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Attorneys for Plaintiffs

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

COOK INLETKEEPER, KACHEMAK  
BAY CONSERVATION SOCIETY,  
THE ALASKA QUIET RIGHTS, and  
FRIENDS OF KACHEMAK BAY  
STATE PARK

Plaintiffs,

v.

COMMISSIONER DOUGLAS  
VINCENT-LANG, in his official  
capacity, and the STATE OF ALASKA,  
DEPARTMENT OF FISH AND GAME.

Defendants.

Case No.: 3AN-21- 05627 CI

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COMPLAINT

Plaintiffs Cook Inletkeeper, Kachemak Bay Conservation Society, the Alaska Quiet Rights Coalition, and Friends of Kachemak Bay State Park (collectively “Plaintiffs”) hereby files this complaint against Douglas Vincent-Lang, Commissioner for the State of Alaska, Department of Fish and Game (“Commissioner”), and the State of Alaska, Department of Fish and Game (“Department”; together “Defendants”), by stating and alleging the following:

## I. INTRODUCTION

1. This case is a challenge to the Commissioner’s repeal of 5 AAC 95.310, the prohibition of personal watercraft (“PWC”) in the Kachemak Bay and Fox River Flats Critical Habitat Areas (“CHAs”).

2. By ignoring the Department’s own expert opinions and guidance, and by having a predetermined outcome before formally initiating the proposed regulatory change, Defendants have violated Alaska’s Administrative Procedure Act (“APA”), have acted without statutory authority, and have violated article VIII of the Alaska Constitution.

## II. PARTIES

3. Plaintiff Cook Inletkeeper is a 501(c)(3) nonprofit whose mission is to protect the Cook Inlet watershed and the life it sustains.

4. Plaintiff Kachemak Bay Conservation Society is a 501(c)(3) nonprofit whose mission includes protecting the environment of the Kachemak Bay region by encouraging sustainable use and stewardship of its natural resources.

5. Plaintiff Alaska Quiet Rights Coalition is a 501(c)(3) nonprofit whose mission is to maintain and restore natural sounds and natural quiet in Alaska for the benefit of people and wildlife.

6. Plaintiff Friends of Kachemak Bay State Park is a 501(c)(3) nonprofit whose mission is to enhance, preserve, and protect the resources of Kachemak Bay State Park.

7. Defendant Douglas Vincent-Lang is being sued in his official capacity as the Commissioner for the Alaska Department of Fish and Game.

8. Defendant Department of Fish and Game is an agency of the State of Alaska, and is charged with managing the Kachemak Bay and Fox River Flats Critical Habitat Areas.

### III. JURISDICTION AND VENUE

9. This court has jurisdiction over this dispute, as well as the ability to enter a declaratory judgment and provide injunctive relief, under AS 22.10.020 and AS 44.62.300.

10. Venue is proper in the Third Judicial District as both Defendants maintain offices and may be served within Anchorage, Alaska, and the CHAs at issue are situated within the Third Judicial District.

### IV. RELEVANT FACTUAL ALLEGATIONS

11. The Alaska legislature established the Fox River Flats CHA in 1972, and the Kachemak Bay CHA in 1974. The purpose of these CHAs — located near Homer, Alaska — are “to protect and preserve habitat areas especially crucial to the

perpetuation of fish and wildlife, and to restrict all other uses not compatible with that primary purpose.” AS 16.20.500.

12. The legislature also created the Kachemak Bay State Park in 1970 and the Kachemak Bay State Wilderness Park in 1972, and placed limitations on oil and gas leases in Kachemak Bay in 1976 after finding “that Kachemak Bay is an area of extraordinary abundance and diversity of marine life that has provided, and will continue to provide in the future, a basis for one of the state’s most important commercial fisheries.” AS 38.05.184(a).

13. In 1993, the Department — along with other state and federal agencies — established the Kachemak Bay and Fox River Flats Critical Habitat Areas Management Plan (“Management Plan”) “to provide consistent long-range guidance to the Alaska Department of Fish and Game and other agencies involved in managing the critical habitat areas.” The creation of the Management Plan required a substantial amount of public input and stated that any future revisions would similarly require a public process. The Management Plan also explicitly stated that all future “activities of the Alaska Department of Fish and Game will also be directed by this plan.”

14. The Management Plan was formally adopted by regulation (5 AAC 95.610) in 1994. That regulation provides that the Department “will use [the Management Plan] in determining whether proposed activities in the critical habitat areas are compatible with the protection of fish and wildlife, their habitats, and public use of the critical habitat areas.”

15. Starting in 1999, the Department and other state agencies considered whether to prohibit PWC in the Kachemak Bay and Fox River Flats CHAs. The Department, along with the Alaska Department of Natural Resources, ultimately enacted regulations to prohibit PWC in the CHAs (5 AAC 95.310) and other areas that are part of the Management Plan, effective May 3, 2001.

16. Approximately 15 years later, in 2016, the Department began a review of its ban on PWC in the CHAs as part of a review of the Management Plan.

17. After an extensive literature review of approximately 140 scientific papers that had not been reviewed before the original ban was enacted, the Department concluded in May 2017 that “there is no new information that would warrant rescinding the prohibition” of PWC within the CHAs. The Department also noted that “most of the concerns that led to the adoption of the PWC prohibition in [the] . . . CHAs in 2001 continue to be valid today.” The Department emphasized that “the nature of PWC, especially the capability to execute rapid changes in speed and direction in nearshore shallow waters, continues to have a high potential to impact habitats, marine organisms, wildlife, and other traditional user groups and those cannot be easily mitigated.” Finally, the Department noted that a draft of its memorandum had been “circulated to affected staff in all [D]epartment divisions . . . and this recommendation was widely supported.”

18. The Commissioner accepted the appointment to his position by Alaska Governor Michael J. Dunleavy in January 2019.

19. Later in January 2019, then-Acting Commissioner Douglas Vincent-Lang reiterated that the Department would only consider a repeal of the ban on PWC in the CHAs through the Management Plan revision process.

20. But by the summer of 2019, the Governor's Office became involved in the process and pushed the Department to repeal the nearly 20-year ban on PWC in the CHAs.

21. At a Management Plan revision planning team meeting in October 2019, Rick Green — Special Assistant to the Commissioner — called in along with two members of a PWC organization to propose removing the PWC ban in the CHAs. After a discussion, the Management Plan revision planning team decided not to recommend repealing the prohibition of PWC in the CHAs.

22. In November 2019, a longtime Department employee tasked with administering the Management Plan wrote to the interagency management team that “[t]he governor’s office has decided to repeal the PWC prohibition for Kachemak Bay and Fox River Flats CHAs. The change will be conducted as a stand-alone regulation change . . . , and will be done independently of the ongoing plan revision.”

23. This decision to pursue a stand-alone regulation change outside of the Management Plan goes against the Department’s longstanding policy, which had been codified in regulation for approximately 25 years, and was a complete change in the Defendants’ position from earlier in 2019.

24. On December 2, 2019, the Department first provided notice of a proposed repeal of the prohibition of PWC in the CHAs. And unlike typical comment

periods, all comments and questions had to go to Special Assistant Rick Green — the same special assistant to the Commissioner who had promoted the proposed repeal in October 2019 — instead of the Department employees responsible for the Management Plan. Public comments were due by January 6, 2020.

25. On December 5, 2019, Rick Green admitted that the proposed repeal of the prohibition of PWC within the CHAs was made at the request of members of the PWC club.

26. On December 10, 2019, Rick Green wrote that there are “no written findings” to support the proposed repeal. Instead, he claimed that proposed repeal of the prohibition of PWC within the CHAs was the result of “verbal consultation[s] and deliberations with our staff biologists and our habitat biologists at the [Department] . . . over the past 11 or 12 months.”

27. On December 11, 2019, Rick Green admitted that the proposed repeal had been requested by both the PWC club and The Alaska Outdoor Council. Rick Green is a lifetime member of The Alaska Outdoor Council.

28. Prior to the Department’s proposed repeal of the prohibition of PWC within the CHAs, the Commissioner stated that he had not even reviewed his own Department’s 2017 memorandum on the scientific literature supporting the continued prohibition.

29. On December 16, 2019, partially in response to the outcry of stakeholders seeking an additional 90-day comment period, the Department provided

supplemental notice to extend the public comment period by 15 days to January 21, 2020.

30. Many public comments opposed the repeal of 5 AAC 95.310, including multiple resolutions adopted by the Homer City Council. Many of these comments asked if there was any scientific basis for the Department's change in position from when the issue was last studied in 2017 and whether there was any new scientific data to support this change. No substantive response was ever provided by Defendants.

31. One of the proponents for repealing the ban on PWC within the CHAs informed Rick Green of her plans to violate the ban during the summer of 2020, and followed up by informing Rick Green that she had, in fact, violated 5 AAC 95.310. Rick Green never reported her or forwarded her name for prosecution.

32. On November 20, 2020, the Commissioner repealed 5 AAC 95.310, which had prohibited PWC in the Kachemak Bay and Fox River Flats CHAs.

33. When repealing the prohibition on PWC in the CHAs, Defendants ignored their own internal review of the scientific literature from 2017 and the Management Plan (both in its existing form and in the new plan being drafted). In fact, the Department — directly contradicting its determination in 2017 — claimed that a ban on PWC within the CHAs is “not supported by any scientific studies.”

34. When repealing the prohibition of PWC within the CHAs, the Department failed to increase funding for enforcement or education, despite the new inconsistency with the continued prohibition of PWC within the nearby Kachemak Bay



State Park and the tidelands for the City of Homer, and the lack of a clear boundary between the CHAs, that State Park, and Homer's submerged lands.

35. The Department also failed to consider how repealing the prohibition of PWC within the CHAs could cause negative economic impacts.

36. On December 10, 2020, a designee for the Lieutenant Governor filed the Commissioner's repeal of 5 AAC 95.310. The repeal became effective thirty days later on January 9, 2021.

## V. COUNT I

### Violation of the Administrative Procedure Act (Predetermined Outcome)

37. Plaintiffs reallege and incorporate by reference all previous and subsequent paragraphs as set forth herein.

38. After meeting with PWC advocates, members of the administration and the Department became determined to repeal the prohibition of PWC in the CHAs.

39. PWC advocates and Special Assistant Rick Green directly coordinated with one another to repeal the prohibition of PWC in the CHAs.

40. The Department decided to repeal the prohibition of PWC in the CHAs before even providing notice of a proposed regulatory change.

41. The decision to repeal 5 AAC 95.310 originated in the Governor's Office, not the Department.

42. At the request of the Governor's Office, Defendants sought to push through a quick repeal by avoiding the Department's longstanding public process

associated with the Management Plan. This decision to push for a stand-alone repeal was only made after Special Assistant Rick Green tried and failed to repeal 5 AAC 95.310 through a revision of the Management Plan in October 2019.

43. The Department reversed its position on PWC within the CHAs in less than a year's time, and without any factual or scientific support. Previously, the Department had strongly supported the continued PWC prohibition within the CHAs because of the extensive scientific literature and the goals of the longstanding Management Plan.

44. The Department's minimal and vague responses to public comments indicate that public comments were not actually properly considered. For example, the following vague response — with the same misspelling — was the Department's only response to hundreds of public comments: "Commissioner and assistant to the commisssioner [sic] both read and considered comment in final decision."

45. Longtime Department staff members involved with the Management Plan were excluded from the repeal process to facilitate Defendants' predetermined outcome of removing the prohibition of PWC within the CHAs. In fact, on December 2, 2019, the Department instituted a "gag rule" to prevent Department employees from speaking with the public about the proposed repeal. The only person the public could speak to about the proposed repeal, Special Assistant Rick Green, has no scientific or other expertise in the matter.

46. Because the Department did not engage in a meaningful public process when considering the repeal of 5 AAC 95.310, and instead had a predetermined

outcome before the regulatory review process even began, Defendants' repeal action violates the APA.

## VI. COUNT II

### **Violation of the Administrative Procedure Act (Arbitrary; Ignored Scientific Data and Review)**

46. Plaintiffs reallege and incorporate by reference all previous and subsequent paragraphs as set forth herein.

47. The Department underwent a substantial review of scientific literature regarding PWC in the CHAs in 2017.

48. The result of that review was a determination that the Department would maintain the regulation prohibiting PWC in the CHAs.

49. The Department did not review any additional scientific studies since the large review of scientific literature concluded in 2017 to support a repeal of the PWC prohibition in the CHAs. The Department did not cite any new scientific study to support the repeal.

50. Despite being unable to point to any new scientific information, the Department reversed its position in late-2019 to support repealing the prohibition of PWC in the CHAs.

51. The Department, ignoring its comprehensive review of the scientific literature in 2017, and additional scientific studies submitted by the public, "justified" its repeal of 5 AAC 95.310 by claiming that a ban on PWC within the CHAs is "not supported by any scientific studies."

52. By ignoring its own scientists and science submitted during the public comment period regarding PWC, the Department has arbitrarily repealed the prohibition on PWC in the CHAs.

53. The Department conducted no research and did no analysis on the possible impact the repeal of the prohibition on PWC within the CHAs may have on the fisheries, wildlife, and existing public uses within the CHAs.

54. Because the Department acted arbitrarily in reversing its position on a PWC prohibition in the CHAs, and promoted this regulatory change without regard and in direct contradiction to its own prior substantial scientific literature review, Defendants have violated the APA.

## VII. COUNT III

### **Violation of the Administrative Procedure Act (Inconsistent with other Regulations)**

55. Plaintiffs reallege and incorporate by reference all previous and subsequent paragraphs as set forth herein.

56. The Management Plan has been adopted by reference through regulation (5 AAC 95.610) since 1994.

57. 5 AAC 95.610 requires that the Department consider the Management Plan “in determining whether proposed activities . . . are compatible.”

58. The Department, ignoring this regulation, decided to move forward with a repeal of the PWC prohibition in the CHAs outside of public process established by the Management Plan.

59. Neither the current Management Plan nor any proposed revisions to the Management Plan support a repeal of the prohibition on PWC within the CHAs.

60. Repealing the PWC prohibition within the CHAs — outside of the Management Plan’s public process — is inconsistent with the longstanding policy of the Department, which had most recently been reaffirmed by the Commissioner himself in January 2019.

61. Because the Department ignored the Management Plan, incorporated through 5 AAC 95.610, Defendants violated the APA by failing to consider whether the repeal of 5 AAC 95.310 would be consistent with the Management Plan. AS 44.62.060(b)(1).

#### VIII. COUNT IV

##### **Repeal Lacked Statutory Authority (Violation of AS 16.20.510)**

62. Plaintiffs reallege and incorporate by reference all previous and subsequent paragraphs as set forth herein.

63. The Alaska legislature established CHAs throughout Alaska in the 1970s “to protect and preserve habitat areas especially crucial to the perpetuation of fish and wildlife, and to restrict all other uses not compatible with that primary purpose.” AS 16.20.500.

64. The Kachemak Bay and Fox River Flats CHAs were established by the legislature in 1974 and 1972 respectively. AS 16.20.590; AS 16.20.580.

65. Alaska Statute 16.20.510 provides that only the Board of Fisheries and the Board of Game “shall adopt regulations . . . for conservation and protection purposes” within CHAs.

66. Neither the Board of Fisheries nor the Board of Game were involved in the process for repealing the prohibition of PWC in the CHAs. Instead, the Department itself proposed the repeal of 5 AAC 95.310, after direction from the Governor’s office.

67. Because the Commissioner lacked the statutory authority to propose regulation changes within the CHAs, the repeal of 5 AAC 95.310 is invalid.

## IX. COUNT V

### Unconstitutional Appropriation Favoring PWC (Violations of the Alaska Constitution)

68. Plaintiffs reallege and incorporate by reference all previous and subsequent paragraphs as set forth herein.

69. Article VIII, section 2 of the Alaska Constitution provides: “The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.”

70. Article VIII, section 14 of the Alaska Constitution provides: “Free access to the navigable or public waters of the State . . . shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.”:

71. Article VIII, section 15 of the Alaska Constitution gives the State the power “to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fisherman and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.”

72. By repealing 5 AAC 95.310, Defendants have violated Alaskans’ constitutional right to the use and enjoyment of the CHAs by unconstitutionally prioritizing the rights of PWC users over all other Alaskans.

73. By repealing 5 AAC 95.310, Defendants have ignored the legislature’s statutory directive to protect the CHAs for the benefit of all Alaskans, now and in the future.

### PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court:

- A. Declare that Defendants’ repeal of the prohibition on PWC within the Kachemak Bay and Fox River Flats CHAs (5 AAC 95.310) violates the Alaska Administrative Procedure Act, Article VIII of the Alaska Constitution, and was executed without statutory authority;
- B. Declare that Defendants’ repeal of 5 AAC 95.310 is invalid;
- C. Find that Plaintiffs are public interest litigants seeking the enforcement of constitutional rights in this proceeding;
- D. Award Plaintiffs their full costs and attorneys’ fees as required by AS 09.60.010(c); and
- E. Grant any and all additional relief to which Plaintiffs are entitled.

Respectfully submitted this 4<sup>th</sup> day of May, 2021

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