

FAQ

Ballot Measure 1 – 17FSH2

Updated 10/24/18

Disclaimer:

Please note that these answers are based on state agencies' current reading of the initiative language. If the initiative passes and is enacted into law, regulations would have to be adopted to implement the initiative, and agencies' ultimate interpretation of the law through the regulations process could change some of the answers provided in these Frequently Asked Questions.

Department of Fish and Game **(ADF&G)**

Would this initiative stop development in Alaska?

No. If this initiative passes, a public notice and review process would be initiated for development projects requiring ADF&G Fish Habitat Permits. This would lengthen the Fish Habitat Permitting process and may, in certain cases, lead to permit denials.

How many Fish Habitat Permits does ADF&G issue a year?

Numbers have decreased in the recent years, but have ranged from 1,500 to over 4,000 per year in the past five years.

What kind of project requires a Fish Habitat Permit?

Currently, any activity or project that is conducted below the ordinary high water mark (typically the vegetation line) of an anadromous stream, or has the potential to impede fish passage, typically requires a Fish Habitat Permit. The initiative would extend ADF&G's authority by orders of magnitude to include the assumption of anadromy (i.e., a natural waterbody is presumed to support anadromous fish) and also extend our authority into riparian* habitat.

*Riparian areas are a transitional habitat between terrestrial and aquatic ecosystems found immediately adjacent to rivers, streams, and lakes.

Would enforcement actions by ADF&G change under the initiative?

Yes, the full effects of the proposed changes would be dealt with and determined through consultation with Department of Law and the Department of Public Safety.

Would I still be able to operate my recreational mining suction dredge?

Yes, although the permitting process would change according to the new language in the initiative. Current recreational suction dredge Fish Habitat Permits already include stipulations designed to minimize adverse effects on fish habitat, so the permit should remain fundamentally the same.

How does this initiative differ from existing regulations regarding resource development in fish bearing waters?

The initiative would do several things which are different from current regulations regarding fish habitat permits, but one of the biggest changes is the creation of a tiered permitting process in which activities defined as “minor” or “major” would go through different steps when an applicant applies for a fish habitat permit; and it would establish a public review requirement for “major” fish habitat permits. The initiative would also provide opportunities for any interested person to request a reconsideration of a decision.

Does ADF&G have concerns that the current permitting system does not adequately protect salmon?

No. The ADF&G believes the current permitting process effectively protects anadromous fish habitat.

What are examples of *de minimis*, minor or major activities?

To be determined, although it is likely that activities such as stream crossings (with off-road vehicles or equipment), mechanized water withdrawals and/or small scale suction dredging may be categorized as minor. Activities such as stream diversions, culvert installations/replacements and stream bank restoration projects may be categorized as major. The *de minimis* category may include activities such as water withdrawals using hand pumps, recreational mining using only hand tools (shovels/ gold pans), and foot traffic in streams.

What are the criteria that would determine ‘significant adverse effects’ to anadromous fish and subsequently, if a proposed activity requires a minor or a major anadromous fish habitat permit? If multiple minor permits are required for a project, does this push the project into the realm of a “major project”?

To be determined. The ADF&G would have to develop regulations regarding these criteria.

Does this initiative apply to waterbodies that support only resident species of fish (Arctic grayling, rainbow trout, northern pike, burbot, etc.)?

No. The initiative only applies to anadromous** water bodies. However if a waterbody has not been defined as anadromous, the initiative presumes that it is anadromous if it is connected to a waterbody defined as anadromous or connected directly to marine waters (see *ADF&G Catalog of Waters Important for the Spawning, Rearing or Migration of Anadromous Fishes*).

**anadromous fish are species such as salmon, lamprey, and sheefish, which spend a portion of their life in marine waters and return to fresh waters to spawn.

Since all natural waterbodies would be considered anadromous, how much effort would be required for a site-specific determination to determine it is not anadromous?

In some cases, effort would be minimal if there is an obvious physical barrier to anadromous fish. In cases without an obvious barrier, proving anadromous fish are not present would be difficult, time consuming, and expensive.

Would I need to post a bond in order to get a Fish Habitat Permit for a project considered major?

Yes, with several exceptions as stated in the initiative.

How would public comments on major fish habitat permits be incorporated into the final permit? Would they just be placed in a project file? Would individual, detailed responses be provided to the comments and placed on the department's website? Could the comments received during the public comment period result in the permit not being issued?

To be determined.

Why are aspects of the state water quality standards under the jurisdiction of the Alaska Department of Environmental Conservation (ADEC) contained in this proposal and would the state grant dual authority over state water quality standards, increasing agency redundancy?

The ADEC would retain primacy regarding the state water quality standards; the ADF&G would provide consultation and support to the ADEC in cases where water quality may be affected by proposed development activities.

How would the ADF&G regulate activities that may affect groundwater and within what distance from a stream would this come into play? Would this be measured in feet, miles, or tens of miles? Would this change affect home water wells? Municipal wells? This appears it may duplicate or potentially come in to conflict with Alaska Department of Natural Resources Water Resources regulatory authority over water and water use.

The state would have to develop a list of definitions, criteria, and standards to address this concern.

Would waters within three miles of the shore potentially be considered anadromous fish habitat, thereby requiring a fish habitat permit for any projects or activities within those waters under the initiative language?

The short answer is, yes, marine waters could potentially be considered anadromous fish habitat. Under existing law, marine waters have never been included under the fish habitat permitting process. But under the initiative language, the definition of anadromous fish habitat is broader and is not specifically limited to fresh waters only, which could mean that marine waters are covered. Ultimately, exactly if, how, and under what circumstances the law will be applied to certain marine waters will have to be determined by ADF&G in the regulations process because the initiative language is unclear.

Department of Environmental Conservation (ADEC)

What is the impact of the ballot initiative on ADEC's Water Division?

The initiative would require several changes to the permitting program in the Department of Fish and Game, Habitat Division. These changes would impact the ADEC's permitting and engineering plan review of wastewater discharges to all fresh waters in Alaska.

The initiative creates a rebuttable presumption that all waters in Alaska are anadromous. Alaska's Water Quality Standards at 18 AAC 70.255(h)(1) states that mixing zones will not be allowed in an area of anadromous fish spawning. The presumption per the initiative can be rebutted by the ADF&G, but unless and until this occurs, the discharges will likely be presumed to be ineligible for mixing zones and thus needing to meet water quality criteria at the "end-of-pipe," the point at which the discharge enters the receiving water.

What is the impact on current wastewater discharge systems with a current National Pollutant Discharge Elimination System (NPDES) or Alaska Pollutant Discharge Elimination System (APDES) permit from ADEC or the Environmental Protection Agency (EPA)?

No change while the existing permit is still current.

What is the impact on expiring (renewals) wastewater discharge system NPDES or APDES permits?

Impact would depend on whether a mixing zone was authorized in the expiring permit

- 1.) If no mixing zone authorized, then no change.
- 2.) If mixing zone authorized and the receiving water is explicitly specified by ADF&G as non-anadromous or anadromous but not a spawning area, then no change.
- 3.) If the receiving water is currently specified as anadromous and a spawning area, then the initiative's statutory language limits the ADEC's discretion and a mixing zone likely could not be authorized during renewal.
- 4.) If the receiving water is not explicitly specified, then a mixing zone likely could not be authorized during renewal.

The responses would depend on ADF&G's interpretation of the initiative language. For example, it is unknown at this time what process and how long it would take ADF&G to determine a water's status given the ballot measure's presumption of anadromous waters. It is unknown whether an expired mixing zone authorization could continue during the evaluation. The longer the ADF&G process, the less likely the expired mixing zone authorization could continue. Regulations may be needed to allow any continuation. These are some of the issues that agencies, in consultation with the Department of Law, would have to address if the ballot measure passes.

What is the impact on storm water systems and permitting/monitoring?

There are no planned changes to current regulatory requirements due to the ballot measure, if passed.

What is the impact on drainage ditches that may eventually lead to open waters?

There are no changes to current regulatory requirements due to the ballot measure, if passed.

Which agency would have lead/supremacy on discharge permitting or would multiple permits be required?

Multiple permits would be required as is currently the case.

How would the ballot measure relate to federal Clean Water Act requirements already monitored/enforced by state agencies?

The impacts of the ballot measure come through the application of Alaska's water quality standards (including mixing zones) which have to be approved by EPA for use in actions under the authority of the Clean Water Act. The ballot measure would not change the requirements but does affect implementation. ADEC relies upon ADF&G determination of which freshwater waterbodies or waterbody segments have spawning areas. Mixing zones are not allowable in freshwater spawning areas. The ballot measure would create a presumption of anadromous waters (and anadromous spawning areas) absent a prior determination by ADF&G (or a subsequent evaluation).

What is the estimated cost to a community for future permitting requirements?

If a municipality cannot have an existing mixing zone re-authorized due to the ballot measure, the costs would vary depending on whether an alternate discharge location (non-spawning area) is logistically feasible and/or what additional level of treatment is necessary to meet the effluent limits without a mixing zone (i.e., at the end of the discharge pipe) or under the new conditions of an alternate discharge location. The cost would be very discharger-specific.

Department of Transportation and Public Facilities **(ADOT)**

How would the proposed ballot initiative language impact the ADOT's mission?

As ADOT keeps Alaska moving through service and infrastructure, ADOT works in and around fish habitat by constructing roads and airports that require: bridges, culverts, roadway embankment protection (riprap armoring), stream realignments (temporary and permanent), as well as habitat mitigation, restoration, or enhancement.

The proposed ballot initiative language could restrict the following: culverts with inverts, riprap for erosion protection and scour counter measures, channel maintenance, and temporary construction activities (diversions and water use).

How would the ballot initiative's presumption of anadromous waterbodies impact ADOT's workload and construction process?

The presumption in the initiative is that a naturally occurring “permanent or seasonal surface water body” is anadromous. This is the critical aspect of the proposed changes to current fish habitat regulations – the assumption that a waterbody is anadromous would lead to extra resource demands for ADOT (staff time, funding, etc.) to “prove” that the waterbody is not anadromous, which would impact project delivery time and cost.

- Increased Cost in project delivery: Structures designed to adequately pass fish are significantly more expensive to design, construct and maintain. The ADOT has historically worked with ADF&G on installing these structures when fish passage is required to reduce the cost to the project. The ADOT has also worked with ADF&G to replace culverts placed in the past that may not provide adequate fish passage.
- Delay in project delivery: The proposed language would require applicants to prove fish *do not* exist for all work in Alaska waters – this can be a challenge. Anadromous fish are migratory and only spend a very short portion of their life cycles in freshwater. Attempting to verify fish presence can be virtually impossible unless a fish biologist is present at the appropriate time of the year. “Assumption” of fish presence would require that all work in stream habitat, riparian areas, and stream crossings would need to be designed, and built to pass fish – at an added expense to the ADOT – regardless of fish presence.
- To expedite the permit process the ADOT may simply design for fish passage everywhere. This would require significantly more technical design time and generally larger hydraulic structures, which would increase both construction and maintenance time and costs.

How would the ballot initiative's additional public notice and comment process impact ADOT's workload and construction process?

The proposed language would create two public notice steps (where no public notice is required currently) in the permit process – the application and initial determination as well as a public notice of the draft permit.

- The two step public notice process would come during the permit application process, which for ADOT, comes after the completion of project design, the public and agency scoping process, and any public involvement conducted during the development of the National Environmental Policy Act (NEPA) document, and other environmental regulatory processes. This provision could create significant delay and additional costs to the development of infrastructure projects as any modifications made to the project design as a result of either public notice period this late in the project development process could result in a re-design of a project and a re-evaluation of the NEPA document.
- This uncertainty could create significant delay in infrastructure design, and construction projects. These additional public notice periods could also introduce enough delay that federal funding could be jeopardized.

How would the ballot initiative’s reconsideration process impact ADOT’s workload and construction process?

The proposed initiative language has included a process by which a permit could be remanded back to the Commissioner for reconsideration. The language suggests that within 30 days of a determination “any interested person” may request the Commissioner reconsider the determination.

- Reconsideration determinations would require significant additional work from both the applicant (ADOT on infrastructure projects) and the permitting agency. This would lead to delay in project delivery.
- Reconsideration determinations result in automatic denial of the permit if the Commissioner fails to act on the request. This could result in the denial of permits for critical infrastructure projects and project uncertainty.

How would the ballot initiative’s requirement that significant adverse effects be mitigated on-site impact ADOT’s workload and construction process?

Mitigation required for all “significant adverse effects”. The proposed language now makes mitigation (“scientifically proven, peer reviewed and accepted”) required for all significant adverse effects.

- Limitation on mitigation options. The proposed language indicates that permit conditions or mitigation measures “may not offset the activity’s adverse effects” in another waterbody, or even portions of the same waterbody. This would restrict the use of off-site mitigation.
- The proposed language would essentially mean that off-site mitigation measures would not satisfy mitigation requirements. Historically, the ADOT has worked with agencies on the best site for mitigation based on the scientific knowledge and comprehensive view of the resources. On-site mitigation for airports may not be an option as this can lead to other concerns as it may cause wildlife hazards.

Does the ballot initiative’s introduction of the term “significant adverse effects” impact ADOT’s ability to deliver infrastructure projects?

The NEPA process considers both state and federal permitting decisions to determine whether a proposed action may “significantly affect” the environment. The ballot initiative’s use of the term “significant adverse effect” will likely lead to confusion, and unnecessary litigation, over whether NEPA’s more stringent review requirements for actions that “significantly affect” the environment are triggered by an action’s potential “significant adverse effect” under the ballot initiative’s terminology.

Would the initiative require ADOT to change its structural designs? Could this impact the safety of road projects?

ADOT Engineers are responsible for safeguarding the traveling public. The proposed language in the initiative limit the structural options available for ADOT engineers. Depending on the project, this could result in a structural option that would be considered less safe under general engineering standards.

The proposed initiative language would require that mitigation and fish habitat permits be based on “scientifically proven, peer reviewed, and accepted” methods. However structural infrastructure features like bridges, erosion control features and culverts should only be designed and sited by qualified professional engineers. The proposed language would increase the risks related to scour vulnerability, reduced flood resiliency, and adverse impacts to adjacent properties.

Does ADOT already have a Public Involvement Process for infrastructure projects?

ADOT currently has multiple opportunities for both the public and agencies to comment during the development of a project.

- During initial planning – For highway projects, ADOT has the Statewide Transportation Implementation Plan (STIP) that is revised and updated regularly and is developed with public input. For aviation projects, each of the 239 Airports develops an Airport Improvement Plan, which is approved by the Federal Aviation Administration.
- During project development – ADOT develops Public Involvement Plans, which outlines the public process to be completed during development of the NEPA document. This can include public comment periods, meetings, and workshops.
- During the permit process – ADOT engages in public review and comment during the permit process for most of the permits that ADOT needs for its infrastructure projects.

Department of Natural Resources
(ADNR)

Does the initiative impact ADNR’s statutes or authority?

The initiative does not amend or change any statutes or regulations under ADNR authorities. However, due to changes to ADF&G statutes and regulations, ADNR expects it to change how it implements some of its authorities related to the use of state water.

Would there be an impact on use of water by state, local, and federal agencies for firefighting?

ADNR does not expect the initiative to affect emergency uses of water.

How would this impact ADNR’s operations?

ADNR anticipates that the initiative would impact how ADNR evaluates and applies Alaska Water Use Act criteria (AS 46.15.080) for issuing a water right or temporary water use authorization, due to changes to ADF&G statutes and regulations.

Would the initiative impact the time it takes to get a permit?

Due to new workloads for ADF&G, the ballot measure may lengthen the timeline for ADF&G to respond to DNR requests for consultation on water authorizations, thus delaying overall permitting timelines for project applicants.

Department of Law

If passed by the voters, when would Ballot Measure 1 go into effect?

Under Article 11, Section 6 of the Alaska Constitution, if a majority of voters vote yes on the ballot measure, the proposed new law would be effective 90 days after the election is certified. Certification takes two to three weeks on average but can take longer depending on the election.

FISCAL IMPACT

Department of Fish and Game

ADF&G estimate the annual cost increase would be **\$1,319,000 for at least five years.**

Department of Environmental Conservation

Division of Water permit application reviews are expected to increase in complexity as industry and municipalities work within the changed model of all fresh waters being presumed anadromous. This presumption would increase complexity for applicants as it is predicted that numerous facilities would be required to meet the end-of-pipe limits.

Existing fees cover approximately 60 percent of the cost of permitting and plan review activities. It would take a year to enact new regulations before the ADEC can begin collecting fees to cover this activity. FY2019 would be funded entirely by general funds while new staff are brought on and trained and new regulations are developed. Revenues would reflect a proportional shift to general fund program receipts starting in FY2020 as new regulations are implemented and additional fees are collected.

Personal Services \$225,100

Other Costs \$57,500

TOTAL \$282,600 / annually

Personal Services: An Environmental Program Specialist III would be responsible for permit application reviews and would be required to address the additional workload without causing a backlog in the permitting. An Engineer I at DEC would be needed for review and approval of engineering plans for treatment system changes needed to meet the more stringent limits. Both positions would be located in Anchorage.

Other Costs: The new Environmental Program Specialist would require permit writer training, which is only available out-of-state at this time. Limited in-state travel would be required to conduct compliance inspections annually. DEC would require assistance from the Department of Law for consultation during the development of new regulations. The new employees would require equipment for the first year, and normal office supply needs in subsequent years.

Department of Transportation

The initiative would introduce changes to the way that ADF&G regulates development within fish habitat and modifies Title 16. This proposal would have a direct impact in the time and cost it takes an infrastructure project (highway, airport, etc.) to be developed and put into construction.

It is anticipated that this proposal would require an additional 8 full time positions within the ADOT at a total annual increase of \$953,900. These positions include additional environmental staff to develop permit applications, and conduct habitat surveys, as well as additional hydraulic engineers to assist in the design of fish passage infrastructure. Note:

- This figure **does not** consider the services and commodities costs of each position, e.g., office furniture, phone service, IT service, computers and other office supplies.
- This figure **does not** include any additional costs to the infrastructure projects as a result of delay, additional habitat surveys, increased process, or additional mitigation requirements.

Department of Natural Resources

The initiative would **not create new costs** for DNR in terms of additional staff and resources.

Please note that project proponents have identified potentially significant impacts to existing and future projects in Alaska that are regulated by ADNR. ADNR does not speak for them.

Department of Law

The Department of Law provides legal counsel to ADF&G. The initiative would potentially significantly increase the current amount of ADF&G permitting and appeals because it would broaden the expanse of waterbodies in the state deemed to be anadromous fish habitat, expand the scope of activities that would require permits, create a detailed permit consideration process, and provide for reconsideration and appeal of a determination of the Commissioner under AS 16.05.871(e), AS 16.05.875(c) or (d), AS 16.05.883, AS 16.05.884(d) or (f), or AS 16.05.885(d).

At a total cost of **\$450,000**, the Department of Law anticipates that two additional full-time civil attorneys would be needed to perform the legal work this initiative would create -- one attorney primarily focused on permitting and appeals and one attorney primarily focused on enforcement, while providing support to permitting and appeals as needed. ADF&G would be responsible for developing regulations to implement the initiative's provisions, and the Department of Law would likely need to provide assistance with the regulations.