



THE STATE
of **ALASKA**
GOVERNOR SEAN PARNELL

Department of Fish and Game

OFFICE OF THE COMMISSIONER

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April 12, 2013

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APR 15 2013

Ms. Valerie Brown
Counsel for Petitioners
Trustees for Alaska
1026 W. 4th Avenue, Suite 201
Anchorage, AK 99501

Re: Amended Petition to Prohibit Surface Coal Mining Operations in Salmon Streams and to Provide Public Notice and Comment on Fish Habitat Permit Applications and Decisions

Dear Ms. Brown:

On March 13, 2013, Trustees for Alaska submitted an amended petition under the Administrative Procedures Act (APA), AS 44.62.220(1)-(3), requesting that the Alaska Department of Fish and Game (ADF&G) adopt new regulatory language. Specifically, the Petitioners request that ADF&G amend Title 5, Chapter 95 of the Alaska Administrative Code to add a new section which reads:

5 AAC 95.XXX. Coal mining activities prohibited in anadromous waterways. (a) The Commissioner shall not approve surface coal mining operations within a river, lake or stream or parts of them that have been specified as important for the spawning, rearing, or migration of anadromous fish pursuant to AS 16.05.871(a) and adopted in the "Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes" at 5 AAC 95.011(a).

(b) "surface coal mining operations" is given the same meaning as in AS 27.21.998(17)(a).

The Petitioners also request that the ADF&G amend Title 5, Chapter 95, Article 1 to add a new section:

5 AAC 95.XXX. Public Notice and Comment for Fish Habitat Applications. (a) The department's habitat division will publish public notice of all completed applications for permits, permit amendments or permit renewals under AS 16.05.871 and the provisions adopted by reference at 5 AAC 95.011.

(b) The Commissioner's office will publish public notice of all permit decisions made under AS 16.05.871 and the provisions adopted by reference at 5 AAC 95.011 and referenced in paragraph (a) above.

(c) "public notice" for subsections (a) and (b) is accomplished by publication on the Alaska Online Public Notice System and the department's official internet site. Any interested person will be allowed to comment at the address provided for in the public notice for a period of 20 days from the date of the public notice.

ADF&G has reviewed the petition and hereby denies it, in its entirety, under the authority of AS 44.62.230. The rationale for denying the petition follows.

The petitioners request that ADF&G add a new section to 5 AAC 95 that specifically prohibits the approval of surface coal mining operations within a catalogued anadromous waterbody. Under AS 16.05.871, ADF&G already has the authority to prohibit an activity in a catalogued anadromous waterbody, as it can deny a permit for a specific activity if the plans and specifications for the activity are deemed insufficient for the proper protection of fish and game. Experienced ADF&G biologists review proposed activities individually, on their own merits, and determine whether sufficient protection for fish and game is afforded in accordance with AS 16.05.871. ADF&G permit denials, when issued, are based on the activities' site-specific proposed scope of work and the ADF&G conclusion that impacts to anadromous fish resources and their habitat cannot be sufficiently and properly protected. For these reasons, ADF&G does not see the need to add the proposed section to the regulations.

The petitioners also request that ADF&G add new subsections to 5 AAC 95 to establish a public notice and public comment process for Division of Habitat permit applications and decisions issued under AS 16.05.871 and the provisions adopted by reference at 5 AAC 95.011. Article VIII, Section 10, of the Alaska Constitution requires prior public notice only for disposals or leases of state lands, or interests therein. AS 16.05.871 does not require nor provide for public notice prior to the activities authorized under that statute, or a regulation adopted under that statute. Thus, the legislature has interpreted the Constitution as not requiring the public notice and opportunity for public comment that petitioners seek for permitting activities under the authority of AS 16.05.871. Further, the proposed regulations are in direct conflict with AS 16.05.891 for emergency situations and are contrary to the State's actions to streamline the permitting functions of agencies. Additional rationale follows:

- Requiring a 20 day public comment period on all permits issued under AS 16.05.871 will increase the average review time from 7.1 days (FY12) to at least 27.1 days.
- The additional review time would substantially delay projects during construction where permit modifications are common and approvals are needed in a timely manner.
- The additional public notice and comment processes would require additional staff and funding, neither of which ADF&G has available without compromising other departmental efforts.
- For all large projects, there are multiple public notice provisions and comment opportunities already in place and required by other state or federal agencies. During these other processes, ADF&G has and avails itself of the opportunity to read, assess, and review public input.

Sincerely,



Cora Campbell
Commissioner

cc: Randy Bates, Director, Habitat, ADF&G