearly three years the National Inholders Association (formerly the National Park Inholders Association) has been asking for help for inholders to hold down the onslaught of federal parks and projects. Not that inholders are against parks for in many cases the inholders or their families were responsible for the creation of the national areas. Experience has shown that the federal land managers lacked the sensitivity and skill to work with the private property owner to protect his rights and the culture and history of the communities surrounding him—the agencies are resource conscious and not people conscious. Some said we were crazy until the United States Comptroller General's Office came out with its report: "The Federal Drive To Acquire Private Lands Should Be Reassessed" (CED-80-14) in January 1980.

Charles S. Cushman, Executive Director

National Inholders Association. A public-interest nonprofit national association that protects the rights of Americans on lands owned or regulated by government.

All of a sudden the Inholders had new credibility as many in the Congress and the country came to realize that hundreds of millions of dollars had been spent buying lands that did not need to be purchased to achieve project objectives. If something were not done, billions more would be wasted. Alternatives to fee acquisition are available and would work according to the report. Often federal land acquisition is not necessary to achieve project objectives.

The GAO report touches the financial and legislative implications but was not able to go into the impact on families and communities as perhaps they might have liked. A quick review of the promises held out to the local people in some federal areas and the resulting impact of federal management gives important lessons for the new administration.

Fire Island National Seashore: (National Park Service)

The residents on Fire Island, New York were convinced that the only way they could keep Robert Moses, of the New York State Parks Commission, from building a four lane highway down the middle of the island was to create a National Seashore. They joined major environmental groups and came to Congress who created the National Seashore and stopped the road. The National Park Service immediately turned around and planned a 20 foot wide two lane bicycle path, in cement, for the length of the island. The residents found they had simply traded one villain for another.

In addition, a number of communities, totaling some 4800 homes on the island were to be protected by exempting them from NPS management. Gradually, these exempted communities have been eroded by cutting off access, almost eliminating reasonable travel to their homes by car and by a successive series of restrictions and dune district designations (some by law but most by administrative action) which if taken by themselves were fairly minor, however; when lumped together, have resulted in many homes being condemned and torn down. The communities thus found themselves not exempt as they had been promised both by members of Congress and representatives of the National Park Service.

One of the most dramatic realizations to Fire Island residents came when the Deputy Director of the National Park Service testified recently that it was the intent of the Service to return the island to its natural state. This agency restatement of purpose for an area not only was totally inconsistent with the intent of Congress but has so enraged the issue to cause both senators from the state to call for oversight hearings and a General Accounting Office review of the entire management of the Fire Island National Seashore.

Mt. Rogers National Recreation Area: (National Forest Service)

When Mt. Rogers was created a letter was sent to the Senate Committee considering the bill by the Chief of the Forest Service stating that 39,500 acres would be purchased, 40% of which would be scenic easements. The purpose of that letter in 1966 was to help establish Congressional intent and the Forest Service understanding of that intent. Clearly the understanding was that 15,800 acres would be scenic easements. The theme of Mt. Rogers was to preserve rural America in the Appalachian Mountains of Southwest Virginia.

The results are astounding. By May, 1980, 26,000 acres had been purchased in fee and a new General Management Plan issued showing many more thousands of acres including homes and communities were slated for condemnation. At that time, not a single scenic easement had been issued and much of rural America in Mt. Rogers no longer exists.

Cuyahoga Valley National Recreation Area: (National Park Service)

One of the most dramatic examples of direct violation of law by a federal land manager. The law states that the Park Service should not acquire land in fee title except for specific administrative need and to protect the resource and it strongly encouraged the use of scenic easements. By July, 1978, over 300 families had been forced to sell under threat and actual condemnation, and no scenic easements has been issued by the Park Service. The number of fee title acquisitions is now over 500, with less than 10% scenic easements. The power of condemnation,

plus the absolute disobedience of the law and the intent of Congress, has totally destroyed a quaint little farming valley and a number of communities. A mass relocation of people occurred and much of the history and culture of the area is now lost.

Big Cypress National Preserve: (National Park Service)

"The Secretary may acquire lands in fee or interests less than fee which he determines are necessary for the management of the resource and for the purposes of the 46,000 landowners upon passage of the original bill and over 1,000 of those properties were specifically protected from condemnation by provisions in the law. Less than 100 of those improved protected properties remain today and almost all of the remaining lands have been acquired or are in condemnation. The Park Service states that they interpreted the language of the law to mean all lands within the area designated by Congress shall be acquired. Now they are not so sure.

Delaware Water Gap National Recreation Area: (Park Service)

This area was created in conjunction with the Tocks Island Dam which was stopped by the residents after a long battle. Thousands of people were forced to relocate before the dam was canceled. Yet, when the Park Service took complete charge, they hired the same Corp of Engineers people so hated in the area and continued the condemnations so that craft villages could be built and homes could be turned into museums to show what life was like when the people used to live there. One resident even committed suicide when the Park Service went back on its word to let him have the salvage rights to his home so he could move it and continue to live in it. The recent article "Death of a Valley" chronicles many similar stories in the May 1980 issue of New Jersey Monthly.

St. Croix National River: (Park Service)

Senator Gaylord Nelson in the Congressional Record, August 8, 1967, "We intended the Secretary's powers of condemnation to be used to protect the scenic and wild rivers from commercial and industrial destruction, not for indiscriminate Acquisitions".

Senator Nelson continued, "The Bill is not a land grab, and the condemnation power is primarily for acquisition of appropriate public access sites".

Senator Mondale, "Would the Bill require that the Secretary, in every case, purchase the fee title(of the land)?"

Senator Nelson, "No, we hope that the Secretary will, in every possible case, use their power to acquire scenic easements instead of outright purchase." He went on to say, "The only acquisition of homes or property may be within the access points themselves."

Today nearly every home within 400 feet of the river has been purchased. Most persons owning land within the state managed area of the river have been left completely alone.

Buffalo National River:

(Park Service)

The National Park Service had the option to use fee as well as scenic easements in this area. It was not necessary to use fee acquisition, as easements would have done the job outlined in the law. The primary objective was the protection of the river and providing a place for canoeists. Farming families that had been on the same land for five and six generations were removed-----in some cases at gun point-----with the use of a declaration-of-taking. This is a condemnation procedure that for all practical purposes, takes away the landowners ability to fight for his land. He has 20 days to make an argument, after title has already passed upon notice of the action. Many times this same individual has only 90 days to get off his land although full settlement may take upwards of 5 or more years and up to 12 years in some cases. Of the 21,000 condemnations now pending in the U. S. Department of Justice, over 10,000 are declarations of taking by the Federal Government.

Sawtooth National Recreation Area:

(Forest Service)

Another case of inconsistency in management and false promises. Most people were told they would get scenic easements when Sawtooth was created but only the large ranchers did. Most

of the homeowners were forced out. In some cases the landowners were forced to move their homes across a highway to protect the viewshed. Apparently the visitor was supposed to look only in one direction so that area was cleared of homes. The results were a substantial loss of several communities, expenditure of many more millions than originally authorized, and a great deal of pain suffered by many people.

Grand Teton National Park:

The landowners were promised that they would not be disturbed by the park. Gradually the boundary was enlarged as more lands were purchased which justified even more lands and even larger boundaries. Eliot Davis, one of the rangers at that time making the promises and later a Park Superintendent as well as a land owner in Grand Teton, testified that the Park Service was breaking all the promises he made during his tenure. He was forced to sell his property or he would never receive a promotion. He later inherited another piece of property but would not accept ownership until he retired from the Park Service.

Sleeping Bear Dunes National Lakeshore: (Park Service)

More exempted communities were promised in this area and a new idea of providing "Certificates of Exemption" from Condemnation" to landowners who could qualify. At this time there are a number of inholders who have such contracts with their government which agreed legally they would never be condemned--these same citizens are now in court under direct condemnation by the Park Service. The same agencies which signed the contracts under authority of the Secretary of Interior. The explanation by the Park Service of their action is that this is a new government (a new president) and those certificates are void.

Mammoth Lakes, Calif. (National Forest)

The National Forest Service built a new headquarters and then closed a trailer court across the road because it blighted the view from and to the new facility. The problem is, this trailer court was one of the only areas for moderate income families and single residents in the area. The closure of this court

severely impacts an already serious shortage of housing in the area. The Forest Service refuses to provide land, even on a lease basis, and says that low or moderate income housing is not their responsibility. Gradually, while increasing the visitor capacity, the Forest Service is strangling the local people who work in the area and cutting off the people who are not financially independent from working and enjoying this "national resource" that belongs to all the people.

In addition, the Service continues to cancel leases of families with recreational homesites and provides them with no other alternatives. When they are removed, the land is turned over to developers for high income condominiums.

Indiana Dunes National Lakeshore:

(Park Service)

Exempt communities and guaranteed non-condemnation again. The 1966 law was a compromise to settle a battle going on since the 1920s. It guaranteed no condemnation. Then in 1976 when the local people had relaxed their guard, the law was changed and those in the area that had thought they were protected by the compromise lost their rights and faced condemnation. In addition two-thirds of the town of Beverly Shores was taken out of exempt status and placed in the Lakeshore. In 1978 more legislation was proposed that would take the rest of Beverly Shores with 330 homes on 630 acres with schools, churches, gas stations etc. It would have required acquisition of all private land in six years. In 1980 this same legislation is again being proposed and would also attempt to take parts of Dune Acres and Porter Beach, communities that were promised never to be even considered for acquisition or annexation into the lakeshore.

Olympic National Park:

"Full use and enjoyment of their land" was the promise in section 5 of the enabling legislation. Inholders now face condemnation, acquisition and severe use restrictions which have forced many to fold under the federal pressures.

Yosemite National Park

Inholders were protected by a number of statements by members of Congress included as part of the legislative history of the area which guaranteed "all valid and existing rights". Wawona, where most inholders live was surrounded by an addition to the park in 1932 by a Presidential Proclamation by President Hoover and many park residents were not even aware they were inside the boundary for several years. Excessive restrictions and pressure by the Park Service which led to the threatening of a 76 year old resident who was planning to build a bathroom and condemnation of another resident who tried to rebuild his house after it had burned have kept the residents in a constant state of upset and fear. "Don't make trouble and wake the sleeping bear" they said to some members of their group trying to protect themselves..

Pt. Reyes National Seashore:

(Park Service)

Ranching and cattle grazing was supposed to be protected. Gradually the federal agency through restrictive regulations forced ranchers to sell as they could no longer operate economically and conform with federal requirements. In some cases whole businesses went under when the Park Service did not comply with the Uniform Relocation Act and provide the people with an alternative.

Zion National Park:

Grazing activity was protected again but gradually it has been eliminated, in some cases breaking agreements made when the legislation was passed. Families were promised that the grazing would continue until the death of the last surviving son but when the father died, grazing was eliminated. In Zion the local people have had to put up with constant harrassment and even testified at Congressional Hearings that water pipes were cut and farming facilities were vandalized by park personel. The Park Service admits to some of this activity.

Appalachian Trail:

(Park Service)

Numerous threats of condemnation along the trail when the act states that scenic easements are to be used. A Rev. Charles Evans was threatened with a Declaration-of Taking in September 1979 if he did not sell his land that afternoon by the Superintendent of the Appalachian Trail and the former chief of land acquisition of the Park Service. Both these men knew that the Park Service had been denied by Congress the general use of Declarations-of-Taking and that their threat to take his land the next day was impossible. It appears they violated his civil rights knowingly.

Another incident was a subsistence farmer was asked to sell 8 of his 11 acres. No scenic easement was offered. This man had no electricity, used a horse and wagon and cut wood from his land to sell for money and to use for heat. If he had been condemned as he was threatened he would not have been able to survive.

Chattahoochee River National Recreation Area

(Park Service)

These people agreed to an NRA on the basis that no more land would be needed. No sooner had the NRA been created than the Park Service and the environmental organizations began working on enlarging the area. They came out with various plans and when those were fought they would be rewritten to look different but when you matched them up, they were the same plan. The Park Service promised willing sellers only yet new management said they could not honor the promises of the previous superintendent. Gradually the people began to believe that they could never trust the Park Service and were just being played with.

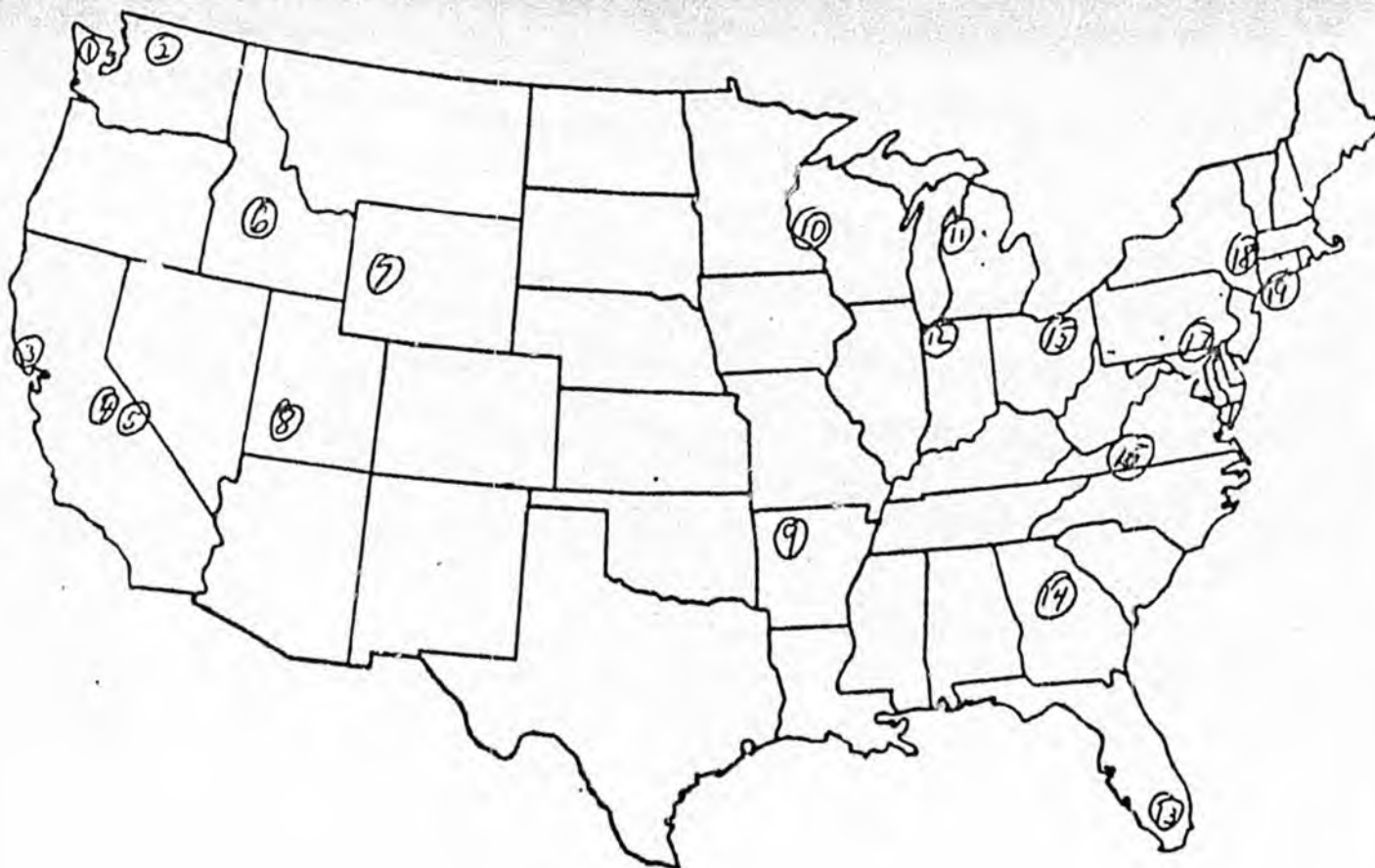
Lake Chelan National Recreation Area: (Park Service)

Many environmentalists wanted this area to be part of Cascades National Park which it borders. The NRA was created to allow for flexible management which included subsistence hunting and limited timbering as well as development in the small isolated community of Stehekin. There were 1600 acres of private land in Stehekin and the Park Service was instructed by Congress to allow development of small compatible eating and sleeping accommodations and to provide a base camp for the millions of wilderness acres under Forest Service and Park Service management surrounding Lake Chelan. The Park Service managed the area like a park by purchasing over 1,000 of the 1,600 acres. While they did not condemn, by threatening condemnation they prevented any further development and even purchased most of the existing developed facilities that served the public, closing some.

Instead of the public having greater access and use of the area, the Park Service managed to significantly reduce the available lodging and eating facilities.

In an interview with Charles Cushman and other inholders in June, 1980, the Assistant Regional Director stated that many people had felt the area should have been a park. When pressed to explain why he and others ignored the intent of Congress he said "we felt it was a bad law".

These are merely examples. There are many more like them. It is reported that the General Accounting Office will finish up reports on Lake Chelan, Buffalo River, Cuyahoga Valley, Fire Island and other areas in the next few months. It appears that small enclaves of people have virtually no protection against the Federal Government and its land control agencies powers and funds once an area is designated a National Area. These people do not elect their governors, who mostly manage for convenience, and are generally trained to manage natural resources--not people.



Federal Area Locations:	Agency	State	Location
Olympic National Park	PS	Washington	1.
Lake Chelan National Recreation Area	PS	Washington	2.
Pt. Reyes National Seashore	PS	California	3.
Yosemite National Park	PS	California	4.
Mammoth Mountain	FS	California	5.
Sawtooth National Recreation Area	FS	Idaho	6.
Grand Teton National Park	PS	Wyoming	7.
Zion National Park	PS	Utah	8.
Buffalo River	PS	Arkansas	9.
St Croix National River	PS	Wis.- Minn.	10.
Sleep Bear Dunes National Lakeshore	PS	Michigan	11.
Indiana Dunes National Lakeshore	PS	Indiana	12.
Big Cypress National Preserve	PS	Florida	13.
Chattahoochee River NRA	PS	Georgia	14.
Cuyanoga Valley National Rec. Area	PS	Ohio	15.
Mt. Rogers NRA	FS	Virginia	16.
Delaware Water Gap NRA	PS	Del-Penn.	17.
Appalachian Trail	PS	'14 States	18.
Fire Island National Seashore	PS	New York	19.

Protecting unique cultural and historical lifestyles is certainly not easy and will not likely fit the semi-military pattern of federal management practiced today.

Even with the GAO report on land acquisition and all the GAO investigations presently under way as well as many news stories in addition to a national television show, the park lobby kept right on rolling along, slowed recently by the president's last ditch efforts to balance his budget in the twilight of his presidency.

Many of you remember the old highway lobby that literally could build a highway anywhere it wanted. Finally some realized that proper planning and thought needed to be done because there was much damage caused along with the good.

So the pendulum swung and now we have the park lobby. So concerned is the dogmatic preservationist about saving nature that he hungerly stomps on the culture and fabric of this country seriously putting in jeopardy the ability of rural America to survive.

Nowhere is that hunger for preservation better exemplified than in the actions of Congressman Phillip Burton. In the face of mounting deficit spending and 20% inflation Mr. Burton keeps the steady stream of preservation legislation coming. You see he must because his power is wrapped up in--as Robert Moses, the original power broker of New York used to say--"getting things done". Take away his ability to create or expand new federal areas and you take away his power.

Mr. Burton has invented a new kind of park--or at least refined it. Formerly we created parks and protected areas because of their unusual beauty which was of national significance. A new kind of national area is upon us with lower standards and different motivations. It is called the--ego-political park.

Not that this wasn't done before but it is done now more often and with a heavier hand.

Look at the legislation considered this year by Phil Burton's sub-committee. The Lake Tahoe legislation was introduced late on Thursday afternoon and passed the Burton Committee on Monday when even the local press had not seen a copy of the bill. The Parks Omnibus Bill (HR 3) went through in a similar fashion. No hearings of any kind until the inholders screamed. We were getting calls from all kinds of groups including homeowners and natural resource groups asking if we knew what was in the legislation. In a year of cutbacks this bill created 7 new areas and affected 37 areas in total.

Some day our representatives will have to decide whether allowing Phillip Burton to continue his abuse of individual rights is worth the price we have paid and are going to pay. Somewhere along the way we are going to have to examine whether we as a nation can afford Mr. Burton's steamroller politics.

Consider that Mr. Burton's power comes from creating parks and other national areas. In the Senate recently, Keith Thompson, former staff aide to Senator Howard Metzenbaum of Ohio, said "that if the only tool Mr. Burton had was a hammer, then everything he saw would begin to look like a nail."

While the money crunch is on we have got to slow or stop the steamroller and bring a new sensitivity to the creation of our national areas. It is no wonder the Park Service does not clean up its act when it is constantly getting signals through Mr. Burton to keep going, regardless of the cost or social consequences.

In addition to the Burton steamroller there are a number of procedural and administrative problems which hopefully the Reagan Administration will quickly address.

Declarations-of-Taking

This procedure allows the agency to hand an individual a paper along with the standard complaint-only condemnation giving the government immediate possession and ownership of the property. Originally an emergency measure or to be used to give immediate access, the recent administration has doubled the total number of condemnations to over 21,000 pending with over 10,000 of those Declarations-of-Taking.

With no notice a person can get told to get off his property within 90 days and sometimes sooner. As a practical matter he has no opportunity to fight the condemnation and no notice that he is even under consideration so that he might provide his side of the story.

Condemnation

We must examine the problem in the courts which allows any federal agency to condemn a piece of property for a "public purpose" without showing that the purpose is consistent with the intent of Congress. In 1979 the National Inholders Association asked under the Freedom of Information Act for a copy of the legislative history of each National Park Service managed area from the local superintendent. We had been told by highly placed officials in the Service that all areas would be familiar with the legislative history since the law in many cases did not fully explain the intent of Congress and the debates, Congressional Records, and Agency understanding letters would be required.

90% of the superintendants were unable to provide the ^{LEGISLATIVE} histories to their area making clear how situations such as Cuyahoga Valley and Lake Chelan could have happened. The local manager, the person responsible for implementing the law simply had never read the law.

Willing Sellers

The agencies in general and the Park Service in particular list