



THE STATE
of **ALASKA**
GOVERNOR SEAN PARNELL

**Department of
Fish and Game**

OFFICE OF THE COMMISSIONER
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October 8, 2012

Mr. Bob Shavelson
Director of Advocacy
Cook Inletkeeper
3734 Ben Walters Lane
Homer, AK 99603

RE: Appeal and Hearing Request

Dear Mr. Shavelson:

On September 28, 2012, I received your appeal under 5 AAC 95.920 and request for a hearing pursuant to AS 44.62.370, dated September 25, 2012, regarding the Department of Fish and Game, Division of Habitat's (Habitat) Fish Habitat and Special Area Permit FH 12-II-0196-SA.

I am denying your appeal and request for a hearing because, pursuant to AS 16.05.871, AS 44.62.330, and 5 AAC 95, only the applicant has the right to appeal a permit decision under the Alaska Administrative Procedure Act (APA), AS 44.62.330 – 44.62.630, and a hearing under AS 44.62.370.

Permit FH 12-II-0196-SA was issued under the authority of AS 16.05.871 and 5 AAC 95. Alaska Statute 16.05.871(d) provides:

(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. (emphasis added).

The term "person" as used within AS 16.05.871(d) is congruent with the term "applicant" or "permittee." The right to request a hearing under AS 44.62.370 is limited to the specific proponent of the construction or use and does not extend to third parties. Further, under AS 16.05.871, the right to a hearing is only triggered upon a determination by the commissioner that the person's plans and specifications are insufficient for the proper protection of fish and game.

Similarly, while 5 AAC 95.920 provides that, “An interested person may initiate an appeal of a decision made under this chapter in accordance with the provisions of AS 44.62.330 – 44.62.630 by requesting a hearing under AS 44.62.370,” the Department of Fish and Game does not interpret this regulation as providing an appellate right under the APA, AS 44.62.330 – 44.62.630, or a right to a hearing under AS 44.62.370, to individuals other than the permit applicant.

Pursuant to AS 44.62.330(a)(30), the APA only applies to the “Department of Fish and Game as to functions relating to the protection of fish and game under AS 16.05.871.” For the procedure of an agency not listed in AS 44.62.330(a), AS 44.62.330(b) applies the APA “only as to those functions to which AS 44.62.330 – 44.62.630 are made applicable by the statutes relating to that agency.” The statutory authority for 5 AAC 95.920 applicable to Special Area Permits in Critical Habitat Areas is AS 16.20.530. AS 16.20.530 does not make applicable the procedures of the APA, nor does it authorize a right to a hearing under AS 44.62.370. Therefore, to extend 5 AAC 95.920 to give the right to an APA hearing to third parties, i.e., non-applicants, would be inconsistent with Department of Fish and Game authority and the APA.

In sum, AS 16.05.871 is the only Fish and Game statute that authorizes a hearing under AS 44.62.370, and by its terms, the right to a hearing is limited to “the person or government agency” who applied for the Fish Habitat permit.

This is a final decision of the department. Based upon Rules 601 and 602 of the Rules of Appellate Procedure, you have 30 days from the date of this letter to appeal this decision to the Superior Court.

Sincerely,

A handwritten signature in blue ink that reads "Cora Campbell". The signature is written in a cursive, flowing style.

Cora Campbell
Commissioner

cc: Randy Bates, Director, Habitat, Juneau