



March 23, 2021

VIA EMAIL ONLY

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Representative Josiah Patkotak, Chairman
Representative Grier Hopkins, Vice-Chair
Alaska House Resources Committee
State Capital Building Room 124
Juneau, Alaska 99801

Dear Mr. Chairman & Vice-Chairman:

I. Introduction

I am writing to the House Resources Committee because you recently received incorrect information regarding fish habitat protection from Alaska Department of Fish & Game (ADFG) Commissioner Doug Vincent-Lang, and because the Alaska Department of Natural Resources (DNR) has proposed new water management rules that will make it harder for Alaskans to protect our wild fish resources.

Accordingly, it's important for the House Resources Committee to understand the intersection between these issues, and to provide the legislative oversight and guidance needed to ensure Alaska maintains basic safeguards for its water resources and wild fish habitat.

This letter addresses:

1. Alaska's water management system, and how proposed DNR rule changes will deny Alaskans the right to keep water in our streams and lakes to protect fish and wildlife;
2. Alaska's primary legal tool for protecting wild salmon from development impacts (Anadromous Fish Act (aka "Title 16" or "Fish Habitat Permits") and how recent

testimony by the ADFG Commissioner to the House Resources Committee incorrectly portrayed the state's implementation of the law;

3. How Alaskans are currently denied the right to know about or comment on projects that will harm or destroy fish habitat; and
4. The importance of legislative oversight to ensure our state agencies comply with the Alaska Constitution to protect our state's magnificent fish and water resources for current and future generations.

This letter concludes by requesting one or more House Resources Committee hearings to better understand and oversee the implications of DNR's proposed rulemaking for instream flow rights that will affect the constitutional rights of all Alaskans.

II. Background on Alaska Water Law

Alaska water law follows the prior appropriation doctrine, which holds that the first person to secure water for a beneficial use has a superior right over anyone who comes after them ("first in time, first in right").

Water rights can be broken into two basic categories depending on whether water is kept in a stream or taken out of it:

- Instream flow reservations keep water in a stream or other waterbody to protect fish, wildlife, recreation or other uses. Under current Alaska laws and rules, Alaska Native Tribes, groups, government agencies and individual persons may apply for and hold the water right certificate needed to reserve sufficient volumes of water in our streams and lakes to protect fish, wildlife and recreation.
- Out of stream diversions – or water withdrawals and impoundments – allow a user to take water out of a stream or waterbody for beneficial uses, including industrial, domestic and other uses. These "consumptive uses" can be held by corporations, individuals, Alaska Native Tribes and government agencies.

So, if you hold a water right – whether it's an instream flow or a water withdrawal – you have a legally enforceable right to stop anyone from harming your water use if they come along after you've secured your water right.

III. DNR Proposed Rules Deny Alaskans the Right to Keeper Water in Fish Streams & Lakes

The Alaska Department of Natural Resources (DNR) recently proposed [new rules](#) at 11 AAC 93 that would strip away the rights currently held by Alaska Native Tribes, groups and individuals to reserve water in our streams and lakes to protect fish and wildlife.

These instream flow reservations provide a vital tool for Alaskans to ensure we retain sufficient water in our waterbodies to support our wild salmon and other fish and wildlife. The process to apply for and secure instream flow reservation is technical, time consuming and expensive, yet under DNR's proposal, Alaskans seeking to protect our water and fish resources would still have to bear the burden and cost for applying for instream flow reservations, yet could not actually hold the water right. Instead, DNR would hold the water right certificates for all instream flow reservations for which an Alaskan Tribe, group or individual applies.

This scenario presents an inherent conflict where on the one hand, DNR is the primary state agency charged with resource development,¹ and on the other hand, it would provide lead oversight under the new rules on water rights intended to protect fish and wildlife. Furthermore, the proposed rule includes a [zero fiscal note](#), despite the fact DNR will be charged with additional duties to manage instream flow rights. Together, these factors raise serious questions about DNR's ability and intent to effectively manage instream flows to protect fish and wildlife.

Importantly, DNR's proposed rules do not change the fact Outside corporations and others will continue to be allowed to withdrawal or impound water from Alaskan waterbodies for industrial uses. Accordingly, DNR's proposed rules seek to deny Alaskans the right to reserve water in a stream to protect fish, but DNR is retaining rules that allow large corporations to remove water from these same waterbodies, with potentially lethal impacts to fish.

This disparate treatment implicates constitutional due process and equal protection concerns, including Article VIII, Section 17, which states:

Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

IV. The Anadromous Fish Act

¹ See, e.g., AS 27.05.010(b): "The department is the lead agency for all matters relating to the exploration, development, and management of mining, and, in its capacity as lead agency, shall coordinate all regulatory matters concerning mineral resource exploration, development, mining, and associated activities. Before a state agency takes action that may directly or indirectly affect the exploration, development, or management of mineral resources, the agency shall consult with and draw upon the mining expertise of the department."

The Alaska Legislature adopted the Anadromous Fish Act (Title 16) shortly after statehood, and it is the primary tool to protect our wild salmon from the impacts of development.

Unfortunately, the law is vague: its only operative language protecting fish habitat places an affirmative duty on ADFG to issue development permits unless ADFG finds project application materials “insufficient for the proper protection of fish and game.” AS 16.05.871(d).

Importantly, there is no definition of “proper protection” anywhere in statute or rule, and as a result, ADFG has enormous discretion to issue permits that may destroy salmon habitat.

Furthermore, the Alaska Administrative Procedures Act – which governs public notice and comment requirements for executive branch agencies – does not apply to Title 16 Fish Habitat permits. That means Alaskans never have an opportunity to know about – let alone comment on – the many Title 16 permits issued each year – even if those permits harm or destroy salmon habitat. ADFG simply processes all permit regarding impacts to fish habitat internally, without any knowledge by or input from Alaska Native, small businesses and others.

This opaque process flies in the face of the Alaska Constitution, which makes every Alaskan the collective “owner” of our fish and water resources:

“Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.” – Alaska Constitution, Article VIII, Section 3

V. ADFG Has Issued Permits that Result in Stream Dewatering & Fish Kills

On February 24, 2021, Alaska Department of Fish & Game Commissioner Doug Vincent-Lang testified before your Committee that ADFG would “never” allow a fish stream to be dewatered. While I’m confident the Commissioner was simply uninformed, the fact is that ADFG has issued permits to remove all water from a stream, and to kill the fish supported by it.²

Importantly, Alaskans only learned about ADFG’s authorizations to destroy wild fish habitat because Inletkeeper took the time and expense needed to submit a Public Records Act request. Otherwise, this information – similar to all the other projects and activities for which ADFG issues Title 16 permits – would have been locked away in government files.

VI. Conclusion

As Governor Wally Hickle rightly noted, Alaska is the “owner state” because our constitutional framers wisely decided to make all Alaskans the collective owners of our vast natural resource

² See, e.g., Fish Habitat Permits for the proposed Donlin Gold Mine ([FH18-III-0191](#) & [FH18-III-0190](#)) (“Flow in American Creek, below the pit area to the mouth of Crooked Creek, will decrease significantly beginning two years before gold production, and will decrease to no flow by year 5 of gold production.” FH18-III-0191).

wealth, including our fish and water resources under the Common Use Clause of Alaska Constitution, Article VIII, Section 3.

Yet as discussed above:

- DNR has proposed new rules that violate the common use and equal application clauses of the Alaska Constitution by treating Alaskans who want to reserve water in streams to protect salmon differently than corporations that want to take water out of fish streams;
- The Anadromous Fish Act – as implemented by ADFG – fails to provide Alaskans with the right to know about or comment on activities that may or will destroy salmon habitat.
- ADFG has issued Fish Habitat Permits that will result in fish kills, which does not comport with the notion of “proper protection” found in the Anadromous Fish Act or the reservation of fish and wildlife found in the Alaska Constitution.

As climate change and human development continue to unfold across Alaska, the threats to our wild fish and water resources will only increase. Yet under current and proposed rules, Alaska appears woefully equipped to address these important challenges. ADFG’s opaque permitting system for authorizing fish habitat impacts, coupled with DNR’s proposed rules to stop Alaskans from reserving water in our streams and lakes, raise serious concerns whether Alaska can effectively manage its magnificent but stressed fish resources into the future.

Accordingly, we request one or more hearings on DNR’s proposed rules on instream flow management, so the Legislature can fulfill its appropriate oversight function by protecting the constitutional rights of Alaskans to healthy fish and water resources.

Thank you and please feel free to contact me if you have questions or would like to arrange a meeting at 907.299.3277 or bob@inletkeeper.org.

Yours for Cook Inlet,



Bob Shavelson
Inletkeeper