

The Fisheries Habitat Protection Initiative

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FOR AN ACT ENTITLED

“An Act to restore fisheries conservation and habitat protection functions to the Alaska Department of Fish and Game”

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

* **Sec. 1.** Purpose. (a) This Act restores to the Alaska Department of Fish and Game its traditional functions of protecting fish and game habitat associated with rivers, lakes, and streams of the state. In 2003, Governor Frank Murkowski unilaterally transferred these functions to a deputy commissioner of the Department of Natural Resources. Many of these functions had resided with the Department of Fish and Game since statehood and had sustained Alaska’s wealth of fish and game. Restoration of these functions to the Department of Fish and Game will help assure the continued conservation of Alaska’s fish and game, and the rivers, lakes, and streams that produce the world’s healthiest sport, commercial, and subsistence fisheries and unparalleled populations of wild salmon, trout, and other species of fish, game and wildlife. (b) The sections below use conventional format: text that repeals the transfer of these functions to the Department of Natural Resources appears in brackets or in Sec. 24, and text that restores these functions to the Department of Fish and Game appears as underlined or in Sec. 4.

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

(a) Unless permitted by AS16.05 – AS 16.40[, BY AS 41.14,] or by regulation adopted under AS 16.05 – AS 16.40 [OR AS 41.14], a person may not take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game, or marine aquatic plants, or any part of fish, game, or aquatic plants, or a nest or egg of fish or game.

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

(a) Except as provided in AS 16.05.430, 16.05.665, 16.05.722, 16.05.723, 16.05.783, 16.05.831, 16.05.860, and 16.05.905, [AND AS 41.14.860,] a person who violates AS 16.05.920 or 16.05.921, or a regulation adopted under this chapter or AS 16.20, is guilty of a class A misdemeanor.

* **Sec. 4.** AS 16.05 is amended by adding new sections to read:

Sec. 16.05.840. Fishway required. If the commissioner considers it necessary, every dam or other obstruction built by any person across a stream frequented by salmon or other fish shall be provided by that person with a durable and efficient fishway and a device for efficient passage for downstream migrants. The fishway or device or both shall be maintained in a practical and effective manner in the place, form, and capacity the commissioner approves, for which plans

and specifications shall be approved by the department upon application to it. The fishway or device shall be kept open, unobstructed, and supplied with a sufficient quantity of water to admit freely the passage of fish through it.

Sec. 16.05.850. Hatchery required. If a fishway over a dam or obstruction is considered impracticable by the commissioner because of cost, the owner of the dam or obstruction, in order to compensate for the loss resulting from the dam or obstruction shall, at the owner's option

- (1) pay a lump sum acceptable to the commissioner to the state fish and game fund;
- (2) convey to the state a site of a size satisfactory to the commissioner at a place mutually satisfactory to both parties, and erect on it a fish hatchery, rearing ponds, necessary buildings and other facilities according to plans and specifications furnished by the commissioner, and give a good and sufficient bond to furnish water, lights, and necessary money to operate and maintain the hatchery and rearing ponds; or
- (3) enter into an agreement with the commissioner, secured by good and sufficient bond, to pay to the fish and game fund the initial amount of money and annual payments thereafter that the commissioner considers necessary to expand, maintain, and operate additional facilities at existing hatcheries within a reasonable distance of the dam or obstruction.

Sec. 16.05.860. Penalty for violating fishway and hatchery requirements. (a) The owner of a dam or obstruction who fails to comply with AS 16.05.840 or 16.05.850 or a regulation adopted under AS 16.05.840 or 16.05.850 within a reasonable time specified by written notice from the commissioner is guilty of a misdemeanor, and is punishable by a fine of not more than \$1,000. Each day the owner fails to comply constitutes a separate offense.

(b) In addition to the fine, the dam or other obstruction managed, controlled, or owned by a person violating AS 16.05.840 or 16.05.850 or a regulation adopted under AS 16.05.840 or 16.05.850 is a public nuisance and is subject to abatement.

Sec. 16.05.870. Protection of fish and game.

(a) The commissioner shall, in accordance with AS 44.62 (Administrative Procedure Act), specify the various rivers, lakes, and streams or parts of them that are important for the spawning, rearing, or migration of anadromous fish.

(b) 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 wheeled, tracked, 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.

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

- (1) full plans and specifications of the proposed construction or work;
 - (2) complete plans and specifications for the proper protection of fish and game in connection with the construction or work, or in connection with the use; and
 - (3) the approximate date the construction, work, or use will begin.
- (d) The commissioner shall approve the proposed construction, work, or use in writing unless the commissioner finds the plans and specifications insufficient for the proper protection of fish and

game. Upon a finding that the plans and specifications are insufficient for the proper protection of fish and game, the commissioner shall notify the person or governmental agency that submitted the plans and specifications of that finding by first class mail. The person or governmental agency may, within 90 days of receiving the notice, initiate a hearing under AS 44.62.370. The hearing is subject to AS 44.62.330 - 44.62.630.

Sec. 16.05.880. Construction without approval prohibited. If a person or governmental agency begins construction on a work or project or use for which notice is required by AS 16.05.870 without first providing plans and specifications subject to the approval of the commissioner for the proper protection of fish and game, and without first having obtained written approval of the commissioner as to the adequacy of the plans and specifications submitted for the protection of fish and game, the person or agency is guilty of a misdemeanor. If a person or governmental agency is convicted of violating AS 16.05.870 - 16.05.895 or continues a use, work or project without fully complying with AS 16.05.870 - 16.05.895, the use, work, or project is a public nuisance and is subject to abatement. The cost of restoring a specified river, lake, or stream to its original condition shall be borne by the violator and shall be in addition to the penalty imposed by the court.

Sec. 16.05.890. Exemption for emergency situations. In an emergency arising from weather or stream flow conditions, the department, through its authorized representatives, shall issue oral permits to a riparian owner for removing obstructions or for repairing existing structures without the necessity of submitting prepared plans and specifications as required by AS 16.05.870.

Sec. 16.05.895. Penalty for causing material damage. If a person or governmental agency fails to notify the commissioner of any construction or use that causes material damage to the spawning beds or prevents or interferes with the migration of anadromous fish, or by neglect or noncompliance with plans and specifications required and approved by the commissioner causes material damage to the spawning beds or prevents or interferes with the migration of anadromous fish, the person or governmental agency shall be guilty of a misdemeanor.

Sec. 16.05.900. Penalty for violations of AS 16.05.870 - 16.05.895. (a) A person who violates AS 16.05.870 - 16.05.895 is guilty of a class A misdemeanor.

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

* **Sec. 5.** AS 16.20.070 is amended to read:

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

* **Sec. 6.** AS 41.17.010(7) is amended to read:

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

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

(e) The division shall serve as staff to the board. The department, the **Department of Fish and Game** [DEPUTY COMMISSIONER], and the Department of Environmental Conservation shall provide technical staffing and information as needed by the board.

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

(c) The board, working with the department, the Department of Environmental Conservation, the **Department of Fish and Game** [DEPUTY COMMISSIONER], other affected agencies and parties, and the forest-dependent industries, shall conduct an annual survey of research needs related to forest practices. The board shall review research proposals and shall make recommendations to promote research projects that would address these needs to the governor and the legislature.

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

(d) The board shall coordinate the monitoring of the implementation and effectiveness of this chapter, the regulations, and best management practices adopted under this chapter in meeting state water quality standards, fish and wildlife habitat requirements, and other forestry objectives. The board shall report annually to the governor on the effectiveness of this chapter and regulations adopted under it, with its recommendations for changes and for needed research and monitoring. The board shall notify the legislature that the annual report is available. The state forester, the **Department of Fish and Game** [DEPUTY COMMISSIONER], and the Department of Environmental Conservation shall each present an annual report, independently, to the board on the effectiveness of this chapter, the regulations, and best management practices adopted under this chapter that protect the resources for which they have statutory responsibility, and shall make recommendations for changes to correct procedural or substantive problems. The board shall include the reports as part of its annual report. The board shall hold hearings at least once annually in southeast, southcentral, and interior Alaska for purposes of taking public testimony on the subjects.

* **Sec. 10.** AS 41.17.090(d) is amended to read:

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

* **Sec. 11.** AS 41.17.090(e) is amended to read:

(e) Within 30 days after receipt of a detailed plan of operations, the state forester shall review the plan to determine if the operations are consistent with this chapter and regulations adopted under this chapter. Operations may begin under the plan upon the expiration of the 30-day period or upon notice from the state forester that the review has been completed, whichever occurs first,

unless the division has issued a stop work order for a particular portion of the plan or has notified the operator that a one-time, 10-day extension is necessary for agency review under AS 41.17.098(f). The operator may proceed with operations not covered by the stop work order, notice of field inspection, or the agency review. During the review of a detailed plan of operations, if a question arises concerning the proper classification of water body type for purposes of the standards in AS 41.17.116(a), the Department of Fish and Game [DEPUTY COMMISSIONER] may resolve the question.

* **Sec. 12.** AS 41.17.098(a) is amended to read:

(a) In administering this chapter, the state forester shall coordinate with other agencies[, THE DEPUTY COMMISSIONER,] and affected coastal districts that have jurisdiction over activities subject to regulation under this chapter.

* **Sec. 13.** AS 41.17.098(b) is amended to read:

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

* **Sec. 14.** AS 41.17.098(d) is amended to read:

(d) The state forester shall recognize the expertise of the Department of Fish and Game [DEPUTY COMMISSIONER] with regard to fish and wildlife habitat. On private land, the state forester shall give due deference to the Department of Fish and Game [DEPUTY COMMISSIONER] regarding effects on fish habitat from timber operations including variations to riparian standards, designation of alternative site-specific riparian protection plans, and road location decisions within riparian areas. On public land, the state forester shall give due deference to the Department of Fish and Game [DEPUTY COMMISSIONER] regarding effects on fish and wildlife habitat from timber operations including timber harvest in riparian areas, variations to riparian standards, and road location decisions within riparian areas. In making decisions under AS 41.17.087, the state forester shall recognize fish habitat as the primary value in riparian areas.

* **Sec. 15.** AS 41.17.098(e) is amended to read:

(e) In this section, "due deference" means that deference that is appropriate in the context of the agency's [OR DEPUTY COMMISSIONER'S] expertise and area of responsibility and all the evidence available to support a factual assertion. Where due deference is given, if the state forester does not agree with a commenting agency [OR THE DEPUTY COMMISSIONER], the state forester shall prepare a written statement of the reasons for the disagreement.

* **Sec. 16.** AS 41.17.118(c) is amended to read:

(c) In the absence of a site-specific determination by the **Department of Fish and Game** [DEPUTY COMMISSIONER], the state forester shall presume for planning purposes that a stream is anadromous if it is connected to anadromous waters that are without **Department of Fish and Game** [DEPARTMENT] documentation of a physical blockage and has a stream gradient of 8 percent or less.

* **Sec. 17.** AS 41.17.120 is amended to read:

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

* **Sec. 18.** AS 41.17.910(a) is amended to read:

(a) The **Department of Fish and Game** [DEPUTY COMMISSIONER] and the state forester shall work cooperatively with private forest landowners and timber owners to protect, maintain, and enhance wildlife habitat to the maximum extent practicable, consistent with the interests of the owners in the use of their timber resources.

* **Sec. 19.** AS 41.17.910(b) is amended to read:

(b) The **Department of Fish and Game** [DEPUTY COMMISSIONER] shall provide educational and technical assistance and extension services to owners of private forest land or timber to assist in identifying important wildlife habitat and to assist in designing voluntary management techniques that minimize adverse effects on wildlife habitat.

* **Sec. 20.** AS 41.17.910(c) is amended to read:

(c) The **Department of Fish and Game** [DEPUTY COMMISSIONER] and the landowner shall cooperate in identifying areas of important wildlife habitat on private forest land and in developing methods for their protection. Methods of protection for wildlife habitat may include, with the agreement of the landowner, the purchase of fee title, purchase of conservation easements, and land exchanges.

* **Sec. 21.** AS 41.17.950(1) is amended to read:

(1) "anadromous water body" means the portion of a fresh water body or estuarine area that (A) is cataloged under **AS 16.05.870** [AS 41.14.870] as important for anadromous fish; or (B) is not cataloged under **AS 16.05.870** [AS 41.14.870] as important for anadromous fish but has been determined by the **Department of Fish and Game** [DEPUTY COMMISSIONER] to contain or exhibit evidence of anadromous fish in which event the anadromous portion of the stream or waterway extends up to the first point of physical blockage;

* **Sec. 22.** AS 44.62.330(a)(48) is amended to read:

(48) the Department of **Fish and Game** [NATURAL RESOURCES] as to functions relating to the protection of fish and game under **AS 16.05.870** [AS 41.14.870];

* **Sec. 23.** AS 46.15.020(b) is amended to read:

(b) The commissioner shall

- (1) adopt procedural and substantive regulations to carry out the provisions of this chapter, taking into consideration the responsibilities of the Department of Environmental Conservation under AS 46.03 and the Department of Fish and Game under AS 16;
- (2) develop and maintain a standardized procedure for processing applications and the issuance of authorizations, permits, and certifications under this chapter; shall keep a public record of all applications for permits and certificates and other documents filed in the commissioner's office; shall record all permits and certificates and amendments and orders affecting them and shall index them in accordance with the source of the water and the name of the applicant or appropriator; shall require that temporary water use authorizations are valid only to the extent that the water withdrawal and use complies with applicable requirements of **AS 16.05.870** [AS 41.14.870]; and shall make the record of applications, including temporary water use applications under AS 46.15.155 that have been accepted as complete, authorizations, permits, certificates, amendments, and orders affecting them available to the public on the Internet;
- (3) cooperate with, assist, advise, and coordinate plans with the federal, state, and local agencies, including local soil and water conservation districts, in matters relating to the appropriation, use, conservation, quality, disposal, or control of waters and activities related thereto;
- (4) prescribe fees or service charges for any public service rendered consistent with AS 37.10.050 - 37.10.058, except that the department may charge under regulations adopted by the department an annual \$50 administrative service fee to maintain the water management program and a water conservation fee under AS 46.15.035;
- (5) before February 1 of each year, prepare a report describing the activities of the commissioner under AS 46.15.035 and 46.15.037; the commissioner shall notify the legislature that the report is available; the report must include
 - (A) information on the number of applications and appropriations for the removal of water from one hydrological unit to another that were requested and that were granted and on the amounts of water involved;
 - (B) information on the number and location of sales of water conducted by the commissioner and on the volume of water sold;
 - (C) recommendations of the commissioner for changes in state water law; and
 - (D) a description of state revenue and expenses related to activities under AS 46.15.035 and 46.15.037.

* **Sec. 24.** AS 41.14.150, 41.14.160, 41.14.165, 41.14.170, 41.14.180, 41.14.190, 41.14.195, 41.14.200, 41.14.840, 16.05.850, 41.14.860, 41.14.870, 41.14.880, 41.14.890, 41.14.895, 41.14.900, 41.14.990, 41.17.905, 41.17.950(23), 44.37.055 and 44.37.060 are repealed.

* **Sec. 25.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITION. (a) Litigation, hearings, investigations, and other proceedings pending under a law amended or repealed by this Act, or in connection with functions transferred by this Act, continue in effect and may be continued and completed notwithstanding a transfer or amendment or repeal provided for in this Act.

(b) Regulations adopted to implement former AS 41.14.840 – 41.14.860 and former AS 41.14.870 – 41.14.895 and to implement AS 41.17 and in effect on the effective date of this Act, remain in effect and may continue to be implemented and enforced, consistent with the changes made by this Act, until amended or repealed. Such regulations continue to apply in litigation, hearings, investigations, and other proceedings pending under a law repealed by this Act.

(c) Contracts, rights, liabilities, and obligations created by or under a law repealed by this Act, and in effect on the effective date of this Act, remain in effect notwithstanding this Act's taking effect, until such time as amended or terminated.

* **Sec. 26.** The uncodified law of the State of Alaska is amended by adding a new section to read: SEVERABILITY. Under AS 01.10.030, if any provision of this Act, or the application of it to any person or circumstance, is held invalid, the remainder of this Act and the application to other persons or circumstances are not affected.