

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STAND FOR SALMON,

Plaintiff,

vs.

BYRON MALLOT, LIEUTENANT  
GOVERNOR OF THE STATE OF  
ALASKA, and the STATE OF  
ALASKA, DIVISION OF ELECTIONS,

Defendants.

Case No. 3AN-17-9183 CI

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND  
DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

Plaintiff, Stand for Salmon, submitted a revised ballot initiative entitled "An Act providing for protection of wild salmon and fish and wildlife habit," labelled 17FSH2 to the Governor's office. Lieutenant Governor Mallott, defendant, denied certification of 17FSH2 as an unconstitutional appropriation of state assets. In response, Stand for Salmon filed an expedited motion for preliminary injunction with this court. Both parties then jointly moved to convert the motion for preliminary injunction to cross motions for summary judgment. The court granted the motion and converted the motion for preliminary injunction to cross motions for summary judgment. Having considered the parties' arguments and for the reasons discussed below, the plaintiff's Motion for

Summary Judgment is granted, and the defendants' Motion for Summary Judgment is denied.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Alaska's Ballot Initiative System**

Section 1 of Article XI of the Alaska Constitution guarantees citizens the right to "propose and enact laws by the initiative." Alaska Const. art. XI, § 1. Once a ballot initiative has been submitted, the Lieutenant Governor must decide within sixty days whether to certify an initiative. AS 15.45.070. If the Lieutenant Governor certifies an initiative, the state prints petition booklets, and the sponsors are required to collect signatures from ten percent of qualified voters, approximately 32,000 signatures, from three quarters of the State's House districts, approximately 30 house districts, by mid-January of the corresponding election year. AS 15.45.090, .140., .190.

### **B. The 17FSHB and 17FSH2 Initiatives**

Stand for Salmon submitted 17FSHB to the Governor's office on May 17, 2017. Motion for Preliminary Injunction 4 [hereinafter Motion]. 17FSHB would have created a rebuttable presumption that state waters are anadromous fish habitat and would have established a permitting regime through the Alaska Department of Fish and Game ("ADFG") for any industrial activity that affects anadromous fish habitat. See Motion, ex. 10, 17FSHB. The Department of Law ("Department") responded on June 30, 2017 informing Stand for Salmon the Department considered certain provisions of 17FSHB to be unconstitutional appropriations of state assets. Motion, ex. 2, Letter from E. Bakalar,

Assistant Attorney General, to M. Wood, *et al.* re: Review of 17FSHB Initiative Application & Petition AGO No. JU2017200303 (June 30, 2017).

In response, Stand for Salmon withdrew the application, revised 17FSHB, and re-submitted it as 17FSH2<sup>1</sup> in mid-July 2017. Motion 5. On September 6, 2017, the Department sent a letter to Lieutenant Governor Mallott informing him that, in the Department's view, the revisions in 17FSH2 had failed to cure the defects of 17FSHB, and 17FSH2 was thus also an unconstitutional appropriation of state assets. See Motion, ex. 5, Letter from E. Bakalar, Assistant Attorney General, to Lieutenant Governor Mallott re: 17FSH2 Ballot Measure Application Review AGO No. JU2017200457 (Sept. 6, 2017). Lieutenant Governor Mallott then denied certification of 17FSH2 on the grounds recommended by the Department on September 12, 2017. Motion 5.

Stand for Salmon responded to Lieutenant Governor Mallott's denial of certification by filing an expedited motion for preliminary injunction on September 18, 2017. See Motion. Stand for Salmon sought an injunction ordering Lieutenant Governor Mallott to print the petition booklets while Stand for Salmon would post a bond to cover the costs of printing said petition booklets. Motion 5–7. The parties then, on September 25, 2017, filed a joint motion to consolidate under Rule 65(a) asking the court to convert the motion for preliminary injunction to cross motions for summary judgment. Joint Motion for Consolidation Under Rule 65(a). The court granted the joint motion to

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<sup>1</sup> Due to the length of 17FSH2, it is appended to this order rather than included in the main text.  
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consolidate and converted the motion for preliminary injunction to cross motions for summary judgment. Order Granting Motion for Consolidation Under Rule 65(a).

Meanwhile, the Council of Alaska Producers (“CAP”) filed a motion to intervene. See Council of Alaska Producers’ Motion to Intervene on September 26, 2017. The court denied the motion but allowed CAP to file a brief as *amicus curiae* and to participate in oral argument. Order Regarding Motion to Intervene.

### III. LEGAL STANDARD

#### A. Summary Judgment

Under Alaska Civil Rule 56, a motion for summary judgment will be granted “if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Alaska R. Civ. P. 56(c). “[A] party seeking summary judgment has the initial burden of proving, through admissible evidence, that there are no [genuine] disputed issues of material fact and that the moving party is entitled to judgment as a matter of law.” *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 517 (Alaska 2014) (quoting *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 760 n.25 (Alaska 2008)). “Once the moving party has made that showing, the burden shifts to the non-moving party ‘to set forth specific facts showing that the party could produce evidence reasonably tending to dispute or contradict the movant’s evidence and thus demonstrate that a material issue of fact exists.’” *Id.* at 517 (quoting *State, Dep’t of Highways v. Green*, 586 P.2d 595, 606 n. 32 (Alaska 1978)). In meeting their respective burdens, the parties may use pleadings, affidavits, and any other material that is admissible in evidence. *Miller v. Fairbanks*, 509 P.2d 826, 829 (Alaska 1973).

A fact is material if the resolution of a disputed issue turns on it. *Christensen*, 335 P.3d at 519. Whether a disputed question of material fact exists is a question of law that is determined according to a reasonableness standard. *Id.* Thus, the non-movant's evidence must not be too incredible for a reasonable mind to believe it, nor may the non-movant rely on mere speculations and unsupported assumptions. *Id.* at 520. A genuine, material factual dispute requires more than a scintilla of contrary evidence. *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005).

In evaluating a motion for summary judgment, the court must draw all reasonable inferences in favor of the non-moving party. *Anderson v. Alyeska Pipeline Service Co.*, 234 P.3d 1282, 1286 (Alaska 2010). "Reasonable inferences are those inferences that a reasonable factfinder could draw from the plaintiff's evidence." *Alakayak v. British Columbia Packers, Ltd.*, 48 P.3d 432, 449 (Alaska 2002). Summary judgment is appropriate only if any reasonable person would conclude that the non-movant's evidence failed to create a genuine dispute as to any material fact. *Christensen*, 335 P.3d at 520.

#### **B. Ballot Initiative Constitutionality**

Section 1 of Article XI of the Alaska Constitution provides citizens the right to "propose and enact laws by the initiative;" however, section 7 of Article XI restricts this right by prohibiting initiatives which "make or repeal appropriations." Alaska Const. art. XI, §§ 1, 7. The Alaska Supreme Court has instructed lower courts to "construe voter initiatives broadly so as to preserve them whenever possible. . ." and to "liberally construe constitutional and statutory provisions that apply to the initiative process."

*Lieutenant Governor of the State of Alaska v. Alaska Fisheries Conservation All., Inc.*, 363 P.3d 105, 108 (Alaska 2015) (quoting *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 898 (Alaska 2003)). Initiatives that deal with public assets "require careful consideration" because of the constitutional prohibition of appropriative initiatives. *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153, 1155 (Alaska 1991). However, this careful consideration does not change the general rule that courts must "preserve the people's right to be heard through the initiative process wherever possible." *Pebble Ltd. P'ship v. Parnell*, 215 P.3d 1064, 1076–77 (Alaska 2009).

Whether a ballot initiative is an unconstitutional appropriation is a question of law. *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016). A court must use its "independent judgment, adopting the rule of law that is most persuasive in light of precedent, reason, and policy." *Pebble Ltd. P'ship*, 215 P.3d at 1072 (Alaska 2009).

The Alaska Supreme Court has developed a two part test to determine whether an initiative is an unconstitutional appropriation. *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 422 (Alaska 2006). First, the court must determine "whether the initiative deals with a public asset." *Id.* Second, the court must determine "whether the initiative would appropriate that asset." *Id.* at 423.

In determining whether an initiative appropriates an asset, a court must look to the "two core objectives" of the prohibition against appropriative initiatives. *Pullen v. Ulmer*, 923 P.2d 54, 63 (Alaska 2006). The first objective is to prevent "give-away programs." *Id.* The second objective is to preserve "legislative discretion by ensuring

that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs." *Pebble Ltd. Partnership*, 215 P.3d at 1075 (*internal quotations and citations omitted*). However, "the prohibition against initiatives that appropriate public assets does not extend to prohibit initiatives that regulate public assets. . . ." *Id.* at 1077. In this context, an initiative "narrows the legislature's range of freedom to make allocation decisions in a manner sufficient to render the initiative an appropriation" if it "would set aside a certain specified amount of money or property for a specific purpose or object in such a manner that is executable, mandatory, and reasonably definite with no further legislative action." *Hughes v. Treadwell*, 341 P.3d 1121, 1126 (Alaska 2015) (quoting *Pebble Ltd. P'ship*, 215 P.3d at 1075).

#### IV. DISCUSSION

##### A. Anadromous Fish Habitat is a Public Asset

The Alaska Supreme Court has held that both water and fish are public assets. *Pebble Ltd. P'ship*, 215 P.3d at 1074 ("[T]he waters of the state qualify as a public asset. . . ."); *Pullen*, 923 P.2d at 61 (" . . . [S]almon are public assets of the state which may not be appropriated by initiative."). Furthermore, both parties and *amicus curiae* agree that anadromous fish habitat is a public asset. Motion 14; State's Opposition to Motion for Summary Judgment 2 [hereinafter State's Opposition]; Council for Alaska Producers' Opposition to Stand for Salmon's Motion for Summary Judgment 2 [hereinafter CAP's Opposition].

##### B. 17FSH2 Does Not appropriate a Public Asset

Having concluded that anadromous fish habitat is a public asset, the court must determine whether 17FSH2 appropriates said public asset. *Anchorage Citizens for Tax Reform*, 151 P.3d at 423. The court must consider the two core objectives of the prohibition against appropriations: to prevent give-away programs and to preserve legislative discretion. *Pebble Ltd. P'ship*, 215 P.3d at 1075.

### *1. 17FSH2 is Not a Give-Away Program*

The prohibition of give-away programs is intended to prevent programs that would "give away state resources to members of the public because such measures could lead to rash, unwise spending that would threaten the state. . . ." *Staudenmaier v. Municipality of Anchorage*, 139 P.3d 1259, 1262 (Alaska 2006). The prohibition targets initiatives which "tempt the voter to prefer his immediate financial welfare at the expense of vital government activities." *Pullen*, 923 P.2d at 63 (*internal citations and quotations omitted*).

Both parties and *amicus curiae* again agree that 17FSH2 is not a give-away program. Motion 15; Motion, ex. 2 at 3; CAP's Opposition 3. *See generally* State's Opposition (omitting any contention or discussion that 17FSH2 is a give-away program). Further, "[n]o provision of the initiative targets any particular group or person or entity to receive state money or property, nor is there any indication that by passing this initiative, the voters would be voting themselves money or property." *Pebble Ltd. P'ship*, 215 P.3d at 1075 (*internal citations and quotations omitted*).

### *2. 17FSH2 Does Not Unconstitutionally Limit Legislative Discretion*



The central disagreement between the parties is whether 17FSH2 is a permissible regulation or an allocation of public assets that impermissibly limits legislative discretion. The Alaska Supreme Court has held that initiatives which regulate public assets are constitutional while initiatives which allocate a public asset in a manner that interferes with legislative control of those assets are unconstitutional appropriations. *Pebble Ltd. P'ship*, 215 P.3d at 1075. To help distinguish between a constitutional regulation and an unconstitutional allocation, the Alaska Supreme Court has further held that courts must consider whether an initiative "set[s] aside a certain specified amount of money or property for a specific purpose or object in such a manner that is executable, mandatory, and reasonably definite with no further legislative action." *Hughes*, 341 P.3d at 1126.

As an initial matter, the court emphasizes that nothing in this order considers the wisdom of 17FSH2 as policy; the court's analysis is limited to whether or not 17FSH2 is a constitutional ballot initiative and is based solely on the text of 17FSH2 and relevant legal authority.

Defendants argue 17FSH2 is an unconstitutional appropriation for two reasons. First, defendants contend a plain reading of 17FSH2 makes it apparent that 17FSH2 would prevent the legislature from approving any development project which is an impermissible limitation of the legislature's discretion to allocate water resources between conservation and development. State's Opposition 22. Second, defendants argue 17FSH2 steers water away from a particular use, mining, which constitutes an unconstitutional appropriation. *Id.* at 24–25.

CAP's arguments are in the same vein but distinct enough to warrant separate discussion. CAP first contends that the line between a permissible regulation and impermissible appropriation is the difference between prohibiting harm and prescribing use, and 17FSH2 prescribes use of water resources. CAP's Opposition 10–12. Next, CAP argues that 17FSH2 would replace existing regulatory statutes and thus unconstitutionally repeals existing appropriations. *Id.* 13–15.

Stand for Salmon conversely argues that 17FSH2 is a constitutional regulation à la *Pebble* rather than an unconstitutional appropriation. They contend that 17FSH2 is a regulation that protects a public asset from harm without proscribing any particular use. Plaintiff's Reply in Support of Motion for Summary Judgment 7 [hereinafter Reply]. Stand for Salmon claims that 17FSH2 follows the model of 07WTR3, the ballot initiative whose constitutionality was upheld in *Pebble*, by setting standards which require further decision making from the legislature to implement. *Id.* In support of this argument, Stand for Salmon notes that many key terms in 17FSH2 such as "adverse effects" and "reasonable time" remain intentionally undefined specifically to preserve legislative discretion. *Id.* at 8.

#### *i. Structure of 17FSH2*

17FSH2 establishes a multi-tiered permitting regime for activities that adversely affect anadromous fish habitat. See 17FSH2. 17FSH2 starts by establishing a rebuttable presumption that most waters are anadromous fish habitat and that any activity which "may use, divert, obstruct, pollute, disturb, or otherwise alter" such waters requires a permit. 17FSH2 §§ 2(a), (c), (e). The initiative then establishes a tiered

permitting system: activities which the ADFG Commissioner determines only have de minimis effects can proceed without a permit; activities which the ADFG Commissioner determines have more than de minimis but less than "significant adverse effects" require either a minor individual anadromous fish habitat permit or a general permit for minor activities depending on the scope of activity; and activities which the ADFG Commissioner determines have "significant adverse effects" require a major anadromous fish habitat permit. 17FSH2 §§ 2(d), 6. One requirement for a major anadromous fish habitat permit is the activity not cause "substantial damage" to the habitat. 17FSH2 § 6 (e)(3) (new § 16.05.885(e)(3)). Running throughout the permitting tiers, 17FSH2 allows, with certain limitations, for mitigation if "significant adverse effects" cannot be avoided. 17FSH2 § 7. Finally, 17FSH2 provides for criminal and civil penalties for violations of the permitting regime. 17FSH2 § 10.

Defendants and CAP argue that 17FSH2 impermissibly limits legislative discretion because the requirements for a major anadromous fish habitat permit would effectively prohibit the legislature from approving any large-scale industrial project reliant on a water source, such as mines, pipelines, or dams. State's Opposition 13. Defendants point to sections 5(b), 6 (e)(3) (new §16.05.885(e)(3)), and 7(a)(1)–(6) as unconstitutional appropriations of legislative discretion. State's Opposition 17–18.

Section 5(b) defines substantial damage:

The commissioner shall find that the proposed activity will cause substantial damage to anadromous fish habitat and fish and wildlife species if, despite the application of scientifically proven, peer reviewed and accepted mitigation measures under AS 16.06.887, the anadromous fish habitat will be adversely affected such that it will not likely recover or be restored within a reasonable period to a level that sustains the water body's, or portion of the water body's

anadromous fish, other fish, and wildlife that depend on the health and productivity of that anadromous fish habitat.

17FSH2 § 5(b).

Section 6(e) of "Major anadromous fish habitat permit" states the requirements for the ADFG Commissioner to issue a major anadromous fish habitat permit:

The commissioner may issue a major permit to an applicant only if. . . (3) the activity, as authorized by the written permit determination, will not cause substantial damage to anadromous fish habitat under AS 16.05.877(b).

17FSH2 § 6(e)(3) (new § 16.05.885(e)(3)).

Section 7(a) limits when permits may be granted:

(a) The commissioner shall prevent or minimize significant adverse effects to anadromous fish habitat. The commissioner shall require a permittee under AS 16.05.885 to implement the permitted activity in a manner that avoids significant adverse effects to anadromous fish habitat or, if significant adverse effects cannot be avoided, to mitigate significant adverse effects to fish and wildlife including anadromous fish habitat under (b) of this section.

Notwithstanding (b) of this section, an anadromous fish habitat permit may not be granted for any activity that will:

- (1) cause substantial damage to anadromous fish habitat under AS 16.05.877(b);
- (2) fail to ensure proper protection of fish and wildlife;
- (3) store or dispose of mining waste, including overburden, waste rock, and tailings in a way that could result in the release or discharge of sulfuric acid, other acids, dissolved metals, toxic pollutants, or other compounds that will adversely affect, directly or indirectly, anadromous fish habitat, fish, or wildlife species that depend on anadromous fish habitat;
- (4) replace or supplement, in full or in part, a wild fish population with a hatchery-dependent fish population;
- (5) withdraw water from anadromous fish habitat in an amount that will adversely affect anadromous fish habitat, fish, or wildlife species; or]
- (6) dewater and relocate a stream or river if the relocation does not provide for fish passage or will adversely affect anadromous fish habitat, fish, or wildlife species.

17FSH2 §§7(a)(1)–(6).

*ii. 17FSH2 Leaves Sufficient Discretion to the Legislature*

Defendants argue a common sense reading of 17FSH2 makes it apparent 17FSH2 provides only illusory legislative discretion, whereas *Stand for Salmon* contends 17FSH2 allows for sufficient legislative discretion in its implementation. As an initial matter, *Stand for Salmon* correctly notes the court must construe 17FSH2 liberally so as to preserve its constitutionality “whenever possible.” *Hughes*, 341 P.3d at 1125.

*Stand for Salmon* contends that the language in 17FSH2 generally mirrors that of 07WTR3 from *Pebble*, and accordingly, the ruling in *Pebble* must control in this case. Motion 16. *Pebble* involved a ballot initiative, 07WTR3, prohibiting any activity which “releases or discharges a toxic pollutant” or “stores or disposes of metallic mineral mining wastes” in such a way that adversely affects “surface or subsurface water or tributaries.” *Pebble Ltd. P’ship*, 215 P.3d at 1069. The Alaska Supreme Court held that 07WTR3 was a constitutional initiative because 07WTR3 left the legislature the discretion to determine what amount of pollutant discharge constituted “adversely affect.” *Id.* at 1077.

Defendants point to 17FSH2’s definition of “substantial damage” as the primary problematic clause. However, 17FSH2’s definition of “substantial damage” leaves the legislature the discretion to determine “accepted mitigation measures,” what level of impact “adversely affects” the habitat, the acceptable probability of recovery for fish habitat to “likely recover,” and what timeframe constitutes recovery within a “reasonable period.” 17FSH2 § 5(b). If 07WTR3 was constitutional because it left the legislature the discretion to define “adversely affect,” 17FSH2 must also be constitutional because it

similarly leaves the legislature discretion in its implementation through the use of a plethora of undefined terms.

Defendants contend that the legislature is unlikely to interpret the various terms in the “substantial damage” clause in a manner that allows any development activity, and the probable effect of 17FSH2 is to force the legislature to prohibit such activity which would constitute an unconstitutional appropriation. State’s Opposition 22–23. As an initial matter, no party has presented any competent evidence about what the effects of 17FSH2 will be, if it even passes. Second, defendants misunderstand the proper construction of ballot initiatives. *Hughes*, 341 P.3d at 1125 ([C]ourts must “construe voter initiatives broadly so as to preserve them whenever possible.”); see also *Pebble Ltd. P’ship*, 215 P.3d at 1072; *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 422 (Alaska 2006). In short, it is enough that the legislature retains enough discretion such that it *could* implement 17FSH2 in a manner allowing industrial activity.

Defendants remaining objections to other sections of 17FSH2 are similarly flawed. Defendants contend section 6(e)(3) of “Major anadromous fish habitat permit” unconstitutionally appropriates legislative discretion because it mandates the ADFG commissioner deny a permit for any activity which substantially damages anadromous fish habitat. As just discussed though, 17FSH2’s “substantial damage” clause does not appropriate legislative discretion. Accordingly, any clause mandating the application of that standard does not appropriate legislative discretion. The exact same reasoning

applies to defendants objections to section 7(a)(1) which also relies on the section 5 definition of "substantial damage."

Defendants also object to sections 7(a)(2)-(6). Sections 7(a)(2), (3), (5), and (6) allow for sufficient legislative discretion for the same reason. Section 7(a)(2) requires the ADFG commissioner to ensure "proper protection" of fish habitat. Section 2 of defines "proper protection" as "protecting anadromous fish habitat from significant adverse effects." 17FSH2 § 2(a). Section 2(b) then provides an eight factor test including "any additional criteria . . . adopted by the commissioner." 17FSH2 § 2(b). Sections 7(a)(3), (5), and (6) require the commissioner to prevent listed activities if they "adversely affect . . . anadromous fish habitat. . . ." 17FSH2 §§ 7(a)(3), (5), (6). While the words are different, none of these sections are unconstitutional appropriations of legislative discretion for the same reason as section 5: all of these clauses have an undefined term requiring legislative interpretation before they can be implemented and enforced. Finally, section 7(a)(4) prohibits the use of hatcheries as mitigation. However, it still allows for the commissioner to approve of any other forms of mitigation.

*iii. 17FSH2 Does Not Impermissibly Steer the Use of Fish Habitat  
Away from a Particular Use*

Defendants argue 17FSH2 steers the use of state waters away from industrial activity which in and of itself is an unconstitutional appropriation. State's Opposition 24–25 (citing *Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, 273 P.3d 1128 (Alaska 2012); *Alaska Action Ctr., Inc. v. Municipality of Anchorage*, 84 P.3d 989 (Alaska 2004)).

*Alaska Action Center* involved an initiative which would have prohibited the development of certain land in Girdwood by declaring it a park. *Alaska Action Ctr., Inc.*, 84 P.3d at 990–991. The Alaska Supreme Court held this was an unconstitutional appropriation because the initiative “designate[d] the use of specified amounts of public assets in a way that encroache[d] on the legislative branch’s exclusive control.” *Id.* at 994.

*Alliance of Concerned Taxpayers* involved an initiative that would have required voter approval of all capital projects which would cost more than one million dollars. *Alliance of Concerned Taxpayers, Inc.*, 273 P.3d at 1130. The Alaska Supreme Court held this initiative was an unconstitutional appropriation because it allowed voters to veto projects previously approved by the legislature. *Id.* at 1138.

Defendants seem to interpret a section of *Alliance of Concerned Taxpayers* suggesting an initiative could be unconstitutional when it “allocates those assets away from a particular group or purpose” as a constitutional bar against any ballot initiative that steers a public asset away from a particular use. State’s Motion 25. This interpretation runs against the plain language of *Alliance of Concerned Taxpayers*. The full quotation from *Alliance of Concerned Taxpayers* reads: “an initiative *may* make an impermissible appropriation not only when it designates public assets for some particular use, but also when it allocates those assets away from a particular group or purpose.” *Id.* at 1138 (*internal emphasis omitted*) (*emphasis added*).

The correct reading of *Alaska Action Center* and *Alliance of Concerned Taxpayers* then is that an initiative which steers an asset away from a particular use can



be an unconstitutional appropriation when it sufficiently limits legislative discretion. This conclusion is bolstered by a comparison to *Pebble*. In *Alaska Action Center*, the legislature had no discretion how to use the land; the initiative mandated it be used as a park. Similarly, the initiative in *Alliance of Concerned Taxpayers* left the legislature with no discretion with regard to capital projects if the voters disapproved of the project. Conversely, in *Pebble*, 07WTR3 left the legislature discretion to decide whether to approve projects based on the legislature's definition of "adversely affect." While steering a public asset away from a particular use may be an unconstitutional appropriation of legislative discretion, such steering alone is insufficient to make an initiative unconstitutional. The key question is whether such steering impermissibly limits legislative discretion. As discussed above, 17FSH2 provides the legislature sufficient discretion.

*iv. 17FSH2 Prohibits Harm to Public Assets While Permitting Their Use*

CAP argues the line between a constitutional regulation and an unconstitutional appropriation in the context of environmental protection is the difference between preventing harm and prescribing use. CAP's Opposition 10–11 (citing *Pebble Ltd. P'ship*, 215 P.3d at 1077 ("07WTR3 . . . prohibits harm to public assets while permitting the use of public assets and exhibiting no explicit preference among potential users.")) CAP contends 07WTR3 was constitutional because it merely prevented harm to state waters whereas 17FSH2 prohibits the use of water without a permit. CAP's Opposition 11. CAP further contends that 17FSH2 is an unconstitutional appropriation because it

explicitly sets a priority for using state waters as anadromous fish habitat. *Id.* (noting that 07WTR3 had no explicit preference among users).

Both arguments are unpersuasive. Using 07WTR3 as an example of an initiative which prevented harm without prohibiting use ignores the mechanism through which 07WTR3 prevented harm: by prohibiting certain uses, namely any mining project that would discharge pollutants above a to-be-determined amount into state waters. As such, 07WTR3 could just as easily be described as an initiative prohibiting the use of state waters for mining discharge, and 17FSH2 could conversely be styled an initiative preventing harm to the public asset of anadromous fish habitat.

CAP's next argument that 17FSH2 favors the use of water as anadromous fish habitat fundamentally misunderstands the initiative. CAP's understanding of 17FSH2 seems to be that water is the public asset and anadromous fish habitat is the use of that asset. The correct taxonomy is that water is a genus of public asset, and anadromous fish habitat is a particular species of public asset within the water genus. Put differently, some water *is* anadromous fish habitat while most water is not; water is *used* as anadromous fish habitat by hatcheries, and 17FSH2 regulates water as the former.

Understanding this distinction, 17FSH2, like 07WTR3, has "no explicit preference among users." *Pebble Ltd. P'ship*, 215 P.3d at 1077. 17FSH2 does not explicitly favor any particular use of anadromous fish habitat between recreational fishing, kayaking, commercial fishing, hatcheries, mining, pipeline, or dams; it only concerns itself with the condition of the water.

*v. 17FSH2 Does Not Repeal Existing Legislative Appropriations*

CAP argues that 17FSH2 repeals existing legislative appropriations for two reasons. First, CAP contends 17FSH2 will necessarily replace existing statutes and in doing so functionally repeal them. To support this proposition, CAP provides an exhaustive comparison of the current regulatory framework and the framework that would be established under 17FSH2. Second, CAP argues 17FSH2 fails to protect existing rights granted to use state waters.

The proposition that any ballot initiative which would replace an existing statute is an unconstitutional repeal of an appropriation must be false if the constitutional right to enact laws through initiatives is to mean anything. CAP has not provided, and likely cannot provide, any legal authority for this incredible proposition. The Alaska Supreme Court across numerous decisions has clearly held that the test for whether a ballot initiative violates Article XI section 7's prohibition against initiatives which "make or repeal appropriations," Alaska Const. Art. XI, § 7, is the two-prong test discussed in section III above: whether the initiative involves a public asset and whether the initiative appropriates that asset. *Anchorage Citizens for Taxi Reform*, 151 P.3d at 422. It is difficult to imagine a ballot initiative that would not unconstitutionally repeal appropriations under the test CAP proposes.

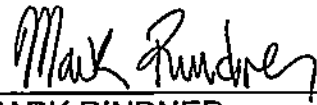
Furthermore, 17FSH2, on its face, protects existing rights and grants of water use. Section 12 of 17FSH2 clearly states that the other provisions in 17FSH2 do not apply to existing "activities, operations, or facilities" that have received "permits, authorizations, licenses, and approvals" before the effective date of the initiative. 17FSH2 § 12.

After a lengthy discussion of the proper construction of 17FSH2 and Alaskan case law relating to ballot initiatives, the court returns to the crux of the matter: defendants argue 17FSH2 will result in an allocation of a state resource based on the State's prediction of what the impact of 17FSH2, if passed, must be. But prediction of the impact of the initiative at this time is pure speculation. The court has no competent evidence regarding the impact of the initiative. Nor does such evidence exist. What the impact of the initiative will be necessarily will depend on what the legislature does in determining what constitutes an adverse effect, what risk to fish population is acceptable, what a reasonable time frame to restore fish habitat is, and thereafter on what mitigation measures are required as part of the permitting process. Because the impact of the initiative can only be determined after legislative action occurs, the court finds, as a matter of law, that the initiative is not an allocation and is thus constitutionally permissible.

## V. CONCLUSION

For the reasons discussed above, the plaintiff's Motion for Summary Judgment is thus granted, and the defendants' Cross Motion for Summary Judgment is denied. Lieutenant Governor Mallott is ordered, in accordance with AS 15.45.090, to print petition booklets for initiative 17FSH2 and make them available to the initiative sponsors no later than October 17, 2017. As this is no longer a decision for a preliminary injunction but rather a final decision on the merits, the court does not believe bond is required at this time.

DATED at Anchorage, Alaska, this 9th day of October 2017.



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MARK RINDNER  
Superior Court Judge

I certify that on 10/09/17 a true  
and correct copy of this order was mailed to:

Strong/Brown  
Demarest/Bakalar  
Fjelstad/Leik

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*Administrative Assistant* (LW)

# Appendix

## AN ACT ENTITLED

“An Act providing for protection of wild salmon and fish and wildlife habitat”

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

\*Section 1. The uncodified law of the State of Alaska is amended by adding a section to read:

### **Alaska Fish Habitat Policy.**

Because wild salmon are critically important to Alaska’s communities, economies and cultures, it is the policy of the State of Alaska to:

- (a) ensure sustainable fisheries for current and future generations by maintaining wild salmon stocks, other anadromous fish species, and important fish and wildlife habitat;
- (b) protect water resources and habitat that support Alaska’s wild salmon and other anadromous fish species;
- (c) ensure that development activities comply with enforceable standards that protect wild salmon, other anadromous fish species, and important fish and wildlife habitat; and
- (d) ensure that the Department of Fish and Game protects the natural fishery resources of Alaska consistent with Article VIII of the Alaska Constitution.

\*Section 2. AS 16.05 is amended by adding a new section to read:

### **Sec. 16.05.867. Fish and wildlife habitat protection standards.**

- (a) The commissioner shall ensure the proper protection of fish and wildlife, including protecting anadromous fish habitat from significant adverse effects.
- (b) When issuing a permit under AS 16.05.867-16.05.901, the commissioner shall ensure the proper protection of anadromous fish habitat by maintaining:
  - (1) water quality and water temperature necessary to support anadromous fish habitat;
  - (2) instream flows, the duration of flows, and natural and seasonal flow regimes;
  - (3) safe, timely and efficient upstream and downstream passage of anadromous and native resident fish species to spawning, rearing, migration, and overwintering habitat;
  - (4) habitat-dependent connections between anadromous fish habitat including surface-groundwater connections;
  - (5) stream, river and lake bank and bed stability;
  - (6) aquatic habitat diversity, productivity, stability and function;
  - (7) riparian areas that support adjacent fish and wildlife habitat; and
  - (8) any additional criteria, consistent with the requirements of AS 16.05.867-AS 16.05.901, adopted by the commissioner by regulation.
- (c) The commissioner is authorized, in accordance with AS 44.62, to adopt regulations consistent with AS 16.05.867-16.05.901. All regulations, administrative actions and other duties carried out under this chapter shall be consistent with and in furtherance of the standards set out in this section.

\* Section 3. AS 16.05.871 is repealed and reenacted to read:

### **Sec. 16.05.871. Fish habitat permit required for certain activities in anadromous fish habitat.**

- (a) Except as provided under AS 16.05.891, a person must obtain an anadromous fish habitat permit under AS 16.05.867 - 16.05.901 before initiating any activity that may use, divert, obstruct, pollute, disturb or otherwise alter anadromous fish habitat. The commissioner may specify in regulation activities that do not require an anadromous fish habitat permit if the activity has only a de minimis effect on anadromous fish habitat.
- (b) The commissioner shall specify in regulation anadromous fish habitat.

- (c) In the absence of a specification under (b) or a site-specific determination by the department under (e) of this section, the commissioner shall presume that a naturally occurring permanent or seasonal surface water body, including all upstream tributaries and segments, is anadromous fish habitat if it is connected to anadromous waters specified under (b) of this section or connected to marine waters.
- (d) The presumption established under (c) of this section applies exclusively to AS 16.05.867-16.05.901.
- (e) The department may conduct a site-specific review at the request of an applicant to determine whether to exclude a water body from the presumption established under (c) of this section. A determination that a water body is not anadromous fish habitat must be supported by the commissioner's written finding and verifiable documentation that it is not anadromous fish habitat. Any site-specific determination must be made available on the department's internet website with public notice provided through the Alaska Online Public Notice System (AS 44.62.175). The commissioner shall adopt regulations specifying how the department shall conduct site-specific reviews.
- (f) In this chapter, "anadromous fish habitat" means a naturally occurring permanent or intermittent seasonal water body, and the bed beneath, including all sloughs, backwaters, portions of the floodplain covered by the mean annual flood, and adjacent riparian areas, that contribute, directly or indirectly, to the spawning, rearing, migration, or overwintering of anadromous fish.

\*Section 4. AS 16.05 is amended by adding a new section to read:

**Sec. 16.05.875. Anadromous fish habitat permit application.**

- (a) An applicant for an anadromous fish habitat permit shall complete an application on a form approved by the department for a permit under AS 16.05.867-16.05.901 and submit the application to the department. The commissioner shall require or collect all information, plans and specifications necessary to assess the proposed activity's potential adverse effects on anadromous fish habitat, and may collect or request additional information to evaluate an application. An applicant shall provide all information required or requested by the commissioner to assess a proposed activity's effects on anadromous fish habitat, including
  - (1) the scope, timing and duration of the proposed activity; and
  - (2) mitigation measures planned for areas of affected anadromous fish habitat.
- (b) Upon receiving a complete fish habitat permit application and any other information requested or collected by the commissioner, the commissioner shall determine whether the proposed activity has the potential to cause significant adverse effects on anadromous fish habitat under AS 16.05.877(a). Before making the determination, the commissioner may work with the applicant in planning the activity to avoid or minimize the activity's potential adverse effects on anadromous fish habitat.
- (c) If the commissioner finds that a proposed activity with proposed conditions and mitigation measures will not cause significant adverse effects to anadromous fish habitat under AS 16.05.877(a), the commissioner shall determine the application is for a minor anadromous fish habitat permit under AS 16.05.883.
- (d) If the commissioner finds that a proposed activity has the potential to cause significant adverse effects to anadromous fish habitat under AS 16.05.877(a), the commissioner shall determine the application is for a major anadromous fish habitat permit under AS 16.05.885.
- (e) The department shall provide public notice of a determination made under this section. The department shall
  - (1) post notice of the determination on the Alaska Online Public Notice System (AS 44.62.175); and
  - (2) make a copy of the application available on the department's website.

\* Section 5. AS 16.05 is amended by adding a new section to read:

**Sec. 16.05.877. Significant adverse effects.**

- (a) The commissioner shall find the potential for significant adverse effects where the activity may, singly or in combination with other factors:
  - (1) impair or degrade any habitat characteristic protected under AS 16.05.867;
  - (2) interfere with or prevent the spawning, rearing, or migration of anadromous fish at any life stage;
  - (3) result in conditions known to cause increased mortality of anadromous fish at any life stage;
  - (4) lower the capacity of anadromous waters to maintain aquatic diversity, productivity or stability; or
  - (5) impair any additional criteria, consistent with the requirements of AS 16.05.867-16.05.901, adopted by the commissioner through regulation.
- (b) The commissioner shall find that the proposed activity will cause substantial damage to anadromous fish habitat and fish and wildlife species if, despite the application of scientifically proven, peer reviewed and accepted mitigation measures under AS 16.05.887, the anadromous fish habitat will be adversely affected such that it will not likely recover or be restored within a reasonable period to a level that sustains the water body's, or portion of the water body's, anadromous fish, other fish, and wildlife that depend on the health and productivity of that anadromous fish habitat.
- (c) In determining whether anadromous fish habitat will recover or be restored within a reasonable period under this section, the commissioner shall account for the life stage, life span, and reproductive behavior of the species of anadromous fish that depend on the habitat adversely affected by the proposed activity using the best available scientific information.
- (d) In determining whether adversely affected anadromous fish species will remain sustainable and recover, the commissioner shall consider likely post-project conditions known to result in the mortality of anadromous fish at any life stage, and known to interfere with or prevent spawning, rearing or migration of anadromous fish using the best available scientific information.

\*Section 6. AS 16.05 is amended by adding new sections to read:

**Sec. 16.05.883. Minor individual anadromous fish habitat permit.**

- (a) A minor anadromous fish habitat permit may be issued by the commissioner for an activity if the commissioner determines that:
  - (1) all application requirements under AS 16.05.875 are met, including the determination that the activity will not cause significant adverse effects to anadromous fish habitat; and
  - (2) public notice has been given as required in AS 16.05.875(e).
- (b) The minor anadromous fish habitat permit under this section must include all permit conditions or mitigation measures required of the permittee under AS 16.05.887.

**Sec. 16.05.884. General permits for minor activities.**

- (a) The commissioner may authorize a general permit on a regional or other geographical basis for similar activities, if the commissioner determines that:
  - (1) the activity will not singly or cumulatively cause significant adverse effects on anadromous fish habitat;
  - (2) the activity is not related to large-scale development;
  - (3) adverse effects can be avoided by meeting certain conditions and stipulations;
  - (4) any conditions or stipulations are mandatory and enforceable; and



- (5) a general permit is in the public interest.
- (b) The commissioner may issue a proposed general permit or a person may petition the commissioner to issue a proposed general permit.
  - (c) A petition shall include a description of the geographic location and the proposed permitted activity and provide information explaining how the activity meets the requirements under (a) of this section. The commissioner shall determine whether to grant or deny a petition within 30 days.
  - (d) When the commissioner makes a determination to propose a general permit under (b) or (c) of this section, the commissioner shall provide public notice of the proposed general permit and provide at least 30 days for receipt of public comments. The commissioner shall hold at least one public hearing if requested by an interested person. If the proposed general permit meets the requirements in (a) of this section, the commissioner may make a determination to issue a general permit.
  - (e) The commissioner may issue a regional or geographical authorization to cover any person conducting an activity under a general permit or require a person to first obtain a written authorization from the department before being covered under the general permit. The department shall make general permit authorizations available through electronic means. The commissioner shall issue a decision on a request for written authorization within 5 work days after receiving the request. The general permit authorization shall set forth enforceable stipulations to avoid adverse effects to anadromous fish habitat.
  - (f) The commissioner shall review a general permit at least every 5 years. The commissioner may make a determination to reissue the general permit if the requirements under (d) of this section are met.
  - (g) The commissioner may amend a general permit at any time to include additional stipulations. The commissioner may rescind a general permit if the commissioner determines that the general permit no longer meets the requirements of (a) of this section. The commissioner shall issue public notice of any proposed permit amendment or the intent to rescind a general permit, and shall provide at least 30 days for receipt of public comments.
  - (h) Notice under this section shall be provided in accordance with AS 16.05.875(e).

**Sec. 16.05.885. Major anadromous fish habitat permit.**

- (a) Unless reconsideration is requested under AS 16.05.889, the commissioner shall, after providing notice under AS 16.05.875(e) of a determination under AS 16.05.875(d), prepare a draft major anadromous fish habitat permit assessment that identifies and describes:
  - (1) the proposed activity;
  - (2) the extent, timing and duration of the potential adverse effects the activity could have on anadromous fish habitat and other fish and wildlife;
  - (3) possible alternatives or modifications to the proposed activity that will avoid or minimize the activity's potential adverse effects on anadromous fish habitat;
  - (4) any permit conditions and mitigation measures that the department may require of the permittee under AS 16.05.887;
  - (5) the amount of the performance bond necessary to restore anadromous fish habitat if the permittee is not in compliance with the permit conditions and mitigation measures required under AS 16.05.887; and
  - (6) the commissioner's determination of whether the proposed activity's significant adverse effects, singly or in combination with other factors:
    - (A) will be prevented or minimized under AS 16.05.887; or
    - (B) will cause substantial damage to anadromous fish habitat under AS 16.05.877(b).

- (b) The commissioner shall collect, or require the applicant to collect, the information needed for permitting. The commissioner may recover fees equal to the cost of services for collecting the information and conducting the fish habitat permit assessment.
- (c) Upon completion of the draft assessment under (a) of this section, the department shall:
  - (1) post notice on the Alaska Online Public Notice System (AS 44.62.175);
  - (2) make a copy of the draft assessment available on the department's website; and
  - (3) provide at least 30 days for public comment.
- (d) After the completion of the comment period established by (c)(3) of this section and evaluation of the comments received, the commissioner shall publish a final assessment and a written permit determination on the department's website. The final assessment must include all of the components required for a draft assessment under (a) of this section. The written permit determination shall set forth the reasons for the decision and the basis for concluding that the requirements of AS 16.05.887 and of (e) of this section are met. The department shall post public notice of the final assessment and permit determination on the Alaska Online Public Notice System (AS 44.62.175) and provide written or electronic notice to each person who commented on the commissioner's determination that the application for the permitted activity was an application for a major permit under AS 16.05.875(d) or on the draft assessment prepared under (a) of this section for the activity.
- (e) The commissioner may issue a major permit to an applicant only if:
  - (1) the public notice period required under (c) of this section is complete;
  - (2) any permit conditions and mitigation measures under AS 16.05.887 are mandatory and enforceable;
  - (3) the activity, as authorized by the written permit determination, will not cause substantial damage to anadromous fish habitat under AS 16.05.877(b);
  - (4) the applicant, if required, provides the bond required by (g) of this section; and
  - (5) a request for reconsideration of the commissioner's final assessment and written determination under (d) of this section is not timely received under AS 16.05.889.
- (f) If request for reconsideration of the commissioner's final assessment and written determination issued under (d) of this section is timely received under AS 16.05.889(a), the commissioner shall issue a major permit for the activity when the commissioner
  - (1) denies the request for reconsideration or issues a new determination under AS 16.05.889(c); and
  - (2) finds that the requirements of (e) of this section have been met.
- (g) After the commissioner issues a written permit determination under (d) of this section, the applicant shall file with the commissioner, on a form furnished by the commissioner, a performance bond in an amount established by the commissioner payable to the State of Alaska and conditioned on faithful performance of the requirements of this chapter and the permit. The commissioner may not issue a permit until an applicant files the bond in an amount sufficient to ensure compliance with permit terms and the completion of the mitigation measures determined necessary by the commissioner under AS 16.05.887 and included in the written permit determination posted under (d) of this section. The performance bond may be a corporate surety bond issued by a corporation licensed to do business in the state or a personal bond secured by cash or its equivalent. The commissioner may not accept a bond executed by the applicant without separate surety.
- (h) A governmental entity or federally recognized tribe is exempt from the bonding requirements of this section.
- (i) A permittee may not transfer or assign authority to conduct an activity that requires a permit under this section to another person without:
  - (1) the written approval of the commissioner; and
  - (2) posting a performance bond for the transferee or assignee as required under (g) of this section, unless the transferee or assignee is exempt under (h) of this section.
- (j) In this section "federally recognized tribe" has the meaning given in AS 23.20.520.

\*Section 7. AS 16.05 is amended by adding a new section to read:

**Sec. 16.05.887. Permit conditions and mitigation measures.**

- (a) The commissioner shall prevent or minimize significant adverse effects to anadromous fish habitat. The commissioner shall require a permittee under AS 16.05.885 to implement the permitted activity in a manner that avoids significant adverse effects to anadromous fish habitat or, if significant adverse effects cannot be avoided, to mitigate significant adverse effects to fish and wildlife including anadromous fish habitat under (b) of this section. Notwithstanding (b) of this section, an anadromous fish habitat permit may not be granted for an activity that will:
  - (1) cause substantial damage to anadromous fish habitat under AS 16.05.877(b);
  - (2) fail to ensure the proper protection of fish and wildlife;
  - (3) store or dispose of mining waste, including overburden, waste rock, and tailings in a way that could result in the release or discharge of sulfuric acid, other acids, dissolved metals, toxic pollutants, or other compounds that will adversely affect, directly or indirectly, anadromous fish habitat, fish, or wildlife species that depend on anadromous fish habitat;
  - (4) replace or supplement, in full or in part, a wild fish population with a hatchery-dependent fish population;
  - (5) withdraw water from anadromous fish habitat in an amount that will adversely affect anadromous fish habitat, fish, or wildlife species; or
  - (6) dewater and relocate a stream or river if the relocation does not provide for fish passage or will adversely affect anadromous fish habitat, fish, or wildlife species.
- (b) When establishing permit conditions for an activity, the commissioner shall, in order of priority, require a permittee under AS 16.05.883, AS 16.05.884, or AS 16.05.885 to mitigate adverse effects by taking one or more of the following actions:
  - (1) limit adverse effects of the activity on anadromous fish habitat by changing the siting, timing, procedure, or other manageable qualities of the activity;
  - (2) if the adverse effects of the activity cannot be prevented under (1) of this subsection, minimize the adverse effects of the activity by limiting the degree, magnitude, duration, or implementation of the activity, including implementing protective measures or control technologies; and
  - (3) if the activity cannot be implemented in a manner that prevents adverse effects to anadromous fish habitat under this subsection, restore the affected anadromous fish habitat.
- (c) Permit conditions and mitigation measures under this section may not offset the activity's adverse effects by restoring, establishing, enhancing, or preserving another water body, other portions of the same water body, or land.
- (d) The commissioner shall require an applicant to employ the best available, scientifically supported techniques to mitigate adverse effects under (b) of this section.
- (e) The department may adopt regulations consistent with AS 16.05.867 - 16.05.901 establishing appropriate permit conditions and mitigation measures applicable to activities subject to permitting requirements under AS 16.05.883, AS 16.05.884 or AS 16.05.885.

\*Section 8. AS 16.05 is amended by adding a new section to read:

**Sec. 16.05.889. Reconsideration of determinations.**

- (a) Within 30 days after the date of a determination of the commissioner under AS 16.05.871(e), AS 16.05.875(c) or (d), AS 16.05.883, AS 16.05.884(d) or (f), or AS 16.05.885(d), any interested person may request that the commissioner reconsider the determination. A request for reconsideration must be in writing.
- (b) Within 30 days after receiving a request for reconsideration, the commissioner shall issue a written determination granting or denying the request. If the commissioner does not act on

the request for reconsideration within 30 days after receiving the request, the request is denied. If the commissioner grants the request for reconsideration, the commissioner will issue a final determination within 30 days.

- (c) Unless the commissioner orders a remand for further agency proceedings, the commissioner's determination upon reconsideration is the final administrative decision for purposes of appeal to the superior court under AS 44.62.560. A person shall initiate an appeal within 30 days after the date that the final determination is mailed or otherwise distributed, or the date that the request for reconsideration is considered denied by the commissioner's failure to act on the request, whichever is earlier.

\*Section 9. AS 16.05 is amended by adding new sections to read:

**Sec. 16.05.894. Notification of violation.**

When the commissioner finds, after investigation, that a person is violating a provision of AS 16.05.867-16.05.901, a regulation adopted under AS 16.05.867-16.05.901, a permit condition or stipulation imposed under AS 16.05.884, or a permit condition or mitigation measure imposed under AS 16.05.883 or AS 16.05.885, the commissioner shall notify the permittee of the nature of the violation and:

- (1) order that the violation be stopped; or
- (2) if the violation cannot be stopped, order the permittee to prevent or mitigate the adverse effects of the violation on anadromous fish habitat, fish and wildlife, and other adversely affected resources in a manner consistent with AS 16.05.867-16.05.901.

\*Section 10. AS 16.05.901(a) is amended to read:

**Sec. 16.05.901. Penalty for violations of AS 16.05.867-16.05.901 [16.05.896].**

- (a) A person who, with criminal negligence, violates or permits a violation of AS 16.05.867-16.05.901, a regulation adopted under AS 16.05.867-16.05.901, a permit condition or stipulation imposed under AS 16.05.884, a permit condition or mitigation measure imposed under AS 16.05.883 or AS 16.05.885, or an order issued under AS 16.05.894 is guilty of a class A misdemeanor and is punishable as provided in AS 12.55. In this subsection, "criminal negligence" has the meaning given in AS 16.81.900(a).

\*Section 11. AS 16.05.901 is amended by adding new subsections to read:

- (c) Notwithstanding (a) of this section, if a person or governmental agency fails to notify the commissioner of an activity for which a permit is required under AS 16.05.867-16.05.901 and the activity causes material damage to anadromous fish habitat or, by neglect or noncompliance with permit conditions and stipulations imposed under AS 16.05.884 or permit conditions or mitigation measures imposed under AS 16.05.883 or AS 16.05.885, causes material damage to anadromous fish habitat, the person or governmental agency is guilty of a class A misdemeanor and is punishable as provided in AS 12.55.
- (d) Each day that a violation under this section occurs or continues is a separate violation.
- (e) A person who violates or permits a violation of AS 16.05.867-16.05.901, or a regulation adopted under AS 16.05.867-16.05.901, a permit condition or stipulation imposed under AS 16.05.884, a permit condition or mitigation measure imposed under AS 16.05.883 or AS 16.05.885, or an order issued under AS 16.05.894 is liable, after notice and hearing, for a civil penalty in an amount not to exceed \$10,000 to be assessed by the commissioner. In determining the amount of the civil penalty, the commissioner shall consider:
- (1) the character and degree of injury to anadromous fish, other fish, and wildlife habitat;

- (2) the degree of intent or negligence of the respondent in causing or permitting the violation;
  - (3) the character and number of past violations caused or permitted by the respondent; and
  - (4) if the information is available, the net economic savings realized by the respondent through the violation.
- (f) If a respondent violates an order issued under AS 16.05.894, the attorney general, upon the request of the commissioner, may seek an injunction requiring the respondent to suspend an activity, in whole or in part, until the respondent complies with the order.
  - (g) If a respondent violates an order issued under AS 16.05.894 that requires the respondent to repair or correct damage, the commissioner may proceed to repair or correct the damage using state agency employees or contractors and the respondent shall be liable for the cost of the repair. The commissioner shall deliver to the respondent an itemized statement of expenses incurred.
  - (h) The supreme court shall establish by order or rule a schedule of bail amounts for violations under (a) of this section that allow the disposition of a citation without a court appearance. The bail amount for a violation must be stated on the citation.

\*Section 12. AS 16.05 is amended by adding new sections to read:

**Sec. 16.05. Scope.**

The provisions of this Act do not apply to existing activities, operations, or facilities that have received all required federal, state, and local permits, authorizations, licenses, and approvals for activities adversely affecting anadromous fish habitat, on or before the effective date of this Act, until expiration or termination of the user's permit, authorization, license, or approval.

\*Section 13. AS 16.05.851 and AS 16.05.896 are repealed.

AS 16.05.851 and AS 16.05.896 are repealed.

\*Section 14. The uncodified law of the State of Alaska is amended by adding a section to read:

The provisions of this Act are independent and severable. If any provision of this Act is found to be invalid or unconstitutional, the remainder of this Act shall not be affected and shall be given effect to the fullest extent possible.