

# MEMORANDUM

State of Alaska  
Department of Law

**To:** The Honorable Mike Menge  
Commissioner  
Alaska Department of Natural  
Resources

**Date:** January 11, 2006

**File No.:** 661-06-0264

**Telephone:** 269-5235

**From:** Steven G. Ross  
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**Subject:** DNR Deputy Commissioner's  
Authority under AS 41.14.840  
to Require the Submission and  
Approval of Plans and  
Specifications for a Fishway or  
Other Device for Efficient Fish  
Passage Prior to Construction of  
Any Dam or Other Obstruction  
Across a Fish Stream

On behalf of the Alaska Department of Natural Resources (DNR) Office of Habitat Management and Permitting (OHMP),<sup>1</sup> your office has requested our opinion on whether the deputy commissioner of DNR has authority under AS 41.14.840 to require the submission and approval of plans and specifications for a fishway or other device for efficient fish passage prior to the construction of any dam or other obstruction across a stream frequented by fish.<sup>2</sup> We have also considered the following related question: Under what circumstances is it appropriate for the deputy commissioner to exercise discretion under the statute?

As discussed below, it is our opinion the DNR deputy commissioner has this authority under AS 41.14.840 and that the deputy commissioner has the ability to exercise discretion under the statute so long as that discretion is exercised consistent with the overarching statutory responsibility to ensure efficient fish passage and protect fish.

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<sup>1</sup> OHMP is an office within DNR that works to preserve the state's fishery resources by protecting the areas fish need to complete their life cycles. In 2003, fishway permitting and fish habitat permitting were transferred from the Alaska Department of Fish and Game (ADF&G), Habitat and Restoration Division, to OHMP. See Executive Order No. 107 (2003).

<sup>2</sup> The statute actually uses the word *built*, which appears to have a broader definition than the noun *construction* or the verb *construct*. See *The American Heritage Dictionary of the English Language* 250, 404-05 (3d ed. 1992).

## BACKGROUND

OHMP issues Fishway Permits under AS 41.14.840 (formerly AS 16.05.840)<sup>3</sup> for activities that affect fish passage in fish streams,<sup>4</sup> and Fish Habitat Permits under AS 41.14.870 (formerly AS 16.05.870)<sup>5</sup> for activities within or affecting anadromous fish waterbodies. These fish protection statutes are designed to maintain fish passage in all fish streams and protect anadromous fish and their habitat.<sup>6</sup>

The importance of ensuring efficient fish passage with respect to those activities which result in physical obstructions in Alaskan streams predates statehood. As early as 1919, the Territory of Alaska had laws that protected fish passage in streams used by fish for spawning and migration, and provided that the Territorial Fish Commissioners, as part of their permitting process, could require adequate fishways, fish ladders, or other means for fish passage prior to construction of any dam or other obstruction in any waters of the

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<sup>3</sup> Originally enacted as part of sec. 30, ch. 94, SLA 1959.

<sup>4</sup> As referred to herein, fish streams, or streams frequented by fish, include streams frequented by resident fish, anadromous fish, or both, including unclassified anadromous fish streams. *See infra* text accompanying note 37.

<sup>5</sup> Originally enacted as part of sec. 31, ch. 94, SLA 1959.

<sup>6</sup> Examples of activities in fish streams that require a permit under AS 41.14.840 include installation of a culvert or other drainage structure; stream realignment or diversion; construction, placement, deposition or removal of any material or structure; and construction of a dam or impoundment. Examples of activities in anadromous waterbodies that require a permit under AS 41.14.870 include construction; road crossings; gravel removal; mining; water withdrawals; the use of vehicles or equipment in the waterway; stream realignment or diversion; bank stabilization; blasting; and the placement, excavation, deposition, or removal of any material or structure in the waterbody. *See* <http://www.dnr.state.ak.us/habitat/FHpermits.htm> (last visited Dec. 21, 2005).

Territory.<sup>7</sup> This fish permitting scheme, which remained throughout Alaska's territorial days,<sup>8</sup> was later incorporated into Alaska's comprehensive Fish and Game Code enacted in 1959,<sup>9</sup> and is now found in AS 41.14.840 (hereinafter "section 840").

Section 840 has remained essentially unchanged since statehood,<sup>10</sup> and currently provides:

***Fishway required.*** If the deputy commissioner considers it necessary, every dam or other obstruction built by any person across a stream frequented by salmon or other fish shall be provided by that person with a durable and efficient fishway and a device for efficient passage for downstream migrants. The fishway or device or both shall be maintained in a practical and effective manner in the place,

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<sup>7</sup> See secs. 1-6, ch. 58, SLA 1919. Section 1 made it unlawful to "obstruct, divert or pollute any of the waters [of Alaska] . . . utilized by salmon," or "to erect any dam, barricade or obstruction of any kind . . . so as to prevent, retard, or interfere with the free ingress or egress of salmon into such waters . . . without first making application therefor and obtaining a permit or license from the Territorial Fish Commissioners." Section 2 provided that if the purpose of the project was the development of power or other natural resources, the permit applicant was required "to construct and maintain adequate fish ladders, fish-ways or other means" to ensure fish passage "over, around or through such dams, obstructions or diversions in the pursuit of the propagation or spawning process." Section 3 made it a misdemeanor to violate the statute and set fines ranging from \$100-\$500.

<sup>8</sup> In 1949, secs. 39-2-31 – 39-2-35, CLA 1949 replaced the earlier 1919 fish protection law (*see supra* note 7), but retained essentially the same permitting requirements.

<sup>9</sup> See sec. 30, ch. 94, SLA 1959; *see also* sec. 31, ch. 94, SLA 1959 (covering Fish Habitat Permits, now found in AS 41.14.870). The Fish and Game Code of Alaska established the Department of Fish and Game. Secs. 3 and 4, ch. 94, SLA 1959. Under the Fish and Game Code, the commissioner of Fish and Game was charged with the duty of "managing, protecting, maintaining, improving, and extending the fish and game resources of Alaska in the interest of the economy and general well-being of Alaska, and . . . shall have all necessary power to accomplish the foregoing . . ." Sec. 4, ch. 94, SLA 1959.

<sup>10</sup> Originally enacted as part of sec. 30, ch. 94, SLA 1959, section 840 was renumbered as AS 16.05.840 in 1962, and as AS 41.14.840 in 2003.

form, and capacity the deputy commissioner approves, for which plans and specifications shall be approved by the deputy commissioner upon application. The fishway or device shall be kept open, unobstructed, and supplied with a sufficient quantity of water to admit freely the passage of fish through it.

It is this statute that DNR has asked us to interpret and specifically address whether the deputy commissioner can require the approval of plans and specifications for a fishway or other fish passage device prior to construction of any dam or obstruction across a fish stream.

### **DISCUSSION**

Since statehood, OHMP and its predecessor, ADF&G Habitat and Restoration Division, have consistently interpreted section 840 to require (1) prior notification of uses or activities in or across fish streams in the state,<sup>11</sup> and (2) the submission and approval of plans and specifications for a fishway or other fish passage device prior to the construction of any dam or other obstruction across a fish stream to ensure efficient fish passage.

Nevertheless, for at least the past two decades, some interests have disputed whether OHMP can require such notice and approval under section 840. They claim that either OHMP has no permitting authority under section 840, or that OHMP's permitting authority under section 840 is not triggered until after a dam or other obstruction has actually been built across a stream. Some also contend that the amendment of AS 16.05.870 (now AS 41.14.870) in 1962 limited OHMP's permitting authority under section 840 to only those dams or other obstructions built across streams containing anadromous fish. Finally, some contend that OHMP may simply ignore section 840 and not even consider whether fish passage is necessary. None of these arguments has any merit.

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<sup>11</sup> For example, in order to streamline the permitting process for industry under section 840, OHMP accepts applications for Fishway Permits based on either (1) a completed General Waterway-Waterbody permit application, or (2) information contained in other state or federal agency applications or notices, such as a DNR/Division of Forestry Detailed Plan of Operation, a DNR/Division of Mining, Land and Water (DMLW) Land Use Permit application, a DNR/DMLW Annual Placer Mining Application, and U.S. Army Corps of Engineers public notices.

## **I. Applicable Standard for Statutory Interpretation**

Whether OHMP has permitting authority under section 840, and whether OHMP can require advance notification and the submission of plans and specifications for fishways or other fish passage devices prior to construction of a dam or stream obstruction, are matters of statutory interpretation.<sup>12</sup> In interpreting section 840, the language, purpose, and legislative history of the statute must be considered “in an attempt to give effect to the legislature’s intent, with due regard for the meaning the statutory language conveys to others.”<sup>13</sup> When the statute in question is a conservation law, such as the fish protection statute involved here, it must be liberally construed to achieve its

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<sup>12</sup> Since 1963, the Attorney General’s Office has issued several opinions that generally recognize the state’s permitting authority under the statutory predecessors of AS 41.14.840 and AS 41.14.870. *See* 1987 Inf. Op. Att’y Gen. at 1 (Aug. 11; 663-87-0410) (concluding that the federal government must comply with the permitting requirements of sections 840 and 870); 1986 Inf. Op. Att’y Gen. at 1 (Jun. 27; 663-86-0315) (recognizing ADF&G’s permitting authority under section 840 over obstructions built across streams frequented by fish and under section 870 over anadromous waters); 1984 Inf. Op. Att’y Gen. at 4 (Sept. 17; 566-072-85) (recognizing the permit requirements of section 870 as a legitimate exercise of the state’s police power, the “obvious purpose” of which “is to promote the protection and management of the state’s valuable anadromous fishery resources”); 1984 Inf. Op. Att’y Gen. at 1 (May 1; 166-346-83) (discussing procedures to follow when making inspections to ensure compliance with permits issued under AS 16.05.870); 1982 Inf. Op. Att’y Gen. at 5 (Nov. 19; 366-178-83) (“AS 16.05.870 allows [the Fish and Game Commissioner] . . . to condition projects in anadromous fish stream[s] on the obtaining of a permit”) 1982 Inf. Op. Att’y Gen. at 1 (Mar. 4; J-66-839-81) (concluding ADF&G has permitting jurisdiction under section 840 “over activities in streams ‘frequented by fish’ if those latter activities would result in the physical obstruction of that stream”); 1963 Inf. Op. Att’y Gen. at 1 (Jan. 3) (concluding section 870 is a permitting statute with respect to specified anadromous waterbodies). However, no previous legal opinion from this office has addressed whether the state can require permit approval under section 840 prior to the construction of a dam or obstruction across a fish stream, or under what circumstances it is appropriate for the deputy commissioner to exercise discretion under the statute.

<sup>13</sup> *Martinez v. Cape Fox Corp.*, 113 P.3d 1226, 1230 (Alaska 2005).

intended purpose.<sup>14</sup> Furthermore, an agency's "continuous, long-standing" interpretation of a statute is entitled to substantial deference.<sup>15</sup> In addition, the opinions of the Attorney General, while not controlling, are entitled to some deference in matters of statutory construction as well.<sup>16</sup>

## **II. The Purpose, History, and Language of Section 840 Support OHMP's Interpretation of the Scope of Its Permitting Authority**

The fact that section 840 is a permitting statute is not open to serious debate.<sup>17</sup> Therefore, we turn our analysis to the issue of whether OHMP has permitting authority under section 840 prior to the construction of a dam or other obstruction across a fish stream. We begin by examining the legislature's purpose in enacting the statute. A fair reading of section 840 evinces a legislative purpose to ensure efficient fish passage in Alaska's streams and protect fish (and fish habitat) from disturbance or destruction caused by dams or other stream obstructions. As a means of protecting fish streams, the legislature provided permitting authority in the statute so that the state could require a person or entity to provide plans and specifications for a fishway or other fish passage device prior to construction or creation of any dam or stream obstruction. The

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<sup>14</sup> *Kenai Peninsula Fisherman's Coop. Ass'n v. State*, 628 P.2d 897, 903 (Alaska 1981). Similarly, when construing a permitting statute intended mainly as a regulatory measure (as opposed to a revenue-raising measure), courts are concerned principally with effectuating the regulatory objectives of the statute. *See* 3A Norman J. Singer, *Statutes and Statutory Construction* § 66:10, at 89-90 (6<sup>th</sup> ed. 2003).

<sup>15</sup> *Bullock v. State, Dep't of Cmty. & Reg'l Affairs*, 19 P.3d 1209, 1210, 1215 (Alaska 2001) (affirming the superior court's decision to defer to the Department of Revenue's interpretation of a tax statute, after concluding the Department's interpretation was "continuous, long-standing, and not arbitrary or capricious" and therefore "afforded great weight"); 2B Norman J. Singer, *Statutes and Statutory Construction* § 49:05, at 52-53 (6<sup>th</sup> ed. 2000) ("Ordinarily, courts should give great weight to the frequent, consistent, and long-standing construction of a statute by an agency charged with its administration . . . .").

<sup>16</sup> *Bullock*, 19 P.3d at 1216.

<sup>17</sup> Since statehood, ADF&G/Habitat and Restoration Division and now DNR/OHMP have consistently administered section 840 as a permitting statute, and the Attorney General's office has issued numerous opinions concluding that section 840 is a permitting statute. *See supra* note 12.

longstanding interpretation by various state agencies of the scope of section 840's permitting authority, which requires advance notification of uses or activities in fish streams, and review and approval of plans and specifications prior to construction of a dam or stream obstruction, is consistent with this purpose.

Although there is no direct legislative history that provides guidance in interpreting section 840, the historical context in which the statute was enacted supports OHMP's interpretation of the scope of its permitting authority as well. At the time of statehood, Alaska's salmon fisheries were considered its greatest natural resource.<sup>18</sup> In fact, Alaska's statehood movement was aimed in large part at retaking management control of Alaska's fishery resources from the federal government,<sup>19</sup> and rebuilding

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<sup>18</sup> Ernest Gruening, *The Battle for Alaska Statehood* 88 (1967).

<sup>19</sup> As delegate Taylor stated during the Proceedings of the Alaska Constitutional Convention:

Now, we have good authority that the [fish] traps are the destroyers of the fish. We have the figures to show, and right in the paper today, the smallest catch of fish in Alaska in 50 years was in 1955; and we have it upon good authority that the traps were responsible for that depletion of fish, because Mr. McKay, Secretary of the Interior, has recommended to Congress that a ten-year elimination period for fish traps be put into effect.

*See* 5 Proceedings of the Alaska Constitutional Convention 3221 (Jan. 26, 1956). Delegate Smith endorsed delegate Taylor's remarks by stating:

[I]t is my opinion that this one issue [the abolition of fish traps] is the thing which gave the greatest impetus to the statehood movement which resulted in the calling of this Convention. This issue is so basic and so fundamental that I simply cannot conceive of any written history of Alaska without a full and complete coverage of the history of the impact of the fish traps on one of the greatest natural resources ever known to man. This impact has been so great that this resource is much closer to final destruction than most of us realize.

*See* 5 Proceedings of the Alaska Constitutional Convention 3224 (Jan. 26, 1956). William A. Egan, Alaska's first elected governor, echoed these sentiments in his message to the Joint Assembly of the First Alaska State Legislature, Second Session:

salmon stocks depleted by commercial over-harvest and the use of the much-hated fish traps.<sup>20</sup> As a result, provisions which required the conservation of all natural resources for the maximum benefit of Alaskans and the maintenance of fish resources on the sustained yield principle were made a part of the Alaska Constitution.<sup>21</sup> In implementing these constitutional provisions, the Alaska legislature in 1959 enacted a comprehensive Fish and Game Code which included, among other things, the statutory predecessor to section 840<sup>22</sup> and a statute prohibiting the operation of fish traps within the state.<sup>23</sup> This history suggests that the primary purpose of the Fish and Game Code, and section 840 in particular, is and was to protect the state's fishery resources. OHMP's interpretation of

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On January 1 of this year, Alaska's Department of Fish and Game was handed the depleted remnants of what was once a rich and prolific fishery. From a peak of three-quarters of a billion pounds in 1936, [salmon] production dropped in 1959 to its lowest in 60 years.

On these ruins of a once-great resource, the department must rebuild. Our gain is that we can profit by studying the destructive practices, mistakes and omissions of the past.

The revival of the commercial fisheries is an absolute imperative. The livelihood of thousands of fishermen and the very existence of many communities scattered along thousands of miles of continental and island coastline depends upon improvement of the fisheries. To this end we will give our best efforts.

1960 House J. Supp. 4-5 (Supplement to House and Senate Journals; January 26).

<sup>20</sup> The unsustainable use of fish traps (and other salmon-fishing gear) in Alaska waters by out-of-state salmon cannery interests was viewed by many Alaskans as being responsible for the precipitous decline in Alaska's salmon population prior to statehood. See Gerald E. Bowkett, *Reaching for a Star; The Final Campaign for Alaska Statehood* 12 (1989); Claus-M. Naske & Herman E. Slotnick, *Alaska: A History of the 49th State* 102 (2d ed. 1987). See also Ernest Gruening, *supra* note 18.

<sup>21</sup> Alaska Const. art. VIII, §§ 2 and 4.

<sup>22</sup> See *supra* note 3.

<sup>23</sup> Sec. 1, ch. 17, SLA 1959.

section 840, requiring advanced notification and permitting for fishways or other fish passage devices prior to construction of any dam or stream obstruction, is entirely reasonable especially when viewed from this historical perspective.

The language used in section 840 also supports OHMP's interpretation of the scope of its permitting authority. For example, the statute's reference to "plans and specifications" connotes a prospective focus, since the terms "plans" and "specifications" generally refer to a scheme "worked out beforehand" or a diagram of something "to be built."<sup>24</sup> The requirement that "plans and specifications shall be approved by the deputy commissioner upon application"<sup>25</sup> strongly suggests that the application for the permit and the deputy commissioner's consideration of the plans and specifications must take place before construction. This common sense interpretation is consistent with generally recognized custom and practice in industry that plans and specifications are submitted to a permitting authority for approval before construction begins, not after the construction is completed. Moreover, the phrase "[i]f the deputy commissioner considers it necessary"<sup>26</sup> implies that the deputy commissioner determines the necessity of providing fish passage prior to construction of a dam or other obstruction. In short, interpreting this statutory language in light of section 840's intended purpose compels the conclusion that section 840 is intended to give OHMP advance notification of uses or activities in fish streams and permitting authority prior to construction of a dam or other obstruction across such streams.

### **III. An Interpretation of Section 840 Which Limits OHMP to Post-construction Permitting Authority Lacks Merit**

Despite the obvious purpose of section 840 (i.e., to ensure efficient fish passage and protect fish), and OHMP's common sense, reasonable interpretation of its permitting

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<sup>24</sup> The term *plan* is defined as "[a] scheme, program, or method *worked out beforehand* to accomplish an objective," and "[a] *proposed or tentative project* or course of action." It is also defined as "[a] drawing or diagram made to scale showing the structure or arrangement of something"). *American Heritage Dictionary, supra note 2* at 1383 (emphasis added). The term *specifications* is defined as "[a] detailed, exact statement of particulars, especially a statement prescribing materials, dimensions, and quality of work *for something to be built, installed, or manufactured.*" *Id.* at 1730 (emphasis added).

<sup>25</sup> AS 41.14.840.

<sup>26</sup> *Id.*

authority under the statute, some have suggested that OHMP's permitting authority under section 840 is limited to fishways for dams or stream obstructions which have already been built or constructed. They reach this conclusion by narrowly focusing on the statute's use of the word *built* in its first sentence, which provides that "every dam . . . *built* by any person . . . shall be provided . . . with a durable and efficient fishway."<sup>27</sup> They argue that the word *built* connotes the past tense,<sup>28</sup> and that therefore OHMP's permitting authority under section 840 cannot be triggered until a dam or obstruction is already built or constructed. This narrow reading of the statute must be flatly rejected for several reasons.

First, the word *built* in the statute is not used as a past tense verb, but rather as a past participle or verbal adjective<sup>29</sup> which allows alternative temporal readings.<sup>30</sup> Thus, evincing the same syntactical equivalence, the word *built* can just as easily refer to dams

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<sup>27</sup> AS 41.14.840.

<sup>28</sup> When used as a verb, *built* is the past tense of *build*. However, *built* is also the past participle of *build* and an adjective. *American Heritage Dictionary, supra* note 2 at 250.

<sup>29</sup> See *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1013 (D.C. Cir. 1999) (holding that "[s]tanding alone, the phrase 'payments made' hardly conveys a single meaning" and "instead of embodying a retrospective inquiry into the amount of outlier payments that *have been* made, the phrase 'payments made under this paragraph' might just as plausibly reflect a prospective command . . . about how to structure outlier thresholds for payments *to be* made in advance of each fiscal year") (emphasis in original); see also *Lang v. United States*, 133 F. 201, 203-04 (7th Cir. 1904) ("[t]he word begun" was not a past tense verb, but rather a "past participle, performing solely the function of a connective – the verbal adjective, qualifying any prosecutions in mind, *pending or future* . . . [and that] *in employment of the word 'begun'* . . . *Congress presumably, was looking to the future, as well as the pa[s]t.*") (emphasis added).

<sup>30</sup> *County of Los Angeles*, 192 F.3d at 1013; see also *Regions Hosp. v. Shalala*, 522 U.S. 448, 458 (1998) (quoting *Tulane Educ. Fund v. Shalala*, 987 F.2d 790, 796 (D.C. Cir. 1993) ("the phrase 'recognized as reasonable,' by itself, does not tell us whether Congress means to refer . . . to action already taken or to give directions on actions about to be taken.")).

being built, to be built, and that have been built.<sup>31</sup> Such an interpretation holds true to the maxim of statutory construction that when interpreting a statute, a court “must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”<sup>32</sup>

Second, while direct legislative history in this case is lacking, section 840 must be construed in light of its intended purpose.<sup>33</sup> Interpreting the statute to allow pre-construction review and approval of plans and specifications for dams or stream obstructions and related fishways or fish passage devices fulfills that purpose by ensuring efficient fish passage. Limiting OHMP’s permitting authority until after construction of a dam or obstruction is completed does not.

Third, limiting OHMP’s authority to post-construction permitting of fishways for dams or stream obstructions already built produces an absurd result and defeats the usefulness of the statute, a result disfavored by the Alaska Supreme Court.<sup>34</sup> From a practical standpoint, without the benefit of notice, it is unlikely that OHMP will be able to readily discover the location of every dam or obstruction built across a fish stream because it would require OHMP’s limited personnel to literally patrol and search tens of thousands of streams across the state to locate the existing dam or other obstruction and then make the determination of whether a fishway or other fish passage device was necessary. If OHMP determined that a fishway or device was necessary, OHMP would have to locate the owner, take legal action, and possibly require costly removal and/or modification of the existing dam or obstruction with a durable and efficient fishway or

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<sup>31</sup> From a practical standpoint, when *built* is read in the context of section 840 and its objective to ensure efficient fish passage, it would apply most often to dams or obstructions to be built or constructed in the future.

<sup>32</sup> *United States Nat’l Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)); see also *Romann v. State, Dep’t of Transp. & Pub. Facilities*, 991 P.2d 186, 190 (Alaska 1999) (“every word and phrase in the statute has meaning and must be given effect”); *Martinez*, 113 P.3d at 1230 (when interpreting a statute, one must consider its language, purpose, and legislative history).

<sup>33</sup> *Bullock*, 19 P.3d at 1214.

<sup>34</sup> See *Martinez*, 113 P.3d at 1230 (the court “will ignore the plain meaning of an enactment . . . where that meaning leads to absurd results or defeats the usefulness of the enactment”) (quoting *Davenport v. McGinnis*, 522 P.2d 1140, 1144 n.15 (Alaska 1974)).

other fish passage device. Until then, the fish populations in those waters would be left totally unprotected.<sup>35</sup> This narrow interpretation of the statute would also require an Alaskan court to conclude that at statehood, the legislature actually intended to withhold stream protection for fish and fish habitat until an already-constructed dam or obstruction was discovered by the state permitting authority. Since protecting Alaska's fishery resources was a driving force to statehood, we consider it highly unlikely that Alaska's first state legislature intended this result.

Fourth, limiting OHMP's authority to post-construction permitting is also inconsistent with prevailing Alaska case law which liberally construes fish and game laws to achieve their intended purpose.<sup>36</sup> Interpreting section 840 to require review of a proposed dam or stream obstruction prior to construction not only protects resident fish from the potential adverse impacts of dams or stream obstructions, but also protects all anadromous fish streams, including fish populations in the tens of thousands of unclassified anadromous fish streams not yet included in the *Catalog of Waters Important for the Spawning, Rearing or Migration of Anadromous Fishes*.<sup>37</sup> This interpretation of section 840 also complements AS 41.14.870, which gives OHMP permitting authority over activities affecting classified anadromous fish streams.

In sum, we believe that when section 840 is read as a whole, viewed from a historical perspective, and liberally construed to accomplish its intended purpose, it is entirely reasonable and correct to conclude that the legislature intended the statute's permitting authority to apply to dams or stream obstructions already built, being built, or to be built. Accordingly, we find that the deputy commissioner of DNR has the authority under section 840 to require the submission and approval of plans and specifications for fishways or other fish passage devices prior to construction of the proposed dam or

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<sup>35</sup> According to OHMP, even one year or less of stream blockage could eliminate an entire year-class of a fish run. Several years of undetected blockage could irretrievably destroy any fish stock that spawned or reared above the obstruction.

<sup>36</sup> *Kenai Peninsula*, 628 P.2d at 903.

<sup>37</sup> See AS 41.14.870(a) (providing DNR with authority to specify anadromous waterbodies); 11 AAC 195.010. To date, approximately 16,000 streams, rivers, and lakes around the state have been specified as important to anadromous fish species, and ADF&G estimates there are at least another 20,000 or more anadromous waterbodies that could be identified or specified under the statute and then added to the catalog. See <http://www.sf.adfg.state.ak.us/SARR/FishDistrib/anadcat.cfm> (last visited Dec. 21, 2005).

stream obstruction so that affected fish runs can be adequately protected and efficient fish passage ensured.

#### **IV. The Scope of OHMP's Permitting Authority Under Section 840 was not Limited by the Amendments to Former AS 16.05.870 in 1962**

Some also argue that the legislature's amendments to section 31 of the Fish and Game Code in 1962<sup>38</sup> (later renumbered in part as AS 16.05.870 and then AS 41.14.870),

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<sup>38</sup> As originally enacted, section 31 regulated uses in and uses of any river, lake, stream or waters of the state, and provided in pertinent part:

*Protection of Fish and Game.* In the event that any person or governmental agency desires to construct any form of hydraulic project or to use any equipment that will use, divert, obstruct, pollute or change the natural flow or bed of *any river, lake or stream* or that will *utilize any of the waters of the State or materials from any river, lake or stream beds*, such person or governmental agency shall notify the [ADF&G] Commissioner of such intention prior to the commencement of construction, and the Commissioner shall acknowledge receipt of such notice by return mail. If the Commissioner so determines, he shall . . . require such person or governmental agency or [sic] submit to him full plans and specifications of the proposed construction or work, complete plans and specifications for the proper protection of fish and game in connection therewith, and the approximate date when such construction or work is to commence, and shall require such person or governmental agency to obtain the written approval of the Commissioner as to the sufficiency of such plans or specifications before construction is commenced.

Sec. 31, ch. 94, SLA 1959 (emphasis added). The amendments to section 31 in 1962 limited the statute's permitting authority to classified anadromous fish streams, and provided in pertinent part:

*Protection of Fish and Game.* *The commissioner shall, in accordance with the Administrative Procedure Act, specify the various rivers, lakes, and streams or parts thereof that are important for the spawning or migration of anadromous fish.* In the event that any person or governmental agency desires to construct any form of hydraulic project, or use, divert, obstruct, pollute, or change the

which limited the scope of the state's section 31 permitting authority to classified waters important to anadromous fish, also impliedly amended section 30 (at what is now AS 41.14.840) to limit its application to classified waters as well. This argument fails for several reasons.

First, amendment or repeal by implication is limited under Alaska law, and only found when necessary to carry out the legislature's intent.<sup>39</sup> In this case, the legislation in question expressly amended section 31, not section 30.<sup>40</sup> There is simply nothing to suggest that the legislature intended to limit the scope of the state's permitting authority for fishways under section 30 when it amended section 31 in 1962.

Second, Alaska's fishway statute<sup>41</sup> (including section 840) and fish habitat protection statute<sup>42</sup> (including section 870) are independent statutory schemes serving distinct purposes.<sup>43</sup> There is nothing in the language of either statute that makes one reliant upon the other. For example, section 840 serves to maintain efficient fish passage

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natural flow or bed of *any such specified river, lake or stream*, or to use any wheeled, tracked or excavating equipment or log-dragging equipment in the bed of *any such specified river, lake, or stream*, such person or governmental agency shall notify the commissioner of such intention prior to the commencement of construction or act [and] . . . [i]f the commissioner so determines . . . shall require such person or governmental agency to obtain the written approval of the commissioner as to the sufficiency of such plans or specifications before the proposed construction or act is commenced.

Sec. 1, ch. 132, SLA 1962 (emphasis added).

<sup>39</sup> *State v. Dep't of Pub. Safety*, 794 P.2d 108, 113 (Alaska 1990) (citing *Warren v. Thomas*, 568 P.2d 400, 403 (Alaska 1977) (implied repeal of an act is disfavored).

<sup>40</sup> *See supra* text accompanying note 38.

<sup>41</sup> AS 41.14.840 - .860.

<sup>42</sup> AS 41.14.870 - .900.

<sup>43</sup> A statute is considered to be independent and complete within itself when it is not necessary to refer to any other statute to understand its scope and meaning. *See* 1A Norman J. Singer, *Statutes and Statutory Construction*, § 22:21, at 319-20 (6<sup>th</sup> ed. 2002).

in all fish streams, whether anadromous or not, but only applies to dams or other obstructions across the stream. On the other hand, section 870 protects only anadromous fish and their habitat, but covers a broader array of uses or activities in classified anadromous streams,<sup>44</sup> including activities occurring upland of the waterbody.<sup>45</sup> These separate statutory schemes reflect the legislature's policy choice that all fish (resident and anadromous) are entitled to protection from the adverse impact of any dam or stream obstruction built across a fish stream, and that anadromous fish in classified streams are entitled to additional protection from a broader array of uses or activities.

We conclude that the scope of the state's permitting authority under section 30 (now AS 41.14.840) was not limited to anadromous streams by the amendments to section 31 in 1962.

**V. The Deputy Commissioner's Exercise of Discretion Under Section 840 Must Be Consistent with the Overarching Statutory Responsibility to Ensure Efficient Fish Passage and Protect Fish**

Some contend that in exercising discretion under section 840,<sup>46</sup> the deputy commissioner can simply ignore the statutory requirements of section 840 and not even consider whether fish passage is necessary. However, such a contention misunderstands the nature of this discretion, which is based on the "[i]f the deputy commissioner considers it necessary" language of the statute. It comes into play when OHMP, as delegated by the deputy commissioner, evaluates the proposed use or activity in the fish stream and the possible need for a fishway or other device for efficient fish passage in the context of pertinent site-specific information. This discretion does not mean that OHMP would be free to forego making a permit determination under section 840 because that would ignore the deputy commissioner's statutory responsibility under section 840 to ensure efficient fish passage and protect fish. Thus, OHMP must exercise discretion under section 840 consistent with this overarching statutory responsibility.

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<sup>44</sup> See AS 41.14.870(b).

<sup>45</sup> See 1982 Inf. Op. Att'y Gen. at 2 (Mar. 4) (agency permitting authority under AS 16.05.870 extends to activities upland of the waterbody important to anadromous fish). This additional protection under section 870 for anadromous fish is understandable in light of the major role that anadromous fish, especially salmon, have played in Alaska's statehood movement and in Alaska's economy.

<sup>46</sup> Under section 840, this statutory discretion is vested in the deputy commissioner, who routinely delegates it to OHMP.

According to OHMP, the procedures used to exercise the deputy commissioner's discretion under section 840 are as follows: (1) the proponent submits plans and specifications that accurately describe its proposed use or activity in the specified stream; (2) OHMP evaluates site-specific information regarding the affected stream<sup>47</sup>; and (3) based on the specific proposal and site-specific information, OHMP determines whether the proposed use or activity may adversely affect efficient fish passage. If there are potential adverse effects to fish passage in the affected stream, OHMP issues a section 840 permit either for the use or activity as submitted, or alternatively with conditions to mitigate the adverse effects on fish passage. However, if the potential adverse effects cannot be mitigated, OHMP may withhold permit authorization altogether.

In some instances, OHMP's procedures may involve a formal permit application followed by a determination of the need for a permit.<sup>48</sup> However, OHMP is not limited to this process and may exercise its discretion in other ways where appropriate. For example, in order to help provide certainty for commercial timber harvesting activities, OHMP has authorized a general permit for the installation, construction and maintenance of certain types of pre-approved corrugated pipes (i.e., culverts) in fish streams.<sup>49</sup> In addition, OHMP recently convened a Scientific Advisory Work Group to compile and review the best available scientific and technical data regarding certain fish passage requirements for resident fish in southeast and southcentral coastal Alaska, including

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<sup>47</sup> According to OHMP, site-specific information may include but is not limited to fish species present, life stages, size of fish, number of fish, water velocity, water temperature, water depth, channel profile, substrate composition, and structure type.

<sup>48</sup> *See supra* note 12. We note that a section 840 permit is not required for every use or activity in or across fish streams. For example, a section 840 permit is generally not required for minor equipment crossings of fish streams, provided the crossing is accomplished following the Alaska Forest Resources and Practices Act (FRPA) Best Management Practices, and the proposed crossings can be accomplished without creating a barrier to fish. However, if the stream is a classified anadromous stream, a section 870 permit would be required for any stream crossing. As another example, a section 840 permit is generally not required for a bridge built across a fish stream, provided a free span is constructed in accordance with FRPA standards. *See Fish Habitat and Timber Fact Sheet*, available at [http://www.dnr.state.ak.us/habitat/tech\\_reports/standards\\_techniques/timber\\_fact\\_sheet.pdf](http://www.dnr.state.ak.us/habitat/tech_reports/standards_techniques/timber_fact_sheet.pdf) (last visited Dec. 21, 2005).

<sup>49</sup> *See* General Fishway Permit FH05-Statewide-0001, issued by OHMP on June 15, 2005, for culverts using the Stream Simulation Design specified in the general permit.

under what circumstances, if any, fish passage is not biologically required to ensure and sustain viable, long-term resident fish populations.<sup>50</sup>

## CONCLUSION

The clear purpose of section 840 is to preserve and protect the state's fishery resources. Since statehood, OHMP and its predecessor agency have consistently and correctly interpreted section 840 to require the submission and approval of fishway or fish passage plans and specifications prior to the construction of any dam or other obstruction across a fish stream in order to ensure efficient fish passage. This interpretation is entirely reasonable, supported by the language of the statute, and gives full effect to the legislature's long-established intent to ensure and protect fish passage in Alaska fish streams. Therefore, we conclude that the DNR deputy commissioner has the authority under section 840 to require the submission and approval of plans and specifications for fishways or other fish passage devices prior to construction of any dam or obstruction across a fish stream. Further, we also conclude that the deputy commissioner has the ability to exercise discretion under the statute so long as that discretion is exercised consistent with the overarching statutory responsibility to ensure efficient fish passage and protect fish.

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<sup>50</sup> According to OHMP, consensus recommendations from this group will be used by OHMP biologists to further evaluate circumstances when fish passage may not be required, both for individual and general permits.