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Chapter No.

38

AN ACT

Modifying administrative procedures and decisions by state agencies that relate to uses and dispositions of state land, property, and resources, and to the interests within them; and modifying administrative procedures and decisions by state agencies that relate to uses and activities involving land, property, and resources, and to the interests within them, that are subject to the coastal management program when the use or activity is to be authorized or developed in phases.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1

Approved by the Governor: May 9, 1994

Actual Effective Date: August 7, 1994

AN ACT

1 Modifying administrative procedures and decisions by state agencies that relate to uses and
2 dispositions of state land, property, and resources, and to the interests within them; and
3 modifying administrative procedures and decisions by state agencies that relate to uses and
4 activities involving land, property, and resources, and to the interests within them, that are
5 subject to the coastal management program when the use or activity is to be authorized or
6 developed in phases.

7

8 * Section 1. LEGISLATIVE FINDINGS. The legislature finds that

9 (1) in order for the state to make a disposal of state land or of an interest in
10 state land, the legislature has previously determined that it is the responsibility of the director
11 of the division of lands in the Department of Natural Resources to make a written
12 determination that the interests of the state will be best served;

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1 (2) each determination under AS 38.05 that the interests of the state will be
2 best served is a policy decision involving facts unique to each proposed disposal, and complex
3 issues the analysis and resolution of which are most appropriately left to the expertise of the
4 agency making the determination;

5 (3) it is the intent of the legislature to confirm that the determination of when
6 and under what circumstances a disposal is in the state's best interest is vested in the
7 discretion of the director of the division of lands, subject to the consent of the commissioner
8 of natural resources and the policy guidance provided by this Act;

9 (4) the scope of the review undertaken by the director of the division of lands
10 in support of a proposed disposal is to be established in the director's written finding made
11 under the provisions of this Act, and is to be based upon the known information or
12 information that is made known to the director during the administrative review;

13 (5) in delegating this discretion, it is not the intent of the legislature to limit
14 public comment or the public's opportunity to participate in the administrative review that
15 takes place before the determination by the director of the division of lands that a disposal is
16 in the state's best interest;

17 (6) it is the legislature's intent to ensure that the public participates in a timely
18 and meaningful manner in the development of the administrative record that will be used by
19 the director of the division of lands to define the scope of review of the written finding;

20 (7) analyses comparable to those generally required by 42 U.S.C. 4321 - 4370a
21 (National Environmental Policy Act of 1969, as amended) for the preparation of an
22 environmental impact statement under 42 U.S.C. 4332(2)(C) are not required by the state for
23 support of best interest findings issued under AS 38.05 or conclusive coastal zone consistency
24 determinations issued under AS 46.40;

25 (8) speculation concerning future development activities that will be subject
26 to independent permitting requirements is not necessary at the time a decision is made to
27 dispose of state land or an interest in state land;

28 (9) this Act is not intended to allow the director of the division of lands to
29 limit the scope of an administrative review so as to omit issues or disregard concerns that
30 otherwise must be addressed under the provisions of applicable statutes and regulations;

31 (10) conducting phased coastal zone consistency determinations is appropriate

1 in those instances where there is insufficient information to determine the consistency of a
2 proposed development project from planning to completion but is not intended to artificially
3 divide or segment a proposed development project to avoid thorough review of the project or
4 to avoid consideration of potential future environmental, sociological, or economic effects; and

5 (11) consideration of a disposal as a phase of a development project is not
6 intended to artificially divide or segment a proposed development project to avoid thorough
7 review of the project or to avoid consideration of potential future environmental, sociological,
8 or economic effects, but rather is intended to allow for consideration of those issues when
9 sufficient data are available upon which to make reasoned decisions.

10 * Sec. 2. AS 38.05.035(e) is amended to read:

11 (e) Upon a written finding that the interests of the state will be best served,
12 the director may, with the consent of the commissioner, approve contracts for the sale,
13 lease, or other disposal of available land, resources, property, or interests in them, and,
14 in addition to the conditions and limitations imposed by law, may impose additional
15 conditions or limitations in the contracts as the director determines, with the consent
16 of the commissioner, will best serve the interests of the state. The preparation and
17 issuance of the written finding by the director is subject to the following:

18 (1) with the consent of the commissioner and subject to the
19 director's discretion, for a specific proposed disposal of available land, resources,
20 or property, or of an interest in them, the director, in the written finding,

21 (A) shall establish the scope of the administrative review on
22 which the director's determination is based, and the scope of the written
23 finding supporting that determination; the scope of the review and finding
24 may address only reasonably foreseeable, significant effects of the uses
25 proposed to be authorized by the disposal;

26 (B) may limit the scope of an administrative review and
27 finding for a proposed disposal to

28 (i) applicable statutes and regulations;

29 (ii) the facts pertaining to the land, resources, or
30 property, or interest in them, that the director finds are material to
31 the determination and that are known to the director or knowledge

1 of which is made available to the director during the administrative
2 review; and

3 (iii) issues that, based on the statutes and regulations
4 referred to in (i) of this subparagraph, on the facts as described in
5 (ii) of this subparagraph, and on the nature of the uses sought to be
6 authorized, the director finds are material to the determination of
7 whether the proposed disposal will best serve the interests of the
8 state; and

9 (C) may, if the project for which the proposed disposal is
10 sought is a multiphased development, limit the scope of an administrative
11 review and finding for the proposed disposal to the applicable statutes and
12 regulations, facts, and issues identified in (B)(i) - (iii) of this paragraph
13 that pertain solely to a discrete phase of the project when

14 (i) the only uses to be authorized by the proposed
15 disposal are part of that discrete phase;

16 (ii) the department's approval is required before the
17 next phase of the project may proceed; and

18 (iii) the department describes its reasons for a
19 decision to phase and conditions its approval to ensure that any
20 additional uses or activities proposed for that or any later phase of
21 the project will serve the best interests of the state;

22 (2) the director shall discuss in the written finding prepared and
23 issued under this subsection the reasons that each of the following was not
24 material to the director's determination that the interests of the state will be best
25 served:

26 (A) facts pertaining to the land, resources, or property, or
27 an interest in them other than those that the director finds material under
28 (1)(B)(ii) of this subsection; and

29 (B) issues based on the statutes and regulations referred to
30 in (1)(B)(i) of this subsection and on the facts described in (1)(B)(ii) of this
31 subsection;

1 (3) a [A] written finding for an oil and gas lease sale under
2 AS 38.05.180 is subject to (g) of this section;

3 (4) a [. A] contract for the sale, lease, or other disposal of available
4 land or an interest in land is not legally binding on the state until the commissioner
5 approves the contract but if the appraised value is not greater than \$50,000 in the case
6 of the sale of land or an interest in land, or \$5,000 in the case of the annual rental of
7 land or interest in land, the director may execute the contract without the approval of
8 the commissioner;

9 (5) public notice requirements relating to the sale, lease, or other
10 disposal of available land or an interest in land for oil and gas proposed to be
11 scheduled in the five-year oil and gas leasing program under AS 38.05.180(b), are
12 as follows:

13 (A) before a public hearing, if held, or in any case not less
14 than 180 days before the sale, lease, or other disposal of available land or
15 an interest in land, the director shall make available to the public a
16 preliminary written finding that states the scope of the review established
17 under (1)(A) of this subsection and includes the applicable statutes and
18 regulations, the material facts and issues in accordance with (1)(B) of this
19 subsection, and information required by (g) of this section, upon which the
20 determination that the sale, lease, or other disposal will serve the best
21 interests of the state will be based; the director shall provide opportunity
22 for public comment on the preliminary written finding for a period of not
23 less than 60 days;

24 (B) after the public comment period for the preliminary
25 written finding and not less than 90 days before the sale, lease, or other
26 disposal of available land or an interest in land for oil and gas, the director
27 shall make available to the public a final written finding that states the
28 scope of the review established under (1)(A) of this subsection and includes
29 the applicable statutes and regulations, the material facts and issues in
30 accordance with (1) of this subsection, and information required by (g) of
31 this section, upon which the determination that the sale, lease, or other

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1 disposal will serve the best interests of the state is based;

2 (6) before [. BEFORE] a public hearing, if held, or in any case not
3 [NO] less than 21 days before the sale, lease, or other disposal of available land,
4 property, resources, or interests in them other than a sale, lease, or other disposal
5 of available land or an interest in land for oil and gas under (5) of this subsection,
6 the director shall make available to the public a written finding that, in accordance
7 with (1) of this subsection, sets out the material facts and applicable statutes and
8 regulations and any other information required by statute or regulation to be
9 considered [LAW] upon which the determination that the sale, lease, or other disposal
10 will best serve the interests of the state was based; however, a [. A] written finding
11 is not required before the approval of

12 (A) [(1)] a contract for a negotiated sale authorized under
13 AS 38.05.115;

14 (B) [(2)] a lease of land for a shore fishery site under
15 AS 38.05.082;

16 (C) [(3)] a permit or other authorization revocable by the
17 commissioner;

18 (D) [(4)] a mineral claim located under AS 38.05.195;

19 (E) [(5)] a mineral lease issued under AS 38.05.205;

20 (F) [(6)] a production license issued under AS 38.05.207;

21 (G) [(7)] an exempt oil and gas sale under AS 38.05.180(d) of
22 acreage offered in a sale that was held within the previous five years if the sale
23 was subject to a written best interest finding, unless the commissioner
24 determines that new information has become available that justifies a revision
25 of the best interest finding; or

26 (H) [(8)] a lease sale under AS 38.05.180(w) of acreage offered
27 in a sale that was held within the previous five years if the sale was subject to
28 a best interest finding, unless the commissioner determines that new
29 information has become available that justifies a revision of the best interest
30 finding;

31 (7) the director shall include in

1 (A) a preliminary written finding, if required, a summary
2 of agency and public comments, if any, obtained as a result of contacts
3 with other agencies concerning a proposed disposal or as a result of
4 informal efforts undertaken by the department to solicit public response
5 to a proposed disposal, and the department's preliminary responses to
6 those comments; and

7 (B) the final written finding a summary of agency and
8 public comments received and the department's responses to those
9 comments.

10 * Sec. 3. AS 38.05.035(g) is amended to read:

11 (g) Notwithstanding (e)(1)(A) and (B) of this section, when [WHEN] the
12 director prepares a written finding required under (e) of this section for an oil and gas
13 lease sale scheduled under AS 38.05.180, the director shall consider and discuss

14 (1) in a preliminary or final written [THE] finding [(1)] facts that are
15 known to the director at the time of preparation of the finding and that are

16 (A) material to [THE FOLLOWING MATTERS OR TO] issues
17 that were raised during the period allowed for receipt of public comment,
18 whether or not material to a matter set out in (B) of this paragraph, and
19 within the scope of the administrative review established by the director
20 under (e)(1) of this section; or

21 (B) material to the following matters:

22 (i) [; (A)] property descriptions and locations;

23 (ii) [(B)] the petroleum potential of the sale area, in
24 general terms;

25 (iii) [(C)] fish and wildlife species and their habitats in
26 the area;

27 (iv) [(D)] the current and projected uses in the area,
28 including uses and value of fish and wildlife;

29 (v) [(E)] the governmental powers to regulate oil and
30 gas exploration, development, production, and transportation;

31 (vi) [(F)] the reasonably foreseeable cumulative effects

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1 of oil and gas exploration, development, production, and transportation
2 on the sale area, including effects on subsistence uses, fish and wildlife
3 habitat and populations and their uses, and historic and cultural
4 resources;

5 (vii) [(G)] lease stipulations and mitigation measures,
6 including any measures to prevent and mitigate releases of oil and
7 hazardous substances, to be included in the leases, and a discussion of
8 the protections offered by these measures;

9 (viii) [(H)] the method or methods most likely to be
10 used to transport oil or gas from the lease sale area, and the advantages,
11 disadvantages, and relative risks of each;

12 (ix) [(I)] the reasonably foreseeable fiscal effects of the
13 lease sale and the subsequent activity on the state and affected
14 municipalities and communities, including the explicit and implicit
15 subsidies associated with the lease sale, if any;

16 (x) [(J)] the reasonably foreseeable effects of oil and gas
17 exploration, development, production, and transportation on
18 municipalities and communities within or adjacent to the lease sale area;
19 and

20 (xi) [(K)] the bidding method or methods adopted by the
21 commissioner under AS 38.05.180; **and**

22 (2) [A SUMMARY OF AGENCY AND PUBLIC COMMENTS
23 RECEIVED AND THE DEPARTMENT'S RESPONSES TO THOSE COMMENTS;
24 AND;

25 (3) the basis for the director's preliminary or final finding, as
26 applicable, [DETERMINATION] that, on balance, leasing the area would be in the
27 state's best interest.

28 * Sec. 4. AS 38.05.035 is amended by adding new subsections to read:

29 (h) In preparing a written finding under (e)(1) of this section, the director may
30 not be required to speculate about possible future effects subject to future permitting
31 that cannot reasonably be determined until the project or proposed use for which a

1 written best interest finding is required is more specifically defined, including
2 speculation about

3 (1) the exact location and size of an ultimate use and related facilities;

4 (2) except as otherwise provided in AS 38.05.073 for land suitable for
5 recreational facilities development leasing, the economic feasibility of ultimate
6 development; and

7 (3) future environmental or other laws that may apply at the time of
8 any future development.

9 (i) A person who is eligible to file an administrative appeal or a request for
10 reconsideration, as appropriate, under this subsection and who is aggrieved by the final
11 written finding of the director entered under (e)(5) or (6) of this section may, within
12 20 days after the issuance of the final written finding, file an administrative appeal or
13 request reconsideration of the decision by the commissioner. A person is eligible to
14 file an administrative appeal or a request for reconsideration if the person

15 (1) meaningfully participated in the process set out in this chapter for
16 receipt of public comment by

17 (A) submitting written comment during the period for receipt
18 of public comment; or

19 (B) presenting oral testimony at a public hearing, if a public
20 hearing was held; and

21 (2) is affected by the final written finding.

22 (j) An administrative appeal or a request for reconsideration submitted under
23 (i) of this section must specify the written finding complained of and the specific basis
24 upon which it is challenged. The commissioner shall grant or deny the administrative
25 appeal or reconsideration request within 30 days after issuance of the final written
26 finding. Failure of the commissioner to act on the request for reconsideration within
27 this period is a denial of the request for reconsideration and a final administrative
28 decision for purposes of appeal to the superior court.

29 (k) If an administrative appeal or a request for reconsideration is granted, the
30 commissioner may order the director to issue a new final written finding as may be
31 required under the circumstances.

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1 (l) A person may appeal a final written finding issued under (e)(5) or (6) of
2 this section to the superior court, but only if the person was eligible to request, and did
3 request, an administrative appeal or reconsideration of that finding under (i) of this
4 section. The person shall initiate the appeal within 30 days from the date that the
5 decision on administrative appeal or reconsideration is mailed or otherwise distributed,
6 or the date the request for reconsideration is considered denied by the commissioner's
7 failure to act on the request, whichever is earlier. The points on appeal are limited to
8 those presented to the commissioner in the person's administrative appeal or request
9 for reconsideration.

10 (m) For purposes of appeal under (l) of this section, the burden is upon the
11 party seeking review to establish the invalidity of the finding.

12 * Sec. 5. AS 38.05.075(h) is amended to read:

13 (h) A person aggrieved by a decision of the commissioner under this section
14 may appeal to the commissioner within five days of the prequalification decision. The
15 decision of the commissioner under this subsection [OR UNDER AS 38.05.035(e)]
16 may be appealed to the superior court.

17 * Sec. 6. AS 38.05.945(a) is amended to read:

18 (a) This section establishes the requirements for notice given by the department
19 for the following actions:

20 (1) classification or reclassification of state land under AS 38.05.300
21 and the closing of land to mineral leasing or entry under AS 38.05.185;

22 (2) zoning of land under applicable law;

23 (3) issuance of a

24 (A) preliminary written finding under AS 38.05.035(e)(5)(A)
25 regarding the sale, lease, or disposal of an interest in state land or
26 resources for oil and gas subject to AS 38.05.180(b);

27 (B) final written finding under AS 38.05.035(e)(5)(B)
28 regarding the sale, lease, or disposal of an interest in state land or
29 resources for oil and gas subject to AS 38.05.180(b);

30 (C) written finding for [A DECISION UNDER
31 AS 38.05.035(e) REGARDING] the sale, lease, or disposal of an interest in

1 state land or resources under AS 38.05.035(e)(6);

2 (4) a competitive disposal of an interest in state land or resources after
3 final decision under AS 38.05.035(e);

4 (5) a public hearing under AS 38.05.856(b);

5 (6) a preliminary finding under AS 38.05.035(e) and 38.05.855(c)
6 concerning sites for aquatic farms and related hatcheries.

7 * Sec. 7. AS 38.05.945(b) is amended to read:

8 (b) When notice is required to be given under this section,

9 (1) the notice must contain sufficient information in commonly
10 understood terms to inform the public of the nature of the action and the
11 opportunity of the public to comment on it;

12 (2) if the notice is of a preliminary written finding described in
13 (a)(3)(A) of this section, the department shall give notice at the beginning of the
14 public comment period for the preliminary written finding, notifying the public
15 of the right to submit comments; the department shall give notice by

16 (A) publication of a legal notice in newspapers of statewide
17 circulation and in newspapers of general circulation in the vicinity of the
18 proposed action at least once a week for two consecutive weeks;

19 (B) publication of a notice in display advertising form in the
20 newspapers described in (A) of this paragraph at least once a week for two
21 consecutive weeks;

22 (C) public service announcements on the electronic media
23 serving the area to be affected by the proposed action; and

24 (D) one or more of the following methods:

25 (i) posting in a conspicuous location in the vicinity of
26 the action;

27 (ii) notification of parties known or likely to be
28 affected by the action; or

29 (iii) another method calculated to reach affected
30 parties;

31 (3) if the notice is of an action [NOTICE OF ONE OR MORE

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1 ACTIONS] described in (a) of this section, other than notice of an action under
2 (a)(3)(A) of this section, the department shall give notice [SHALL BE GIVEN] at
3 least 30 days before the action by publication in newspapers of statewide circulation
4 and in newspapers of general circulation in the vicinity of the proposed action and one
5 or more of the following methods:

6 (A) [(1)] publication through public service announcements on
7 the electronic media serving the area affected by the action;

8 (B) [(2)] posting in a conspicuous location in the vicinity of the
9 action;

10 (C) [(3)] notification of parties known or likely to be affected
11 by the action; or

12 (D) [(4)] another method calculated to reach affected persons
13 [. A NOTICE SHALL CONTAIN SUFFICIENT INFORMATION IN
14 COMMONLY UNDERSTOOD TERMS TO INFORM THE PUBLIC OF THE
15 NATURE OF THE ACTION AND THE OPPORTUNITY OF THE PUBLIC
16 TO COMMENT ON THE ACTION].

17 *Sec. 8. AS 46.40 is amended by adding a new section to read:

18 Sec. 46.40.094. CONSISTENCY DETERMINATIONS FOR PHASED USES
19 AND ACTIVITIES. (a) The provisions of this section apply to a use or activity for
20 which a consistency determination is required if

21 (1) at the time the proposed use or activity is initiated, there is
22 insufficient information to evaluate and render a consistency determination for the
23 entirety of the proposed use or activity;

24 (2) the proposed use or activity is capable of proceeding in discrete
25 phases based upon developing information obtained in the course of a phase; and

26 (3) each subsequent phase of the proposed use or activity is subject to
27 discretion to implement alternative decisions based upon the developing information.

28 (b) When a use or activity is authorized or developed in discrete phases and
29 each phase will require decisions relating to a permit, lease, or authorization for that
30 particular phase, the agency responsible for the consistency determination for the
31 particular phase

1 (1) may, in its discretion, limit the consistency review to that particular
2 phase if, but only if,

3 (A) the agency or another state agency must carry out a
4 subsequent consistency review and make a consistency determination before a
5 later phase may proceed; and

6 (B) the agency responsible conditions its consistency
7 determination for that phase on a requirement that a use or activity authorized
8 in a subsequent phase be consistent with the Alaska coastal management
9 program; and

10 (2) shall, when the consistency review is limited under (1) of this
11 subsection, conduct the consistency review for the particular phase and make the
12 consistency determination based on

13 (A) applicable statutes and regulations;

14 (B) the facts pertaining to a use or activity for which the
15 consistency determination is sought that are

16 (i) known to the state agency responsible or made a part
17 of the record during the consistency review; and

18 (ii) material to the consistency determination; and

19 (C) the reasonably foreseeable, significant effects of the use or
20 activity for which the consistency determination is sought;

21 (3) shall, when the consistency review is limited under (1) of this
22 subsection, describe in the consistency determination the reasons for its decision to
23 make the consistency determination for the use or activity in phases.

24 (c) In this section,

25 (1) "agency responsible for the consistency determination" means

26 (A) the office of management and budget, for a consistency
27 determination required to be made under AS 44.19.145(a)(11); and

28 (B) the commissioner of the resource agency that coordinates
29 a consistency review for a proposed use or activity, or for a proposed phase of
30 a use or activity, when required by this chapter for which a permit, lease, or
31 authorization is required to be approved or issued only by that resource agency;

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- 1** (2) "resource agency" has the meaning given in AS 44.19.152.