



Contents

SUMMARY OF COMPLAINTS J2009-0217 and J2009-0224.....	1
OMBUDSMAN’S FINDINGS AND RECOMMENDATIONS	2
BACKGROUND	3
Department of Fish and Game	3
Department of Natural Resources.....	4
Alaska Chilkat Bald Eagle Preserve	5
INVESTIGATION.....	7
History of the Tour Company Owners’ Floating Docks.....	7
The Tour Company Owner’s 2007 Marina Proposal.....	7
ADF&G Gives the Go-Ahead to Dig Prior to Final Permitting Approval	10
Parks Upper Management Disapproves of the Marina Project.....	12
No Messenger Will Bear the Bad News to the Owners.....	12
Parks Threatens to Take Over the Marina If Connected to the Chilkat.....	13
ADF&G Refuses to Reimburse the Complainants; Parks Threatens Enforcement ..	15
The Marina and Chilkat Connect.....	16
The Owners Seek Legal Counsel.....	17
Habitat Division Site Visits	18
Habitat Division Recommends Keeping the Marina	19
Parks Deputy Director Disagrees with ADF&G Recommendations.....	20
May 2009 DNR and ADF&G Meet in Haines.....	21
Habitat Biologist Dean Hughes Discusses the Marina	22
DNR Threatens to Suspend or Revoke the Owners’ Commercial Use Permit.....	23
The Owners Discuss DNR’s Promise of Recompense	24
Chris Degernes Discusses Her Contact with the Owners	25
The Owners Fill in the Marina.....	25
Comparison of the Kenai River and Chilkat River Management Plans	26
Kenai River Comprehensive Management Plan.....	26

Chilkat Bald Eagle Preserve Management Plan	26
Commercial Permitting System	27
Permitting: Procedures and Standards	27
Literature Review: Impact of Marinas on the Environment	28
ANALYSIS AND FINDINGS	30
Allegation 1 Finding	33
Agency Response to Allegation 1 Finding	33
Ombudsman Comment	34
Allegation 2 Finding	36
Agency Response to Allegation 2 Finding	36
Allegation 3 Finding	38
Agency Response to Allegation 3 Finding	38
Ombudsman Comment	38
Allegation 4 Finding	41
Agency Response to Allegation 4 Finding	41
Ombudsman Comment	42
RECOMMENDATIONS	43
Recommendation 1: Agency Response and Ombudsman Comment	43
Agency Response	44
Ombudsman Comment	44
Recommendation 2	46
Agency Response	47
Finding of Record on Allegations Against ADF&G	48
Finding of Record on Allegations Against DNR	48



OMBUDSMAN COMPLAINTS J2009-217, J2009-224

INVESTIGATIVE REPORT
PUBLIC REPORT

July 18, 2013

This report has been edited to remove the names of the complainants and their business.

SUMMARY OF COMPLAINTS J2009-0217 AND J2009-0224

The owner operators of a jet boat tour company on the Chilkat River filed a complaint with the Office of the Ombudsman in July 2009. They complained about actions by the Alaska Department of Fish and Game (ADF&G), Division of Habitat (Habitat), and the Department of Natural Resources (DNR), Division of Parks and Outdoor Recreation (Parks).

The Complainants, a married couple, own property in Haines, Alaska. They own and operate a jet boat tour company that operates in the Chilkat River. The Owners' tour company owners planned to build a marina on their private property adjacent to the Chilkat River and the Alaska Chilkat Bald Eagle Preserve. They explained that they intended the marina to house the commercial jet boats that they currently moor on seasonal floats on the Chilkat River. The Owner Couple said they relied upon the assurances of a Habitat Division employee in 2007 that they could begin construction of the marina prior to final permitting approval. The project also entailed excavating an access route from the marina to the bank of the Chilkat River. However, the marina work Owners did not breach the riverbank, as instructed by Habitat.

They told the ombudsman that Parks was aware of the planned construction in 2007 and tacitly approved of the project. However, in June 2009, Parks informed the Owners that they must fill the excavation route and marina, essentially reversing the previous work, or lose the Parks special use permit for their jet boat business. Although the Owners assert that Parks offered partial reimbursement for the costs of restoration, the Owners were expected to pay for the work and then receive reimbursement, which the Owners said would be no more than half of the cost. The couple said they paid the original excavation costs, and now were expected to pay half the cost of filling it in, all because of an unreasonable reversal by state agencies between 2007 and 2009.

The Owners requested two alternative remedies from the ombudsman: (1) a recommendation that they be allowed to operate within their marina; or (2) if not allowed

to operate a marina, to be fully reimbursed for all incurred expenses for refilling the marina, the access route, and the river bank, which had been breached by flood waters.

The ombudsman opened an investigation into the following allegations:

Allegation 1: Unfair: The Department of Fish and Game and Department of Natural Resources led the complainants to believe that the necessary permits for connecting a private marina to the Chilkat River were forthcoming, which convinced the complainants to spend thousands of dollars constructing the marina and access route prior to final permitting approval.

Allegation 2: Unfair: The Department of Natural Resources required the complainants to pay for the costs of repair to the riverbank adjacent to their property that was breached naturally by rising water in the river.

During the course of the investigation, the ombudsman added the following allegations by her own motion per AS 24.55.120:

Allegation 3: Performed Inefficiently: The Department of Natural Resources performed inefficiently by failing to timely notify the complainants of its position opposing a permit allowing the complainants to connect a private marina to the Chilkat River for commercial use operations.

Allegation 4: Unsupported by an adequate statement of reasons: The Department of Natural Resources failed to adequately explain to the complainants the agency's reasons for opposing the connection of a private marina to the Chilkat River for commercial use operations.

Ombudsman Linda Lord-Jenkins sent notice of investigation to the directors of both agencies on September 21, 2009. The ombudsman modified the original allegations in the notices during the course of the investigation.

Assistant Ombudsman Jennifer Christensen and Assistant Ombudsman Beth Leibowitz investigated the allegations and drafted the preliminary report. The ombudsman forwarded her preliminary findings and recommendations to both agencies on April 8, 2013. ADF&G Habitat Director Randy Bates and DNR Parks Director Ben Ellis prepared a joint agency response to the ombudsman on May 28, 2013. The joint agency response is incorporated in this Finding of Record, and included in Appendix A of the report.

The ombudsman requested additional clarification from both agencies after receipt of their response to the preliminary report. On June 20, 2013, the agencies provided a supplemental joint agency response, which also is incorporated in the Finding of Record.

* * *

OMBUDSMAN'S FINDINGS AND RECOMMENDATIONS

Based on the evidence developed during this investigation and for reasons more fully articulated in this report, the ombudsman found Allegation 1 against ADF&G and DNR and Allegations 3 and 4, filed against DNR, ***justified***. The ombudsman found Allegation 2 filed against DNR, ***not supported***.

The ombudsman proposed two recommendations to the agencies:

Recommendation 1: DNR and ADF&G should each pay one-third of the expenses incurred by the Complainants for excavation and construction of the marina, restoration of the riverbank, and filling in of the marina.

Recommendation 2: DNR should provide additional training to its staff concerning statewide policy permitting restrictions, especially when more than one division or department is involved in a project, to ensure consistent information in turn is provided to the public.

Both agencies responded to the ombudsman's preliminary report in a letter dated May 28, 2013. The agencies' joint response indicated that they generally agreed with the proposed findings for Allegation 1, 2 and 3, but disagreed with the finding for Allegation 4 as further explained in the report. Both agencies rejected the ombudsman's recommendation that they pay the complainants for any portion of the costs associated with the marina project, but accepted the recommendation for additional staff training on multi-agency project approvals.

BACKGROUND

The Chilkat River and most of its tributaries are anadromous fish habitat listed by ADF&G in its *Catalog of Waters Important for the Spawning, Rearing or Migration of Anadromous Fishes*¹, under AS 16.05.871.² Construction in the Chilkat River, including placement of docks, therefore requires a fish habitat permit. In 2007, fish habitat permits were reviewed by the Office of Habitat Management and Permitting (OHMP) within DNR, operating under AS 41.14; in July 2008, Executive Order 114 transferred these functions from DNR to the Habitat Division within the ADF&G.

The events giving rise to the ombudsman investigation began in 2007, when the fish habitat permits were under the jurisdiction of OHMP (in DNR), but continued through 2009, after jurisdiction over anadromous fish habitat was returned to the Division of Habitat in ADF&G. The ombudsman report generally refers to the relevant personnel as employees of the Habitat Division (their current location), rather than the OHMP.

Department of Fish and Game

AS 16.05.841 (Fishway Act) requires that an individual or a government agency notify and obtain authorization from the ADF&G, Division of Habitat for activities within or across a stream used by fish if Habitat determines that such uses or activities could represent an impediment to the efficient passage of fish. For example, culvert installation, water withdrawals, stream realignment or diversion, dams, low-water crossings, and

¹ "**Anadromous Fish**" means a fish or fish species that spends portions of its life cycle in both fresh and salt waters, entering fresh water from the sea to spawn.
<http://www.adfg.alaska.gov/sf/SARR/AWC/index.cfm?ADFG=defs.definitions>

² This statute has been renumbered by executive order twice since 2003. In 2003, Governor Frank Murkowski's Executive Order 107 repealed former AS 16.05.870 (Protection of Fish and Game) and moved its provisions to AS 41.14.870. The change placed anadromous fish habitat protection within DNR instead of ADF&G. In 2008, Governor Sarah Palin's Executive Order 114 returned these statutory functions to ADF&G, repealing AS 41.14.870 and creating AS 16.05.871. Currently, the relevant statutes are part of AS 16.05 (as they were prior to 2003).

construction, placement, deposit, or removal of any material or structure below the ordinary high watermark³ all require approval from Habitat.

AS 16.05.871 (Anadromous Fish Act) requires that an individual or government agency provide prior notification and obtain permit approval from Habitat “to construct a hydraulic project or use, divert, obstruct, pollute, or change the natural flow or bed” of a specified water body. All activities within or across a specified anadromous water body and all in-stream activities affecting a specified anadromous water body require approval from Habitat, including 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.

Certain activities within water bodies may also require additional authorizations from other state, federal, or local agencies, including the U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Forest Service Land, Alaska Department of Environmental Conservation, and the Alaska Department of Natural Resources.

Department of Natural Resources

The Department of Natural Resources manages all state-owned land, water, and natural resources, except for fish and game. The department presently consists of seven divisions that reflect its major programs: Agriculture, Geological & Geophysical Surveys, Forestry, Mining, Land & Water, Oil & Gas, Parks and Outdoor Recreation, and Support Services. Prior to changes that occurred in 2011, there was an eighth division within DNR, the Division of Coastal and Ocean Management.

The Chilkat River runs adjacent to the Owners’ property. Because the Owners’ proposed marina project ultimately entailed connecting the marina to the Chilkat River, a coastal water body, DNR’s Division of Coastal and Ocean Management was required at the time the Owners initially proposed the project in 2007 to coordinate a multiple-agency review of the project. DNR’s Division of Coastal and Ocean Management used a multiple agency-coordinated system for reviewing and processing all resource-related permits required for proposed projects in or affecting coastal areas of Alaska. This system, called “project consistency review,” was based on the Alaska Coastal Management Program (ACMP). The ACMP was eliminated in 2011 when the Alaska Legislature zeroed out funding for the program. A citizen’s initiative to reinstitute the program was defeated in 2012. Consequently, the Division of Coastal and Ocean Management was dissolved on July 1, 2011 with the sunset of the ACMP.

³ Ordinary high watermark means (A) in the non-tidal portion of a river, lake, or stream: the portion of the bed(s) and banks up to which the presence and action of the non-tidal water is so common and usual, and so long continued in all ordinary years, as to leave a natural line or "mark" impressed on the bank or shore as indicated by erosion, shelving, changes in soil characteristics, destruction of terrestrial vegetation, or other distinctive physical characteristics; (B) in a braided river, lake, or stream: the area delimited by the natural line or "mark," as defined in Part A above, impressed on the bank or shore of the outside margin of the most distant channels; or (C) in the tidally influenced portion of a river, lake, or stream: the portion of the bed(s) and banks below the (1) OHW as described in A or B above, or (2) mean high water elevation; whichever is higher at the project site. (Source: <http://www.adfg.alaska.gov/sf/SARR/AWC/index.cfm?ADFG=defs.definitions>)

The ACMP was a voluntary state program, authorized by the Coastal Zone Management Act of 1972. Several state departments and agencies participated in the ACMP permit review process. Likewise, several coastal municipalities and service areas (collectively known as coastal districts) voluntarily participated in the ACMP permit review process.

The primary tool used to implement the ACMP was the consistency review process at 11 AAC 110. Through this process, proposed resource development activities were reviewed for consistency and compliance with Alaska's coastal management program, which included state laws, state standards, and district enforceable policies.⁴

Multiple state agencies reviewed project proposals to determine the project's consistency with the standards of the ACMP and enforceable policies of approved district coastal management programs. The Division of Coastal and Ocean Management (DCOM) coordinated the permitting review if:

- The project was a federal activity;
- The project required a federal government approval; or
- The project required permits from more than one State of Alaska agency.

All other reviews were coordinated by the state agency responsible for issuing those permits.

Alaska Chilkat Bald Eagle Preserve

The DNR Division of Parks and Outdoor Recreation manages the Alaska Chilkat Bald Eagle Preserve (Preserve) with the assistance of the 13-member Alaska Chilkat Bald Eagle Preserve Advisory Council.

The State of Alaska created the Alaska Chilkat Bald Eagle Preserve in June of 1982 to protect and perpetuate the world's largest concentration of bald eagles and their critical habitat. It also sustains and protects the natural salmon runs and allows for traditional uses, provided such uses do not endanger preserve resources. The Preserve consists of 48,000 acres of river bottom land of the Chilkat, Kleheni, and Tsirku Rivers. The boundaries include only areas considered important eagle habitat.⁵

Five species of salmon spawn in these rivers and nearby streams and tributaries. The salmon runs begin in summer and continue through late fall or early winter. The salmon die shortly after spawning, and their carcasses provide much food for the eagles. This combination of open water and plentiful food attract large numbers of eagles to the Chilkat Valley from early October through February each year.

DNR permits certain activities within the preserve. Any commercial activity, including guiding, transportation services, or sale of goods or services within the boundaries of the preserve, requires a commercial use permit.

⁴ This link was originally posted at http://alaskacoast.state.ak.us/ReferenceMaterial/ACMP_Fact_Sheet_2010.pdf The current link is at http://alaskacoast.state.ak.us/Current_News/ACMP_Fact_Sheet_2011.pdf

⁵ <http://dnr.alaska.gov/parks/units/eagleprv.htm>

Permitting System Specific Structure Types and Uses in the Preserve

DNR is required to use the Permit Matrix Structure and Use Permit Conditions List in Appendix D of the Chilkat Bald Eagle Preserve Management Plan as the basis for permit decision-making.⁶ The permitting standards are intended to bring consistency and predictability to the permitting process. With some exceptions, these standards are not regulations or state statute and do not carry the force of law.

DNR is required to make individual permitting decisions on a case-by-case basis, with guidance from the Permit Matrix standards in the decision making process.⁷ DNR and the ADF&G divide preserve management responsibilities between the two agencies. DNR is responsible for overall management of the Preserve and ADF&G is responsible for the management of fish and wildlife resources. DNR generally requests the participation of ADF&G in any permit reviews that may affect water quality, fish and game populations or habitat, or stream modification within the Preserve.

General Management Authority – Department of Natural Resources

The authority for DNR to administer the Preserve derives from article VIII, section 7, of the State Constitution. Specific authority to manage the Preserve is assigned to the Division of Parks and Outdoor Recreation within DNR. The kind of management appropriate in the Preserve is generally stated under the listing of intent and purposes in the statute creating the Preserve, contained in AS 41.21.610-630. More specific direction in this management is inferred through the requirement for the preparation of a management plan in AS 41.21.620, with the plan providing management direction for particular management units within the Preserve.

Fish and Wildlife Resources – Department of Fish and Game

ADF&G is responsible for the management of the fish and wildlife resources within the Preserve consistent with the purposes of AS 41.21.610-630. Under AS 41.21.616, ADF&G must consult with DNR in proposing regulations governing fish and game management in the Preserve for adoption by the Board of Fisheries or the Board of Game. ADF&G is also responsible for the administration of the Chilkat River State Critical Habitat Area (CHA). The CHA was created in 1972 in "order to protect natural habitat crucial to the perpetuation of fish and wildlife, especially bald eagle feeding." Management of the activities in the CHA is the responsibility of DNR, with ADF&G responsible for the management of fish and wildlife and their habitats.

⁶ See Permitting Procedures, Chilkat Bald Eagle Preserve Plan, App. D (September 2002).

⁷ "It is the intent that the agencies, in applying the Permit Matrix to subsequent permitting decisions, will act in a fair, equitable way in approving permits of a similar type; that their decisions will be based on the best available information and professional judgment; that they will attempt to follow the requirements of the Permit Matrix in the application of their regulatory authorities in a consistent, predictable fashion; and that they will exercise discretionary judgment, varying from these standards where reasonable, appropriate and consistent with item #15 of the 'Structure and Use Permit Conditions.'" Permitting Procedures, Chilkat Bald Eagle Preserve Plan, App. D (September 2002).

INVESTIGATION

The investigators interviewed or contacted the following people as part of this investigation:

- The complainants
- Kent Sullivan, the complainants' attorney
- ADF&G Southeast Regional Supervisor Jackie Timothy
- ADF&G Habitat Biologist Kate Kanouse
- DNR Park Ranger Joel Telford (No longer in this position)
- DNR Division Operations Manager Chris Degernes (No longer in this position)
- ADF&G Sports Fisheries Biologist Rich Chapell
- ADF&G Sports Fisheries Biologist Dean Hughes

Other information and materials reviewed included agency files, materials provided by the complainants, agency Web sites, the tour boat company Web site, Lynn Canal Conservation's (LCC) Web site, and court files concerning prior litigation between the State of Alaska and LCC. A summary of the information obtained during the investigation follows.

History of the Tour Company Owners' Floating Docks

On July 9, 1996, ADF&G approved the Owners' application to install a floating boat dock on the Chilkat River under AS 16.05.840. The original permit expired on December 31, 1996. (Fish Habitat permit FG 96-I(N)-30). The Owners are required to remove the floating dock from the Chilkat River prior to November 1 and store the dock in a location 25 feet from the riverbank through March 1. The Owners also are required to annually renew their fish habitat permit to use the floating dock in their tour operations. In the past, the Owners have been required to revegetate the riverbank to promote bank stability as part of the terms of the Fish Habitat permit. In May 2004, Habitat inspected the Owner' property as part of the permit renewal process and noted that the Owners' earlier efforts to revegetate the bank were not successful in controlling bank erosion. In June 2004, Habitat required the Owners to take additional steps to control erosion as part of the terms of their renewed permit (FH04-I-0088).

Habitat's June 2004 permit approval noted that the Owners' use of equipment to seasonally remove and replace the docks as required by prior permits was in fact causing further erosion of the riverbank. The Owners requested Habitat allow them to store their floating docks in the river at an adjacent upstream location where the docks would not ground during low water. This proposed change was intended to reduce the use of heavy equipment on the streambank. Habitat approved this change, provided that the docks never grounded at any time. Permit FH04-I-0088 was in effect from June 2004 through December 31, 2007.

The Tour Company Owner's 2007 Marina Proposal

In the summer of 2007, the Owners proposed to DNR Parks a plan to excavate and construct a marina for their floating docks so they could remove them from the Chilkat River.

The Owners' current permit allows the use of floating docks in the Chilkat River during the period of April through December 31. After this period, the Owners are required to move the floating docks to an adjacent upriver location for winter storage and return the docks to the same location at the start of the tour season. The Owners asserted that it was better to have floating docks inside of a protected marina instead of in the Chilkat River. They asserted that if a fuel spill were to occur, it could be contained within the marina, as opposed to contaminating the river.

In July 2007, the Owners applied for a “dredge and fill” permit from the U.S. Army Corps of Engineers. Under the federal Clean Water Act, the Army Corps has permitting authority over dredging and filling in navigable waters of the United States. Their authority also extends to wetlands. The Army Corps of Engineers approved the project on September 28, 2007, under a general permit. Most water-related projects requiring state permits were required to go through the Alaska Coastal Management Program (ACMP) process. This started with a Coastal Project Questionnaire and Certification Statement signed and certified by the applicant. It was also required to contain a description of the project and its likely impacts. The ACMP staff then forwarded this questionnaire to other agencies that needed to permit the project before it could legally proceed. The ACMP included standards for habitat, subsistence, etc., but the ACMP itself served a mostly procedural role rather than a substantive one.

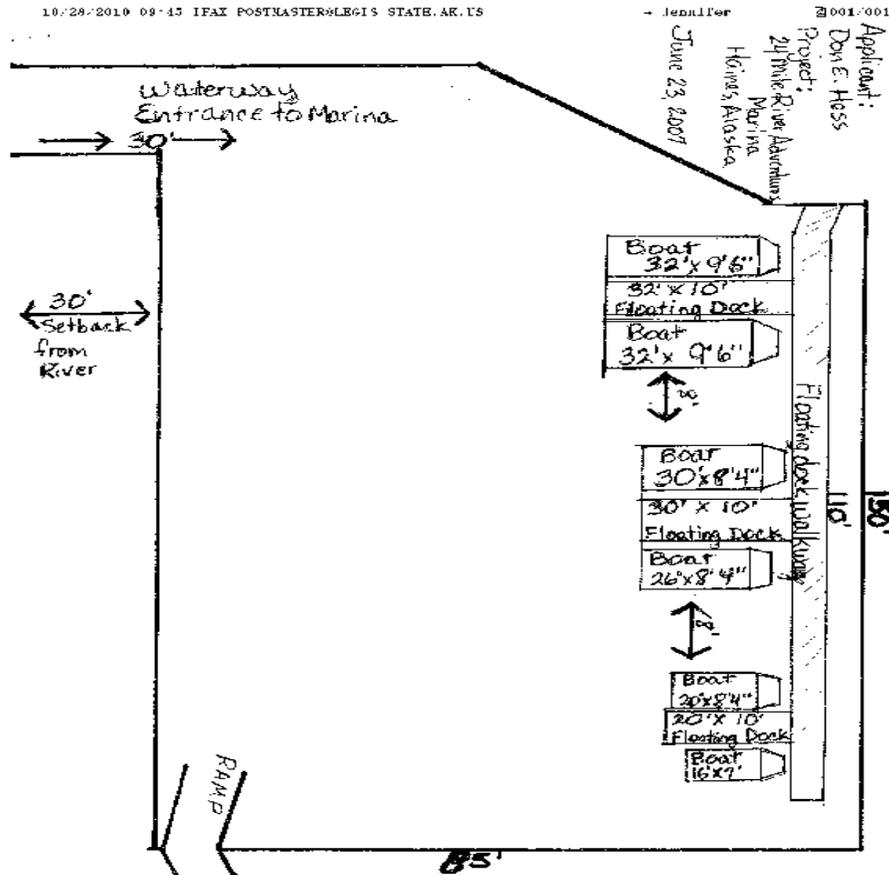
On August 20, 2007, the Owners submitted their Coastal Project Questionnaire and Certification Statement to Erin Allee, an ACMP project specialist. The fax cover sheet included the Wife's comment:

Erin,

I have completed the application for your evaluation. As you can see, we would like to be able to do this project, if approved, in mid-October.

The ACMP questionnaire included drawings of the proposed project, included below:

(SPACE)



In correspondence with Erin Allee in August 2007, ADF&G Southeast Regional Supervisor Jackie Timothy summarized her initial position on the proposed marina:⁸

Long story short – [the Owner husband] has a slough on his property that he wanted to fill for buildings and parking. Instead, he will now make a marina and dock there. It's a good idea from a habitat perspective. The slough is wet sometimes, but does not support fish. If he dredges it out deep enough, water could flow in there and keep his boats protected. Right now, he is required to pull his dock out of the Chilkat at freeze up, but his banks are not stabilized so it is quite the trick to keep from losing his heavy equipment into the drink. Chilkat water will get in the marina some of the year, so there is the potential that juveniles will get trapped. We'll have to evaluate the best way to mitigate that. Maybe require him to trap or something . . . or maybe not. Might be good rearing habitat, who knows. We can test DO [dissolved oxygen] and temps and stuff to see if it is suitable for fish. . . if it is, we could maybe have him trench into the Chilkat so water in there doesn't get stagnant. Lots to think about.

⁸ E-mail from Jackie Timothy to ACMP Project Specialist Erin Allee, August 24, 2007 (RE: CPQ: [Name redacted] Marina – ID2007-814J).

In a letter to the Owners on October 5, 2007, Erin Allee described the proposed project as follows:

The purpose of the project is to construct an 85' x 150' marina and outlet channel to house six flat bottom commercial river boats. The work consists of using an excavator to dig into the earth approximately 8' to the level of the riverbed that parallels this property. The water from the Chilkat River will fill the proposed marina in the summer months; during the winter the boats will be removed and the marina will become a dry bed. Within the marina a 110' x 10' floating dock will be constructed of marine plywood and lumber. Three finger docks will extend from this floating dock. There will be a 30' setback from the edge of the river and the proposed marina's closest bank. The 20' x 30' outlet channel will require some excavation and bank stabilization.

ADF&G Gives the Go-Ahead to Dig Prior to Final Permitting Approval

The Owners said they were constrained by seasonal conditions – they needed to do the excavation when the river was low in the fall, but before freeze-up. Hence, the following e-mail exchange between ADF&G Regional Supervisor Jackie Timothy and the wife in the fall of 2007, on October 9 or 10:

Jackie,

I received an e-mail from Randy Vigil saying that they will be issuing a permit from the Corps, for our Marina project. I have questions about the State's permit process. Erin did say that usually there is a 30 day process with 17 days being public notice for comments. That puts us past the time that we could do this project for this year. If this is the case, then we would not complete the project until October of next year. If the State does go the public process and there are no objections, is it possible to issue a permit that is good for at least a year? October is really the only month that we would be able to dig the ground, so if indeed there is a 30 day process, that wouldn't work for this October.

Please let me know what the process is for the State.

Thank you,
NAME

Haines, AK

* * *

Hi NAME –

I won't do a single agency review. I'll modify your existing permit. That will solve the problem. I'm in Icy Bay right now and will be really busy in the Mendenhall River through the 16th. Therefore, go ahead and start digging and placing your logs in the marina... but DO NOT connect to the Chilkat yet. I'll have your permit before you need to do that. Will that work for you?

Jackie Timothy
Juneau Area Manager

Jackie Timothy later described the situation that led to her reply. Ms. Timothy was in the field with only intermittent e-mail access, and little or no cell phone coverage. She was not scheduled to be back in her office in time to address the Owners' permitting issues before they lost their construction window for the year. Further, she believed that the Owners proposed marina was a good solution to the problem presented by their floating docks, and she believed that all of the DNR staff – OHMP, Parks, and ACMP – agreed on the project. She did not anticipate that the remaining permit process would be anything more than a formality.

Ms. Timothy prepared a draft modification to the Owners' existing fish habitat permit. The draft, dated October 30, 2007, was intended to be a modification of Fish Habitat Permit FH04-I-0088. She also sent the Owners a copy of the draft permit for their feedback; they responded that it looked fine.

In the meantime, the Owners wasted no time. In a November 1, 2007 e-mail, Joel Telford, the Parks ranger assigned to Haines at that point, wrote to Jackie Timothy and Rich Chapell:

Jackie and Rich,

I was up talking to [Owner husband] today regarding his marina. The marina itself is mostly complete and just requires some landscaping. I did talk to [him] about doing in-river work and breaking into the Chilkat. [He] is aware that the best timing for that is much later in the winter or early spring and is not pushing to do that immediately....

On November 2, 2007, ADF&G Fisheries Habitat Biologist Kate Kanouse conducted a site visit of the marina, accompanied by ADF&G Fisheries Biologist and Park Ranger Rich Chapell and Joel Telford. The marina was dug out, with a foot or two of water in it, and the outlet channel was mostly complete. A dirt berm separated the Owners' outlet channel (on their private property) from the Chilkat River and the Preserve. In photographs taken during the site visit, the berm appears to be a few feet wide. Rich Chapell's notes from the visit describe it as a "2 ft high sand bank." He described the water level in the pond/channel as being a foot higher than the water level in the Chilkat at that point.

Joel Telford wrote to Jackie Timothy and Erin Allee on November 6, 2007, regarding the permit Parks would need to issue before the Owners connected their excavation to the Chilkat River. He indicated that the Owners would need to obtain a special use permit from Parks in order to breach the bank of the Chilkat River. Telford noted that the Owners already had a 2007 non-competitive commercial use permit from Parks; however, he wrote that the stipulations in that permit addressed the jet boat operations on the river, and the intent of the permit did not stretch well to address the excavation of the riverbank and addition of a marina. In his e-mail, he stated in part, "The Special use permit would be for a one-time, in-water work project to create the opening, after which access would be created. Additional permits would probably be necessary for maintenance in future years if needed."

In a second e-mail that day, Mr. Telford wrote to Jackie Timothy, Erin Allee, and Southeast Area Parks Superintendent Mike Eberhardt:

Upon the conclusion of the ACMP review for the . . . marina project, Parks is prepared to issue special use permit H-0711 to allow them to breach the bank and connect their marina to the Preserve. Please don't hesitate to call me if you have additional questions.

Parks Upper Management Disapproves of the Marina Project

The then-deputy director of Parks, Chris Degernes, said that she learned about the Owners' marina in mid-November 2007. Ms. Degernes explained that Regional Parks Superintendent Mike Eberhardt was on leave, and Joel Telford was acting as regional supervisor. Mr. Telford provided Ms. Degernes with a routine update on the Southeast office, and she noticed a reference to the Owners' marina. Ms. Degernes asked for more information and was sent the photographs from the November 2 site visit, among other documents.

Ms. Degernes said that she was horrified that Parks had allowed this project to happen. She cited her experience as a manager on the Kenai River, and said that Parks generally just would not permit this kind of project—a private marina opening into a river managed as a state park. She was further appalled that OHMP was not treating the marina construction as a new project requiring a separate fish habitat permit, but was processing it as a modification of the fish habitat permit for floating docks in the river.

Ms. Degernes said that she was very disappointed with the Parks staff in Juneau and Haines; On December 6, 2007 she suspended Mike Eberhardt's and Joel Telford's authority to issue permits by ordering that all Parks permits in the region be approved at the deputy director level, at least until the Southeast staff received further training.

In early November 2007, Parks staff had told Erin Allee in the ACMP office that they would need to proceed with an ACMP consistency review for the Parks special use permit. On November 20, 2007, Ms. Allee e-mailed Mr. Telford to find out what had happened to the proposed review. Mr. Telford's response, sent to Jackie Timothy as well as Erin Allee on November 29, 2007, read:

Erin,

It doesn't look like we are going to permit the . . . project and at this time would like to continue to hold the ACMP review. We are in the midst of writing them a letter responding to the project and their response will probably dictate the action on that.

Jackie Timothy, outside Parks, described the change as startling – between November 6 and November 29, 2007, Parks reversed its position on the marina.

No Messenger Will Bear the Bad News to the Owners

The ombudsman investigators asked Ms. Timothy whether she contacted the Owners to tell them that their project was in trouble. Ms. Timothy said that she assumed Mike Eberhardt or Joel Telford did so.

The ombudsman investigators also asked Chris Degernes when Parks officially notified the Owners that Parks was denying the special use permit – a decision apparently made by the end of November 2007. Ms. Degernes said she did not think the Owners had

actually filed an application for the special use permit. Although the Owners had not filed for a Parks permit before they constructed most of the marina in October, they did apply for a Parks special use permit in November 2007. The referenced application was not in the documents reviewed by the ombudsman investigators, although it was referenced in an e-mail dated November 20, 2007. Instead, the file contained a special use permit application signed by one of the owners and dated January 25, 2008. Ms. Degernes said that she thought that Parks had “never really put a decision in writing” regarding that permit application.

Parks worked on a draft letter to the Owners beginning in late November of 2007, but this apparently did not result in a final document. However, some of the bad news reached the Owners anyway, judging by a January 23, 2008 e-mail from one of the Owners to Mike Eberhardt:

Mike,

We have not received a letter from Parks stating that we are not able to continue with the entrance opening to our Marina Project at 24 mile. Since we have to order material very soon, for the covers that are going to be over each finger float, can you please give me an update on this project. If we are unable to continue as planned and we receive a letter stating that we must halt the project, I think you should be aware that we will ask the State for reimbursement for all expenses incurred up to this point. This is due to the fact that we filed all the proper permits and were give the o.k. to proceed. I do hope you understand.

Michael Eberhardt at Parks sent a letter to the Owners on January 23, 2008, about two months after Parks had internally decided not to permit the project. The letter did not announce a decision:

Dear Mr. [Name Redacted]:

In mid November, 2007, the Alaska Division of Parks and Outdoor Recreation received your permit application in which you requested authorization to breach the river bank between your constructed marina and the waters of the Alaska Chilkat Bald Eagle Preserve (CBEP). Your application is currently undergoing a multiple agency review by our division, DNR’s Office of Habitat Management and Permitting, and the Alaska Department of Fish and Game.

Until the multi-agency review has been completed, you are advised that you do not have authorization to proceed with any activities that may affect the CBEP.

Thank you for your cooperation. I will be in contact should we require any additional information.

Parks Threatens to Take Over the Marina If Connected to the Chilkat

Parks’ decision in November 2007 was to issue or not to issue a special use permit for the Owners’ marina entrance. This decision was necessary because the outlet channel would alter the bank of the Chilkat River, and thus affect the state park, the Preserve. However, in early 2008, Parks raised a new argument – that the marina itself would become part of the Preserve as soon as it was connected to the Chilkat River. Parks staff were discussing this argument beginning in late November 2007, but it does not appear to have passed

beyond Parks internal debate until February 2008. This argument supposed that the Preserve's boundary would follow the water and bulge to encompass the marina. This was clearly objectionable to the Owners, as the entire square footage of the marina had been dug on the Owners' private property. To the Owners, Parks' argument amounted to a loss of real estate, not to mention loss of control.

This issue took a turn in February 2008, at a meeting of the Owners, James King (then-Parks director), Mike Eberhardt, and Joel Telford. The Parks director and staff put forward their position that the marina would become part of the Preserve. The immediate result would be that many portions of the already-constructed marina would violate the Preserve Management Plan. For example, the log cribbing inside the marina did not meet requirements for construction within the Preserve, nor did the boat launch. Not surprisingly, the Owners promptly abandoned their plan to finish the marina's outlet to the river, and switched to demanding reimbursement for construction costs incurred in asserted reliance on ADF&G and Parks' earlier conduct.

On February 18, 2008, one of the Owners laid out their demand for reimbursement in a letter to Regional Supervisor Jackie Timothy at ADF&G. The Owners sent courtesy copies to Parks Director James King and the Southeast Area Parks Superintendent, Michael Eberhardt; however, the letter was addressed to Ms. Timothy instead of Parks, perhaps because Timothy had earlier provided the single most concrete assurance to the Owners that their project would be permitted. The most relevant excerpts read as follows:

Jackie,

We met with the Director of Parks, James King . . . last week and were told that if we breach the entrance to the marina that it would become part of the Preserve and therefore fall under the jurisdiction and management of Parks. This was definitely news to us and not what we expected. As per your instructions in your e-mail to us dated October 9, 2007, we began digging the marina and placed logs for cribbing on two sides of the banks. We did this without knowing that the marina would become part of the Preserve. We were also told by the Director of Parks, that the cribbing and boat launch are not conducive to the Preserve's management plan. Had we known this was going to happen, we certainly would not have even done this project. Since this is our private property, there is no way that we would ever give up part of our property to the Preserve, nor would we ever want Parks to manage this marina.

When we began the permitting process, we contacted every agency we thought we needed to contact and the permitting process went forth on advisement from your department. We believe that there was a communication breakdown within the State agencies. . . . (Owners' names) have suffered significant costs for a project that we would never have began, had we known the outcome. We are requesting that DNR reimburse us for our costs to date. . . .

* * *

The Owners requested \$23,270 for reimbursement, including equipment rental, labor, and Styrofoam logs purchased in Seattle specifically for the new floating docks that were part of the design.

The Owner wife asserted that her October 10, 2007, e-mail to Jackie Timothy was not actually a request to proceed with construction immediately, but really an inquiry about whether DNR could issue a permit (or permits) that would be valid through the fall 2008 construction season if they were not issued in time for construction in 2007. She also cited the November 2, 2007, site visit by Habitat ADF&G and Parks personnel as grounds for the Owners' assumption that the project was approved. She concluded, "This is a matter of unnecessary costs incurred on our part and without fault on our part."

Parks' threat that if the Owners breached the entrance to marina, it would become part of the Preserve, was an effective one. Instead of denying a special use permit, Parks told the Owners that if they did get a permit, they would lose part of their real estate and be unable to use the marina as built. The Owners responded on February 18, 2008, by withdrawing their permit application to finish the marina, and indicating the marina would remain a pond. Therefore, Parks did not have to issue a decision denying the special use permit.

According to Ms. Timothy, Parks would not issue the Owners a special use permit, but at the same time, Parks also refused to put their reasons in writing.

It is also worthwhile at this point to clarify jurisdictional issues. In discussing a prospective fish habitat permit back in October 2007, Ms. Timothy had warned the Owners that the waters in their marina would become subject to state regulation:

"The draft modification stated that 'Once you breach the berm between the marina and the Chilkat River, those portions of the marina and the outlet below ordinary high water will be part of a specified water body, the Chilkat River, and subject to written approval in a Fish Habitat Permit before you can begin any construction, activity, or use.'"

The October 2007 habitat draft permit also stated:

". . . be advised that this determination applies only to activities regulated by OHMP; other divisions with ADNR also may have jurisdiction under their respective authorities."

This was no more or less than a statement that the marina, when connected to the river, would be anadromous fish habitat. Waters regulated as anadromous fish habitat are subject to regulation by the Habitat Division (formerly OHMP) even when they are on private property. In other words, while one may own a private parcel of land, one still needs a fish habitat permit to dig in a salmon stream on the land. This is rather different from Parks' 2008 assertion that the marina would belong to the state park instead of to the Owners.

ADF&G Refuses to Reimburse the Complainants; Parks Threatens Enforcement

ADF&G declined to reimburse the Owners. Jackie Timothy wrote to the Owners on April 11, 2008. Her letter stated in part:

We are in receipt of your letter dated February 18, 2008 regarding your marina project. I understand that the Division of Parks and Outdoor Recreation (DPOR) has already responded to you about concerns they have related to the proposed marina and work completed to date. . . . Because the DPOR manages the Chilkat

Bald Eagle Preserve and issues Parks permits, it is up to that division to evaluate implementation of the Preserve plan and the need for their permits. **In regards to your letter, we cannot agree to your request for reimbursement.**” [Emphasis added.]

Parks responded to the Owners’ February 18, 2008 letter about a month later, on March 14, 2008. Parks Director King wrote in part:

Please accept my thanks for meeting with Mike Eberhardt and me during our visit to Haines in mid February. . . . Based upon our conversation during that meeting, I understand that you do not wish to proceed with the project permitting for the marina. We are prepared to accept that decision, but I would like to clarify the circumstances under which a permit might have been authorized, should you have chosen to continue along that path, as well as the requirements that are needed to restore the Chilkat River shoreline at this site.

Director King reiterated that if the river water entered the marina, then the waters within the marina “would be considered part of the Chilkat Bald Eagle Preserve (CBEP), and subject to DPOR regulatory requirements and management plan provisions.” He suggested that the channel entrance was likely to become a “functional boating channel” connecting the marina and the river, unless the Owners filled it in. He suggested that they obtain an Army Corps of Engineers permit for the necessary fill in order to avoid a Parks “enforcement effort.”

In April 2008, Parks informed Erin Allee at the ACMP:

The Owners have withdrawn their application for breaching the bank of the river in order to make a marina. They are sticking with the dock as it has been in previous years. So, no parks permit other than the Commercial use permit.”

Erin Allee sent the Owners a letter on April 14, 2008, informing them that ACMP had closed the project file for the marina. Ms. Allee stated:

On August 21, 2007, the Division of Coastal and Ocean Management (DCOM) received your Coastal Project Questionnaire, evaluation, and supporting plans and applications you submitted for the construction of a riverboat marina on your private property. On April 11, 2008 DCOM was notified by [Parks] that you wish to withdraw your application for this proposed marina and continue mooring your riverboats in the Chilkat River.”

In the meantime, the Owners’ 2007 fish habitat permit for the floating docks in the river had expired, as had their non-competitive park use permit from Parks. The Owners sought renewed permits for their in-river docks.

It looked like the marina proposal had been an expensive digression for the Owners, but that they were back to business as usual, albeit with a costly new pond on their land. Subsequent events, however, proved otherwise.

The Marina and Chilkat Connect

In late April of 2008, the berm failed, and water connected the marina to the Chilkat River, whether the Owners desired that outcome or not.

The Owners maintained that the breach was an accident. On May 2, 2008, the Owners' attorney Kent Sullivan described the breach as follows:

[O]ver the weekend, the waters within the . . . marina began to rise significantly due, not to the water level in the Chilkat River, but instead, due to the run-off filling the marina from both on and up-gradient from the Owners' property. As a consequence, on Monday morning, the water level within the marina was approximately 2 feet higher than the water level in the Chilkat River. The fine gravels and sand which comprised the dike became saturated and unable to contain the pressure . . . [T]here is breach in the dike approximately 6 feet in width and several feet deep. At that time, water was actively flowing from the marina into the Chilkat River.

Some of the Fish and Game biologists – Kate Kanouse and Rich Chapell – said that the top of the berm had been below the ordinary high water mark when the Owners completed their work in November 2007. If true, this would mean that the Owners' October 2007 excavation was illegal, because excavation below ordinary high water on the riverbank would have required a fish habitat permit beforehand, unlike excavation of their private pond separate from the river. It would also mean that the subsequent breach was basically inevitable.

The Owners Seek Legal Counsel

The Owners retained attorney Kent Sullivan, who wrote to Parks director, James King, on May 2, 2008, disputing Parks' assertion that the marina was encompassed within the Preserve. Mr. Sullivan cited and summarized case law that tended to support his argument, and stated that his clients now "intend to move forward with the marina use and operation."

The State did not respond to Mr. Sullivan until September 2008, when Assistant Attorney General (AAG) Thomas Lenhart authored a letter responding to Mr. Sullivan's May 2 correspondence. AAG Lenhart conceded that the submerged land under the marina remained the Owners' private property (and not property of the state park), yet he managed to avoid budging substantively from Parks' basic position. AAG Lenhart argued that although the land was private, the water in the marina was available for public access as navigable water and thus subject to regulation by Parks. He asserted that the Owners were required to comply with the conditions set forth in Director King's March 21, 2008, letter.

However, AAG Lenhart recommended negotiation: "A collaborative effort to come to a resolution that will bring the marina into compliance would appear to be in the best interest of all parties, and would avoid any enforcement or other legal action."

Mr. Sullivan sent a subsequent letter to Mr. Lenhart on October 21, 2008. Again, the letter disputed that the marina would become public lands, subject to regulation by the state, simply because the marina would be connected to the Chilkat River. Mr. Sullivan asserted that the State had no right to regulate the marina and that it remained the private property of the Owners. If the State attempted to regulate the marina's operations, Mr. Sullivan asserted it would be a compensable taking, requiring payment to the Owners. Mr. Sullivan relied on Jackie Timothy's e-mail: "this written email was following

numerous oral discussions which had already taken place between the Owners and representatives from the State, all of which left the Owners with the expectation that it was appropriate to move forward with this project.”

Despite disagreement over the state’s ability to regulate activities in their marina, Mr. Sullivan indicated the Owners were agreeable to allowing access by the State to their marina and private property to test, sample, and monitor any fish to ensure their activities had minimal impact on the area fish and wildlife. Mr. Lenhart did not respond to this letter.

During the summer of 2008, while the attorneys faced off in slow motion, the Owners ran their jet boat tours. The docks stayed in the Chilkat River (pursuant to the fish habitat permit issued on April 11, 2008), and the marina sat unused during the tour season. The only use the Owners made of the marina was to store the dock floats in it during the winter of 2008-2009.

*Habitat Division Site Visits*⁹

Jackie Timothy and Kate Kanouse took the pragmatic view that because the marina was there, they should gather data. The first site visit had occurred November 2, 2007, before the project became controversial. Kate Kanouse conducted site visits to the marina on the following dates:

- November 2, 2007 (November 14, 2007 trip report)
- July 20-21, 2008 (September 3, 2008 trip report)
- September 8, 2008 (September 12, 2008 trip report)
- February 13, 2009 (March 3, 2009 trip report)
- May 13, 2009 (June 15, 2009 trip report)

During the July and September 2008 visits, Kanouse found juvenile fish in the marina, mostly Coho and Dolly Varden, and dissolved oxygen levels within the range specified by the Department of Environmental Conservation (DEC) water quality standards for fish-bearing fresh water (7-17 mg/L). Temperature was also within DEC standards for fresh water fish habitat (less than 15 degrees Celsius). As of September 2008, Kanouse reported on bank stability along the shore of the marina:

Cottonwood saplings are growing from most of the horizontal cribbing logs . . . Horsetails, grass and tree saplings are colonizing the west sloped bank, and I observed some erosion rills on the unvegetated north bank. The log cribbing structure appears secure, but soil behind the cribbing continues to slough between the logs in many places.¹⁰

Jackie Timothy also made a site visit on October 8, 2008, incidental to a trip to Haines for other matters. Her report was similar, but she did not measure dissolved oxygen and

⁹ The anadromous fish habitat permitting functions were transferred from OHMP in DNR to the Habitat Division of the Department of Fish and Game, effective July 2008.

¹⁰ September 12, 2008 trip report, page 2.

water temperature, and did not catch any fish, possibly due to a short soak time for her fish traps.

Kate Kanouse was at the marina again in February 2009. The marina was not fully frozen; groundwater upwelling into the marina kept several spots free of ice. Ms. Kanouse sampled four sites, of which Site 4 was the confluence of the marina's access channel with the Chilkat River. In the marina, one site had dissolved oxygen above 7 mg/L, but the other two sites had dissolved oxygen levels of 1.14 – 3.37 mg/L, well below the DEC water quality standard for fresh water fish habitat. Ms. Kanouse dropped salmon eggs in the water as bait, but “none of the eggs were disturbed or consumed after about 40 minutes,” according to Ms. Kanouse's trip report. Overall, Ms. Kanouse concluded that the marina could provide “localized marginal overwintering fish habitat as open water upwelling locations, however, overall the marina provides poor overwintering fish habitat.”

By May 2009, the juvenile fish were back in the marina. During the May 13, 2009 site visit, Ms. Kanouse and Ms. Timothy trapped juvenile Coho and threespine stickleback at four locations in the marina. Dissolved oxygen and temperature met the DEC water quality standards.

Habitat Division Recommends Keeping the Marina

Jackie Timothy and Kate Kanouse authored a memo in March 2009 that provided Habitat Division recommendations for improvements to the marina. Ms. Timothy believed the marina could be permitted, and made suitable from a fish habitat perspective. This March 23, 2009 memorandum to Chris Degernes set forth several recommendations:

ADF&G biologists have monitored the marina on five occasions since the marina was constructed in October 2007, during summer, fall and winter months. Based on our findings of fish use and year round habitat potential in the marina, we recommend the following:

- Place gravel along the entire ramp length to stabilize the soil and reduce turbidity in the marina
- Retain log cribbing, and improve the soil stability behind the structures to arrest erosion, and reduce turbidity and sedimentation in the marina
- Excavate behind the cribbing
- Install a filter fabric behind the cribbing that passes water but retains sediment
- Backfill behind the filter fabric
- Plant native vegetation behind the cribbing, including willow, alder, wild rose, high-bush cranberry and current [sic] bushes to filter surface water and prevent soil erosion
- Vegetate exposed banks with native vegetation to protect against erosion and provide overhanging fish habitat including shade and food;
- Where exposed banks cannot be vegetated due to annual water inundation, place filter fabric covered by rock along the banks; and
- Stabilize the banks of the Chilkat River immediately adjacent to the cribbing walls at the confluence to prevent riverbank erosion and

unraveling from eddy currents. We will work with [the Owners] to identify the best method for stabilizing these riverbank sections.

The marina option is environmentally preferred compared to the existing dock operation directly in the Chilkat River. Specifically, previous Fish Habitat permits authorized Chilkat [the tour boat company] to remove their docks from the Chilkat River on or before November 1st and then replace them after the end of March. Heavy equipment must approach the edge of a grassy, sloughing riverbank and reach into the river to place and to retrieve the dock sections. This activity has compounded riverbank degradation adjacent to the . . . property. A Fish Habitat Permit that allows the docks to stay in the marina, year round, will reduce the riverbank instability aggravated by dock installation and removal. Additionally, at this time we have not documented that the marina provides overwintering fish habitat. Therefore, we are not concerned about the dock grounding in the marina during low water. Another benefit for using the marina includes the ability to easily and quickly contain spilled fluids before contaminants reach the Chilkat River. This is not possible for the existing dock operation directly in the river.

If [Parks] is able to permit the activity, ADF&G would issue a new Fish Habitat Permit for dock operations in the marina. The permit would include conditions necessary to ensure the proper protection of anadromous fish and their habitat.

When interviewed, Ms. Timothy indicated that she considered the marina a potential enhancement of fish habitat. She pointed out the juvenile Coho had been found in the marina in the summer.

Parks Deputy Director Disagrees with ADF&G Recommendations

Chris Degernes, deputy director for Parks, disagreed with the Habitat Division's assessment of the marina. When asked for the basis for her rejection of the habitat biologists' recommendations, Degernes cited both her experience as a Parks superintendent for the Kenai River area, and the expertise provided by another ADF&G biologist, Dean Hughes.

While she acknowledged there were differences between the Kenai River Management Plan and the Chilkat River Management Plan, and that neither plan specifically prohibited a marina on private property, she said that DNR would not permit the marina. In addition, while she acknowledged that the Chilkat River has limited private property on it in comparison to the Kenai River, she said there were enough other attributes about the marina project that supported DNR denying their permit application request.

In contrast, according to ADF&G Southeast Regional Supervisor Jackie Timothy, there are many differences between the Kenai River and the Chilkat River. She said that one of the reasons Ms. Degernes gave for not approving the Owners' permit was that it would create a bad precedent. Ms. Degernes reportedly expressed concerns about similar permits issued for the use of marinas on the Kenai River and commenting that they created a huge problem. Ms. Timothy disagreed there was any similarity between the two water bodies:

This isn't the Kenai. Kenai has many private parcels, so a whole bunch of marinas could be a problem there. But on the Chilkat, there is hardly any private land and very little development. It's not the same.

Ms. Degernes said that in late 2008, she consulted with Habitat to come up with a series of recommendations for retention of the marina project. In December 2008, Ms. Degernes met with ADF&G Habitat Director Kerry Howard to talk about Parks' concerns and how they could move forward with the project. Ms. Howard requested that Ms. Degernes outline recommendations that would make the marina project acceptable to DNR.

On December 10, 2008, Ms. Degernes sent an e-mail to both Habitat and Parks staff with her own proposed recommendations, including the removal of all bulkheads within the marina and entrance channel, as well as restoring any shoreline areas within the marina used as a boat ramp. In turn, Ms. Howard then forwarded DNR's recommendations to Jackie Timothy for review.

In December 2008, Ms. Timothy drafted a letter to the Owners with recommendations to make the marina more compatible with DNR's preserve management plan. However, according to Ms. Degernes, there were several recommendations in Ms. Timothy's draft letter that DNR could not live with. Ms. Timothy's draft recommendations included the use of a boat ramp and installation of bulkheads, contrary to provisions of the Preserve management plan. Ms. Degernes suggested that Ms. Timothy and Kate Kanouse contact fisheries biologist Dean Hughes for recommendations compatible to the Preserve plan.

In March 2009, Ms. Timothy proposed a second set of recommendations, as documented by Ms. Timothy's March 23, 2009 memo to Chris Degernes. Ms. Degernes stated that Habitat's second set of recommendations were unacceptable and included many of the same recommendations previously proposed by Ms. Timothy in December 2008. Ms. Degernes characterized Timothy's recommendations as incompatible with the Preserve plan. She said that the two agencies could not come to an agreement on joint recommendations for the Owners to follow in order to make the marina compatible with the Preserve plan.

May 2009 DNR and ADF&G Meet in Haines

In May 2009, the key ADF&G and DNR staff met in Haines to discuss the fate of the marina, including Kate Kanouse, Jackie Timothy, Rich Chapell, Dean Hughes, Mike Eberhardt, Preston Cruze (a park ranger in Haines), and Chris Degernes. Ms. Degernes said that it was decided at this meeting that DNR would pursue restoration of the marina entrance by the Owners. The spring trip included an inspection of the marina by the state agency personnel.

Ms. Degernes characterized the position of the Habitat staff at this meeting as follows: "[The] Habitat folks were so adamant defending their decision to originally allow the marina as a good idea, so surprised we didn't think it was the greatest thing on earth. [Habitat] defended a bad decision, despite lots of evidence to the contrary. [It was a] death trap to fish." Ms. Degernes asserted that although there was a little bit of dissolved oxygen in the marina as documented during ADF&G staff during earlier site visits, it was not enough to sustain fish, and small fry would be trapped in the marina and die. Ms.

Degernes asserted that the marina had no habitat value. She relied heavily on the expert opinion of ADF&G Habitat Biologist Dean Hughes, who she asserted could best explain why the marina was not a good idea.

Jackie Timothy confirmed that the two agencies were unable to come to an agreement on the sustainability of the marina at the agency meeting. She also took issue with Ms. Degernes allegedly calling the marina a “killing field” for rearing salmon. In response to this comment, Ms. Timothy said she asked Ms. Degernes how many dead fish were pulled out of the fish traps during the recent site visit. According to Ms. Timothy, Ms. Degernes responded that the dissolved oxygen levels were too low to sustain fish and she would not agree to permit the project regardless of any evidence Ms. Timothy offered showing the marina was good fish habitat.

Habitat Biologist Dean Hughes Discusses the Marina

Mr. Hughes works in Anchorage as a habitat biologist with the ADF&G Sport Fish Division. He previously worked in the ADF&G Habitat Division from 1995-2002. He is currently in charge of a program for streambank restoration and habitat improvement.

Mr. Hughes said that Kate Kanouse had initially contacted him for advice on the best ways to revegetate the marina and improve it as fish habitat; however, he told her that the better option would be to fill in the marina. He also spoke with Jackie Timothy, Chris Degernes, and Rich Chapell concerning the project, and confirmed that he conducted a site visit with Chris Degernes in either May or June 2009.

Hughes said that the marina had several problems as fish habitat in his opinion:

Juvenile salmon can live in such an artificial inlet in the summer, but they can be trapped in it as the river level drops below the level of the outlet channel in the fall, and then die because there is insufficient open water and dissolved oxygen for them to survive the winter.

He said that sometimes this can be prevented by providing “positive drainage” so fish are washed out of the marina at the end of the summer, instead of being marooned because the outlet channel drained sooner than the main marina. He added that the marina had not been designed to provide positive drainage.

He was concerned about the depth of freezing in the marina and the low level of dissolved oxygen. Based on his recollection, the dissolved oxygen levels documented by Kate Kanouse’s February 2009 site visit indicated a level of dissolved oxygen well below the state standard of 10/mg/L.

The lack of overhanging vegetation on the shore of the marina leads to increased predation by birds, he said. The marina was not good habitat because it failed to provide cover for young salmon.

According to Mr. Hughes, a marina is likely to concentrate hydrocarbons, which are toxic to juvenile salmon. Further, typical dredging for maintenance of the marina and channel stirs up and releases hydrocarbons that had settled out of the water.

Hughes said that although the marina had groundwater upwelling and thus areas of open water in the winter, he did not think the upwellings were big enough or high enough in dissolved oxygen to sustain juvenile fish through the winter.

Mr. Hughes noted that the problem with the marina was that the agencies were not involved in its design.

He also confirmed that the interagency meeting in May 2009 did not resolve the two agencies' differences of opinion on the marina project. As Mr. Hughes recalled,

There certainly were two different points of view. People got a little defensive. Only thing that made me uncomfortable was that Chris [Degernes] used a term: the basin if [fish were] trapped, would become a killing field, which Jackie [Timothy] took offense to. This was a surprise to me. Jackie got a little defensive there. Chris went in looking at this as it needs to be fixed. She said they made a mistake, both [agencies] made mistakes, went in without permits. It was not a typical Fish and Game meeting. [The] most uncomfortable part was that Jackie Timothy said because they found fish, it has to be good habitat. This was not necessarily true.

[The Owner husband] has done something without a permit. Chris needed to step up. We made a mistake without permitting or denying. . . We were trying to figure out a solution.

The ombudsman investigators asked Mr. Hughes about Ms. Timothy's argument that the marina was an improvement over the existing dock location in the Chilkat River. Ms. Timothy had maintained that the marina was the lesser risk, because the Owners would no longer be eroding the riverbank by using heavy equipment to haul out the docks, or leaving the docks to ground in the river during the winter. Mr. Hughes pointed out that the Owners chose large dock floats that they could not remove easily without damaging the riverbank, and that the solution was to limit the size of the dock segments. He said that leaving the docks in the Chilkat River year round could be a viable option. If the docks were not causing erosion by banging up against the riverbank, they could be allowed to rest on a gravel bar, or float in shallow water. He did not think that the docks resting on a gravel bar would have much impact on salmon eggs, in part because Fisheries Biologist Rich Chapell indicated that most spawning occurred further upstream.

DNR Threatens to Suspend or Revoke the Owners' Commercial Use Permit

In April 2009, the Owners received their 2009 commercial use permit from Parks¹¹, permitting them to operate their jet boat tours in the Chilkat Bald Eagle Preserve.

However, in June 2009 DNR Deputy Director Degernes sent the Owners a letter outlining DNR's requirements the Owners needed to comply with in order to keep their commercial use permit, including obtaining the necessary permits to fill the marina and riverbank. Chris Degernes' June 12, 2009, letter to the Owners stated in part:

¹¹ Alaska State Parks Non-Competitive Use Permit for Commercial Activities, Permit #SEP 0903.

The Division of Parks and Outdoor Recreation has had a long history of working with you to permit a responsible commercial recreational business while ensuring that the resources of the Chilkat Bald Eagle Preserve (CBEP) are protected as required in AS 41.21.610. Additionally, the State of Alaska has expended significant resources on various appeals over the years in which permits for [tour boat company] have been upheld. DPOR, however, must on occasion take appropriate action to correct certain actions by permittees in order to fulfill the management purposes of the CBEP.

Attached is a proposed amended permit for Permit #SEP 0309 [sic], your authorization to provide jet boat tours within the Chilkat Bald Eagle Preserve. One of the general stipulations within the original permit that was approved by Park Superintendent Mike Eberhardt on April 24, 2009 is a provision that permits the State to amend the permit.

Please carefully read the attached amended permit and return a signed copy to me no later than June 17, 2009 . . .

Since the Department of Natural Resources wishes to provide a timely response to an appeal of #SEP 0309 [sic] filed [by] Lynn Canal Conservation, Inc. on May 26, 2009, a prompt response from you is critical. **If we do not hear from you by the close of business on June 17, 2009, we will assume that you do not accept the terms of the amended permit and we will be forced to take actions to suspend or revoke your permit to operate within the Chilkat Bald Eagle Preserve.** [Emphasis added.]

The amendment to the commercial use permit provided detailed directions for filling the marina entrance channel. The amendment required that the work be completed no later than November 30, 2009. Ms. Owner faxed the signed permit amendment to Chris Degernes on June 15, 2009.

The Owners Discuss DNR's Promise of Recompense

The Owners stated that in early June of 2009, Chris Degernes of DNR Parks contacted them, said that Parks wanted to resolve the issue, and wanted to meet with them. According to the Owners, Ms. Degernes proposed that they fill in the entrance to the marina. They asserted that Ms. Degernes stated DNR would match the money they spent in doing so.

The Owners said Ms. Degernes also stated that the Lynn Canal Conservation (LCC) had filed an appeal on their Parks permit because they had violated their permit by allowing the entrance to the marina to be breached without a permit. According to the Owners, Ms. Degernes said LCC was going to file a lawsuit against DNR and the Owners, and that the Attorney General's office had advised her that LCC would probably win the lawsuit. They would run the risk of losing their permit to operate on the river according to Ms. Degernes. According to the Owners, Ms. Degernes said if LCC won the lawsuit DNR Parks would have no other choice but to revoke their permit to operate. The Owners stated they felt they were "basically blackmailed into agreeing to fill the entrance and we could not afford to fight the battle." They acknowledged that their attorney advised them not to sign an agreement proposed by Ms. Degernes. However, against the advice of their

attorney, they signed the agreement, because they did not feel that they could afford the legal fees to contest the issue.

Chris Degernes Discusses Her Contact with the Owners

Degernes said she met with the Owners in Haines on May 12 or 13, 2009, and again on June 12, 2009. She presented the Owners with the June 12, 2009 letter threatening to revoke their use permit unless they agreed to fill in the marina access. The ombudsman investigators asked Degernes why the matter had become so urgent (as of June 12) that she set a deadline of June 17, 2009, for the Owners' reply. Degernes said AAG Lenhart had advised her the existence of the marina added ammunition for Lynn Canal Conservation's annual appeal contesting the Owners' commercial use permit. Degernes felt that the problems with the marina could make the difference between LCC winning a lawsuit, instead of losing as in the previous litigation. She said DNR intended to decide LCC's appeal promptly, and that was why she needed the Owners to respond quickly. However, she admitted DNR did not in fact respond to the LCC appeal as quickly as she had hoped or intended. Degernes also said AAG Lenhart had advised her that Parks could legitimately make the removal of the marina/channel a condition of the commercial use permit for the jet boat tours.

Regarding reimbursement, Degernes denied having committed Parks/DNR to reimbursing the Owners' expenses. Degernes said that she had told the Owners they could apply for a grant from a streambank restoration program, which could potentially offer matching funds. She referred them to Dean Hughes for further information on the grant applications, but she said Hughes reported that the Owners did not follow up with him.

The Owners Fill in the Marina

The Owners applied for permits to fill in the marina entrance channel and the marina itself. They obtained the necessary permits from the Army Corps of Engineers¹², Habitat, and Parks.

The Owners have since filled in the marina and are utilizing the space as a parking lot. The Owners previously requested \$23,270 as reimbursement for excavation of the marina, including equipment rental, labor, and Styrofoam logs purchased in Seattle specifically for the new floating docks that were part of the original marina design. They incurred an additional \$15,156 in the process of filling in the marina. The total combined expenses incurred by the Owners for initial construction of the marina and subsequent filling in came to approximately \$38,426.

¹² Under section 10 of the Rivers and Harbors Act of 1899, the U.S. Army Corps of Engineers (USACE) regulates all work and structures in navigable waters of the United States. Under section 404 of the Clean Water Act, USACE permits are issued or denied to regulate discharges of dredged or fill materials in navigable waters of the United States, including wetlands.

Comparison of the Kenai River and Chilkat River Management Plans

The ombudsman investigators reviewed the Kenai River and Chilkat River Management Plans, DNR's permitting procedures, and various literature studies discussing the impact of marinas on the environment during the course of this investigation. Below is a summary of the information obtained from this review.

Kenai River Comprehensive Management Plan

The Kenai River Special Management Area (KRSMA) consists of more than 105 linear miles of rivers and lakes, including Kenai Lake, Skilak Lake, and the Kenai River from river mile 82 downstream to four miles above the river's mouth on Cook Inlet. Adjacent to these waters are 15 state park sub-units and land owned by cities, the borough, and the federal government, as well as private and Native lands.

In 1984, the Alaska Legislature established the Kenai River Special Management Area as a unit of the state park system. In 1997, a comprehensive management plan for the area was adopted, developed by Parks, ADF&G, the Kenai Peninsula Borough, and a public advisory board. The plan's goal is to protect the natural resources, fish, and wildlife habitat, and manage the river's resources.

In 1993, the ADF&G obtained Alaska Coastal Management Plan (ACMP) Section 309 funding to document all structures and fish habitat components on each parcel along the Kenai River. ADF&G identified 1,869 structures along the river, which holds 11 miles of juvenile Chinook salmon rearing habitat. In 1997, the "309 study" was funded again to detect changes to the river; primarily to evaluate newly developed structures and habitat components. In 1997, ADF&G documented 5,989 structures along the river, an increase of over 300 percent since 1993.¹³

Chilkat Bald Eagle Preserve Management Plan

The Chilkat Bald Eagle Preserve Plan is the basis for the management and use of state lands and waters within the Preserve. The Preserve is more than 30 miles long and up to three miles wide. The principal river is the Chilkat, which passes through the Preserve from its northern boundary to the southern boundary, which is nine miles from the community of Haines. Private property is exempt from management under the plan.¹⁴ Unlike the Kenai River, there are few privately owned parcels of land along the Chilkat River.

As described in Alaska Statute, the purpose of the Preserve Plan is to protect and perpetuate the Chilkat bald eagles and their essential habitats within the Preserve. It was also established to:

- Protect and sustain the natural salmon spawning and rearing areas of the Chilkat River and Chilkoot River systems in perpetuity;

¹³ http://www.adfg.alaska.gov/static/home/library/pdfs/habitat/95_06.pdf

¹⁴ Lands Excluded From the Preserve (AS 41.21.612): Private land, approved or pending Native allotments, pending and approved land selections made of the Haines Borough, and University of Alaska grant land are excluded from the Preserve.

- Provide continued opportunities for research, study and enjoyment of bald eagles and other wildlife;
- Maintain water quality and necessary water quantity;
- Provide for the continued traditional and natural resource based lifestyle of the people living in the area; and
- Provide for other public uses consistent with the primary purpose of the Preserve

According to the Preserve,

The Preserve within the last ten years has experienced greatly increasing levels of commercial recreation use. **Generally, this use has had little discernible effect upon the hydrologic resources, wildlife, and habitats of the Preserve.** It is expected that the demand for commercial recreation activities will increase over the next 10-15 years, and with it, increased use of the Preserve for a variety of such uses. The management intent statements and the listing of allowed/not allowed uses for each plan unit are intended to provide direction for the management of current and future commercial recreation services.¹⁵ [Emphasis added.]

The Preserve focuses on the protection of bald eagles and their associated habitat and the spawning and rearing areas of the anadromous streams that provide the basis for the existence of the extensive bald eagle population. The traditional, natural resource lifestyle of the Haines community was recognized as an appropriate use within the Preserve, subject to reasonable regulation. Under this provision, access to traditional use areas is allowed, including access by motorized vehicles, and non-motorized uses. Other uses are permitted if they are consistent with the underlying objectives of wildlife and habitat protection.¹⁶

Commercial Permitting System

The Alaska Legislature in 1987 enacted further restrictions on commercial use within the Preserve: "With the exception of guided tours and noncompetitive commercial use permits, concessions or commercial activities are not permitted within the Alaska Chilkat Bald Eagle Preserve" (AS 41.21.027(g)).

The commercial use permitting system administered by DNR is to be used to mitigate the effects of commercial recreation operations upon traditional uses, habitat, and wildlife resources, as well as upon other lawful uses of the Preserve in order to meet the objectives of the Plan.¹⁷

Permitting: Procedures and Standards

Consistent with the requirements of AS 41.21.027(g), DNR shall issue only noncompetitive, non-exclusive use permits for commercial activities on the Preserve.

¹⁵ CBEP, Sept. 2002, Chapter 1, p. 15.

¹⁶ CBEP, Chapter 1, p. 11.

¹⁷ CBEP, Chapter 2, p. 6.

DNR may authorize commercial users of the Preserve when such uses are consistent with the general and specific standards identified in the CBEP Plan, the statutory intent and requirements identified in AS 41.21.630(a and b), and with the management intent and specific standards of individual management units. DNR should not issue a permit if the proposed use or activity is inconsistent with this requirement or it is unclear if the use or activity can meet this requirement.

DNR staff are guided by Permit Matrix procedures when deciding to issue permits for commercial activities in the Preserve:

It is the intent that the agencies, in applying the Permit Matrix to subsequent permitting decisions, will act in a fair, equitable way in approving permits of a similar type; that their decisions will be based on the best available information and professional judgment; that they will attempt to follow the requirements of the Permit Matrix in the application of their regulatory authorities in a consistent, predictable fashion; and that they will exercise discretionary judgment, varying from these standards where reasonable, appropriate and consistent with item #15 of the ‘Structure and Use Permit Conditions.’¹⁸

The ombudsman investigator reviewed the Preserve and Permit Matrix procedures that DNR is required to utilize when deciding permitting requests and could not find a specific prohibition on the use of a marina within the preserve. Without a specific prohibition therefore, DNR in its decision-making process was required to be fair and equitable, and base its decision on the best available information and professional judgment.

Literature Review: Impact of Marinas on the Environment

The U.S. Environmental Protection Agency (EPA) has conducted several studies researching pollutants associated with boat harbors and marinas and their impact on the environment. According to these studies, some of the adverse environmental impacts from boat harbor and marina activities include the reduction of dissolved oxygen in coastal waters and high concentrations of toxic metals in aquatic organisms.

The EPA has identified six categories of “non-point source pollution”¹⁹ relating to harbor and marina activities affecting coastal waters:

- Toxicity in the Water Column

¹⁸ App. D, Permitting Procedures, CBEP plan at Page D-1 (Sept. 2002).

¹⁹ Non-point source (NPS) pollution, or polluted runoff, generally results from land runoff, precipitation, atmospheric deposition, drainage, or seepage. Non-point sources commonly originate from urban development, road runoff, timber harvest practices, agricultural practices, and activities related to harbors and marinas. Examples include failing septic tanks, runoff, snowmelt carrying oil and grease into streams, and poor construction of roads resulting in sediment and runoff. NPS differs from point source, which refers to facilities that discharge treated wastewater through a pipe or other discrete conveyance and go through a permitting process. (<http://water.epa.gov/polwaste/nps/whatis.cfm>)

- Increased Pollutant Levels in Aquatic Organisms
- Increased Pollutant Levels in Sediments
- Increased Levels of Pathogen Indicators
- Disruption of Sediment and Habitat
- Shoaling and Shoreline Erosion

The EPA has established 16 management measures to address these non-point source pollution categories or “best management measures.” See EPA's *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters* (EPA 840-B-92-002 January 1993); *National Management Measures to Control Non-point Source Pollution from Marinas and Recreational Boating* (EPA 841-B-01-005, November 2001). The management measures include:

- Flushing
- Water quality assessment
- Habitat assessment
- Shoreline stabilization
- Storm water runoff
- Fueling station design
- Petroleum control
- Liquid material management
- Solid waste management
- Fish waste management
- Sewage facilities
- Maintenance of sewage facilities
- Boat cleaning
- Boat operation
- Public education

Marinas and recreational boating are increasingly popular uses of coastal areas. The growth of recreational boating, along with the growth of coastal development in general, has led to a growing awareness of the need to protect waterways. In the Coastal Zone Management Act (CZMA) of 1972, as amended, Congress declared it to be national policy that State coastal management programs provide for public access to the coasts for recreational purposes.

Boating and adjunct activities (e.g., marinas) are an important means of public access. According to the EPA studies reviewed by the ombudsman investigator, when these facilities are poorly planned or managed, they may pose a threat to the health of aquatic systems and may pose other environmental hazards. The EPA has suggested that selecting the best sites and designs for marinas, and utilizing the best construction, operation, and maintenance practices, can greatly reduce non-point source (NPS) pollution from marinas. See, EPA's *Clean Marinas Clear Value: Environmental and Business Success Stories* (EPA 841-R-96-003, August 1996).

According to the EPA, adverse environmental impacts can result from the following sources of pollution associated with marinas and recreational boating:

- Poorly flushed waterways where dissolved oxygen deficiencies exist;
- Pollutants discharged from boats;
- Pollutants transported in storm water runoff from parking lots, roofs, and other impervious surfaces;
- The physical alteration or destruction of wetlands and of shellfish and other bottom communities during the construction of marinas, ramps, and related facilities; and
- Pollutants generated from boat maintenance activities on land and in the water.

However, the EPA has suggested several management measures that can be utilized to reduce NPS pollution from marinas and recreational boating. This information is readily accessible through the EPA's Web site.

State Coastal Management Programs are required to implement EPA measures or develop alternative management measures in conformity with these measures in the coastal management area. Accordingly, while still operational, the Alaska Coastal Management Program authored a study analyzing the impact of harbors and marinas on the environment and proposed measures to protect Alaska's coastal waters from pollution. See, *Alaska Best Management Practices For Harbor, Marina And Boat Operations* (Alaska Coastal Management Program, 1995 and updated 2004). These measures are otherwise known as the 1995 Alaska Coastal Clean Water Plan. The ACMP study proposed multiple best management practices to help minimize any environmental impact by marina and harbor operations in Alaska.

An internet search indicates that there are also numerous online resources available for best management practices in the construction of a marina to minimize environmental impact.²⁰

ANALYSIS AND FINDINGS

Alaska Statute 24.55.150 authorizes the ombudsman to investigate administrative acts of the state agencies that "the ombudsman has reason to believe might be contrary to law; unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law; based on a mistake of fact; based on improper or irrelevant grounds; unsupported by an adequate statement of reasons; performed in an inefficient or discourteous manner; or otherwise erroneous." The ombudsman reformulates citizen complaints against state agencies as allegations using these statutory terms. AS 24.55.150 also provides that "the ombudsman may investigate to find an appropriate remedy."

Under 21 AAC 20.210 the ombudsman evaluates evidence relating to a complaint against a state agency to determine whether criticism of the agency's actions is valid, and then

²⁰ The Web link originally cited for this information is no longer valid. An link providing equivalent information is at: <http://www.coastal.ca.gov/ccbn/toolkit/marina-toolkit.pdf>

makes a finding that the complaint is *justified*, *partially justified*, *not supported*, or *indeterminate*. A complaint is *justified* “if, on the basis of the evidence obtained during investigation, the ombudsman determines that the complainant’s criticism of the administrative act is valid.” Conversely, an allegation is *not supported* if the evidence shows that the administrative act was appropriate. If the ombudsman finds both that an allegation is *justified* and that the complainant’s action or inaction materially affected the agency’s action, the allegation may be found *partially justified*. An allegation is *indeterminate* if the evidence is insufficient “to determine conclusively” whether criticism of the administrative act is valid.

The standard used to evaluate all ombudsman complaints is **the preponderance of the evidence**. If the preponderance of the evidence indicates that the administrative act took place and the complainant's criticism of it is valid, the allegation should be found justified.

Allegation 1: Unfair: The Department of Fish and Game and Department of Natural Resources led the complainants to believe that the necessary permits for connecting a private marina to the Chilkat River were forthcoming, which convinced the complainants to spend thousands of dollars constructing the marina and access route prior to final permitting approval.

The complainants allege that ADF&G Habitat Regional Supervisor Jackie Timothy authorized them to dig the marina prior to issuance of a required Habitat permit. They also assert that both Park Ranger Joel Telford and Parks Southeast Regional Supervisor Mike Eberhardt supported the project and indicated a permit would be forthcoming. The Owners excavated and began construction of the marina in October 2007. They said they relied on the assurances of these supervisory level state employees that the necessary permits would be forthcoming and assert that it was unfair for DNR to have subsequently changed positions on the project.

The Office of the Ombudsman Policies and Procedures manual defines “Unfair” at 4040(3). The portion of the definition that applies to this investigation reads as follows:

“Unfair” means:

An administrative act violated some principle of justice.

Investigation of a complaint that an administrative act was “unfair” should consider both the process by which the action was taken or the decision was made and the equitableness of that decision, that is, the balance between the agency and a complainant in the decision-making process.

Procedurally, a complaint that an administrative act was “unfair” usually will involve an examination of one or more of the following elements:

(A) adequate and reasonable notice of the matter was not provided to the complainant;

(B) adequate opportunity was not given for a person having an interest in a decision to be heard or, if applicable, to conduct an examination or cross-examination to secure full disclosure of the facts;

(C) the decision maker was not without bias or other disqualification;

(D) the decision was not made on the record: the action or decision was made without consideration of pertinent facts and circumstances, or the testimony, evidence, or point of view of those having a legitimate interest in the decision was disregarded;

(E) the decision was not supported by reasons or by a statement of evidence relied on; or

(F) the agency applied standards or principles inconsistently in making a decision.

The Owners' primary support for this allegation is the October 9, 2007, e-mail Jackie Timothy sent to them ". . . go ahead and start digging and placing your logs in the marina. . . . but DO NOT connect to the Chilkat yet." However, as Ms. Timothy has stated, the excavation of the marina on the Owners' property did not require a Fish Habitat Permit, therefore, her approval to begin digging was unnecessary. Irrespective, the Owners clearly stated in their project proposal for the marina that it was their intention to connect the marina to the Chilkat River, and Ms. Timothy knew this.

Habitat has the specific statutory responsibility for protecting freshwater anadromous fish habitat (Anadromous Fish Act, AS 16.05.871) and providing free passage for anadromous and resident fish in freshwater bodies (Fish Way Act, AS 16.05.841). Habitat fulfills this responsibility by writing fish habitat permits for activities and projects conducted by private individuals or other state or federal government agencies below the ordinary high water of anadromous streams. Habitat biologists conduct research and field surveys, review plans with permit applicants to permit a project that does not adversely impact fish habitat, and monitor projects for compliance with permit standards. Although Ms. Timothy's approval may not have been required at the time the Owners requested the "go-ahead," it was prudent of Ms. Timothy to provide recommendations to the Owners on habitat-friendly construction methods to ensure there would not be problems later.

As of early November 2007, DNR Park Ranger Joel Telford and Southeast Region Parks Superintendent Mike Eberhardt supported the project and conveyed this to the Owners and to Habitat. As of November 6, 2007, Mr. Telford indicated that, at the conclusion of the ACMP review, Parks was prepared to issue a special use permit allowing them to breach the bank and connect their marina to the preserve. However, before the end of that month, Parks Deputy Director Degernes countermanded Telford and Eberhardt. There is no indication that either Habitat or Parks informed the Owners of this change in policy then, despite both agencies knowing the DNR permit would not be approved. Instead, on January 23, 2008, Mr. Eberhardt sent the Owners a letter indicating that their special use permit application was still undergoing review by both Habitat and Parks. It was only at this point that Parks notified the Owners that they were not authorized to proceed with the project.

DNR ultimately took issue with the Owners use of bulkheads and cottonwood logs in construction of the marina, as well as a boat ramp. Ms. Degernes cited this as one of the primary reasons DNR could not approve a permit connecting the marina to the Chilkat River: the Chilkat Preserve Management Plan specifically prohibits the use of bulkheads

and private ramps. However, despite proposed recommendations by both Jackie Timothy and Chris Degernes to make the marina's construction compatible to the Preserve Plan when this issue came up more than a year later, the two agencies would not come to any joint agreement. In addition, it's clear from Ms. Degernes own statements that despite the two agencies trying to reach an accord on recommendations to the Owners to make the marina more compatible with the Preserve, Parks would have never permitted the marina project, had Parks "done the right thing in the first place."

Accordingly, it is the ombudsman's conclusion that had a coordinated agency review or timely consultation taken place between Habitat and DNR, this issue could have come up much earlier, and the Owners would have saved considerable money in construction of the marina. Instead, both Habitat and DNR stood by while the Owners dug their own financial hole. The Owners incurred approximately \$23,000 in costs excavating and constructing the marina, and an additional \$15,000 after they were essentially forced to abandon the project.

The ombudsman concludes that Parks failed to give adequate and reasonable notice to the Owners that it would not permit the project as of November 2007 when it was clear this was the directive of Parks upper management. This was unfair.

In addition, it was unfair of Ms. Timothy to have told the Owners to go ahead and start digging the marina, without the appropriate permits in place, when she was fully aware the intended use of the marina was to connect to the river, an act requiring permits from both agencies. The Owners jumped the gun, but only after ADF&G and DNR agency staff gave them the green light. The assurances came not from minions or lower-echelon employees of the two agencies – the assurances, reassurances, and encouragement came from the regional supervisors for Parks and ADF&G. The complainants reasonably relied on the assurances of these state employees that both agencies were on board with the project and the permits would be approved.

Allegation 1 Finding

The Owners were directed in an e-mail communication by Ms. Timothy to go ahead and begin digging the marina prior to final permit approval. Likewise, Parks staff tacitly approved the project initially, and then later switched positions without timely informing the complainants of the agency's change of heart. The complainants, while not inexperienced in the permitting process given their years of dealings with multiple state agencies in the operation of their business, nonetheless relied on the direction of Ms. Timothy and assurances of Parks staff that a Parks permit would be forthcoming. As a result, the complainants incurred thousands of dollars in expenses for a marina they could not use. This was unfair. Consequently, the ombudsman found the allegation *justified*.

Agency Response to Allegation 1 Finding

The agencies joint response argues in essence that Jackie Timothy, Mike Eberhardt, and Joel Telford lacked the authority to approve the permits for the marina project:

The primary basis for the [the Couple's] complaint is reliance on statements or inferences by Jackie Timothy, Mike Eberhardt, and Joel Telford. The report concludes that [the Owner] was misled by reasonably relying on the perceived expectations of these state employees that the marina would ultimately be

approved. While it does appear that these individuals were optimistic that the project would receive approval, the facts presented by the preliminary report also make it clear that [the Owner] was aware the final decision did not rest in these individuals' hands.

However, the joint response acknowledged that “[b]ecause the State should have done a better job in coordination of consistent communication with the Complainant, the State does not disagree with this finding.” Despite acknowledging the joint inefficiencies of the agencies, “the State notes that the definition of ‘unfair’ for the ombudsman finding is a very different standard from actions that justify equitable estoppel against the State and damages as a matter of law.” *May 28, 2013, Department of Fish and Game and Natural Resources Joint Response to Ombudsman.*

Ombudsman Comment

It is not atypical for the DNR or ADF&G Commissioner to delegate permitting authority to lower management. In fact, this appears to have been a consistent practice based on the ombudsman's review of earlier permits issued to the Owners by both agencies for their jet boat operations in the Chilkat. (See for example, 1997-2008 Fish Habitat Permits approved by OHMP/ADF&G Habitat Biologists; 2002-2009 Parks Non-Competitive Park Use Permits for Commercial Activities approved by the Area Superintendents).

According to the ombudsman's review of the Workplace Alaska's posted job descriptions for both Habitat Biologists and Park Superintendent, these supervisory positions are tasked with issuing appropriate permits for proposed projects. See for example, Habitat Biologist 3 and 4 Job Class Specifications:

. . . issue appropriate permits for proposed projects and activities that may potentially impact aquatic and terrestrial habitats.[Emphasis Added]

Habitat Biologist 2 Job Class Specifications include:

Review permit applications and issue Fish Habitat Permits and Special Area Permits. Review other agency permit applications and **recommend conditions or stipulations** for the protection of fish and wildlife resources and their habitat. **Draft permit terms and conditions.** [Emphasis Added]

Likewise, see the DNR Park Superintendent Job Class Specification which states

. . . Approve requests for park use permits that involve significant third-party interests, controversial commercial use, or have long-term impact on park resources. [Emphasis added]

Prior to Ms. Degernes temporarily revoking Mr. Eberhardt's permitting authority on December 6, 2007, Mr. Eberhardt, as the Southeast Area Parks Superintendent, clearly had the authority to either modify the existing Parks permit, or to approve a special use permit. Likewise, Ms. Timothy, as the ADF&G Southeast Habitat Supervisor, also had authority to grant modification of the OHMP permit, or to require a new permit. Given that these state employees had the authority to approve earlier permits for the Owners, it is illogical to conclude that the Owners knew or should have known that “the individuals making these representations of support” did not have such authority with respect to the marina project.

Both Mr. Eberhardt and Ms. Timothy represented to the Owners and other state agency personnel that modified permits for both ADF&G and Parks would be forthcoming prior to them digging the marina:

October 3, 2007 email from Jackie Timothy to Randal Vigil: “OHMP will be issuing a fish habitat permit for this activity.”

October 5, 2007 letter from the Division of Coastal and Ocean Management (DCOM) to the Owners, which states in relevant part: “ASPOR [Parks] notified OHMP that the existing park permit would be modified to reflect this marina.”

The October 5, 2007, DCOM letter to the Owners confirms *in writing* as of early October 2007, Parks intended to modify the Owners existing Parks permit to allow the marina. Ms. Allee, who authored the consistency review letter to the Owners, confirmed in an October 5, 2007, e-mail to Jackie Timothy that she had spoken to Mr. Eberhardt and he told her that the Parks permit would be modified to allow the marina.

After the Owners were led to believe that modified permits from both ADF&G and Parks were coming, and *after* being given the green light by Ms. Timothy to go ahead and dig, they started the project. The October 9, 2007, e-mail from Jackie Timothy to the Owner stated:

I'll modify your existing permit. That will solve the problem. . . Therefore, go ahead and start digging and placing your logs in the marina ... but DO NOT connect to the Chilkat yet. I'll have you your permit before you need to do that.

Mr. Telford later concluded in early November 2007 that a Parks special use permit was more applicable for breaching the riverbank as opposed to modifying the existing commercial use permit. He requested that the Owners apply for the special use permit on November 7, 2007. As of November 6, 2007, Parks still clearly intended to issue the Owners a special use permit to breach the riverbank:

November 6, 2007 email from Joel Telford to Erin Allee and Jackie Timothy: “Parks is prepared to issue special use permit H-0711 to allow them [the Owners] to breach the bank and connect their marina to the Preserve.”

It was not until Ms. Degernes caught wind of the marina project that Parks made a drastic change in its position. As Ms. Degernes wrote to Mr. Eberhardt in a memo dated December 6, 2007: “[The Owners] should never have been given approval, tacitly or otherwise, to construct a marina adjacent to the Chilkat River without a full ACMP review and consideration of all of the recommendations within the *Chilkat Bald Eagle Preserve Management Plan*. . .”

Because neither agency specifically disputed the overall finding of Unfair, Allegation 1 will be closed as *justified*.

ALLEGATION 2: Unfair: The Department of Natural Resources required the complainants to pay for the costs of repair to the river bank adjacent to their property that was breached naturally by rising water in the river.

The Owners allege that it was unfair for DNR to require they pay for the costs of the repair to the riverbank adjacent to their property, when the breach was caused by

naturally rising water in the Chilkat River. The Office of the Ombudsman Policies and Procedures manual defines “Unfair” at 4040(3). The portion of the definition that applies to this investigation reads as follows:

(D) the decision was not made on the record: the action or decision was made without consideration of pertinent facts and circumstances, or the testimony, evidence, or point of view of those having a legitimate interest in the decision was disregarded;

Both Ms. Kanouse and Mr. Chapell from ADF&G indicated that their site reviews showed the Owners had dug below the ordinary high water mark of the Chilkat River during their excavation of the site. Mr. Chapell noted this as early as November 2007. He said that during his site visit, he observed about a two-foot high sand bank separating the marina from the Chilkat River. The bank was approximately one foot higher than the river level. The barrier was comprised mostly of sand and gravel without vegetation. In mid-winter, this was enough to keep the two separate. However, he predicted that when the river rose to normal heights the two would connect. Ms. Kanouse’s July 2008 trip report did not note this initially. However, she later amended her report in September 2008 noting the excavation below the ordinary high water mark as well. The report also indicates that Ms. Kanouse copied the Owners on her observations.

In the spring of 2008, the Chilkat River rose to flood levels due to warm weather and melting ice. According to the Owners, water from the river breached the entrance to their marina. However, while the Owners assert they were not responsible for the breach, it is likely the river would not have overflowed into the Owners’ slurry pond were it not for their excavation of the channel to the riverbank to make the marina.

DNR required the Owners to restore the bank and stabilize it at their own expense. DNR clearly had authority to require the Owners take these measures under AS 41.21.610(b)(1) to “protect and sustain the natural salmon spawning and rearing areas of the Chilkat River. . .” and AS 41.21.020.

Allegation 2 Finding

Although the Owners may not have caused the breach intentionally, their excavations were the likely cause of the breach. It was not unfair of DNR to require they restore and stabilize the bank. DNR did not make this decision without consideration of pertinent facts and circumstances, including the Owners stated cause of the breach. Consequently, the ombudsman proposes to find the allegation **not supported**.

Agency Response to Allegation 2 Finding

Both agencies concurred with this finding, therefore Allegation 2 is closed as **not supported**.

ALLEGATION 3: Performed Inefficiently: The Department of Natural Resources performed inefficiently by failing to timely notify the complainants of its position opposing a permit allowing the Complainants to connect a private marina to the Chilkat River for commercial use operations.

The ombudsman policy and procedures manual defines *Performed inefficiently* in relevant part at 4040(14):

(A) The timeliness of an administrative act is sometimes an issue. An agency performed inefficiently when an administrative act exceeded:

(b) a limit or a balance established by custom, good judgment, sound administrative practice, or decent regard for the rights or interests of the person complaining or of the general public.

(B) An agency performed ineffectually when it mishandled the decision-making process or the process of implementing an act or service. The agency might have:

(a) proceeded with too much caution or spent too much time in internal consultation and thus delayed action;

In a November 1, 2007, e-mail, Joel Telford, the Parks ranger assigned to Haines at that time, wrote to Jackie Timothy and Rich Chapell:

Jackie and Rich,

I was up talking to [Owner husband] today regarding his marina. The marina itself is mostly complete and just requires some landscaping. I did talk to [Owner husband] about doing in-river work and breaking into the Chilkat. [He] is aware that the best timing for that is much later in the winter or early spring and is not pushing to do that immediately . . .

The November 1, 2007 e-mail demonstrates that the local Parks staff knew and to all appearances approved of the marina construction at that time.

The last e-mails tracking this consensus were on November 6, 2007. The Owners had already incurred most of the expenses for construction of the marina, without having obtained permits – or permit modifications – from either ADF&G or Parks. The record clearly shows that Parks and ADF&G staff and the Owners all appeared to anticipate that the permits would be forthcoming.

As of November 20, 2007, Mr. Telford's e-mail to Erin Allee in the ACMP office and Jackie Timothy indicated that Parks was not going to permit the project.

At this point, it was clear that Parks would deny the Owners' special use permit to connect the marina to the Chilkat River– a decision apparently made after Ms. Degernes was made aware of the marina project. However, neither Ms. Degernes, nor any other Parks staff notified the Owners of this decision at that time.

Instead, approximately two months later, Park Superintendent Michael Eberhardt sent a letter to the Owners. This letter notified the Owners a multi-agency review of their permit application was required and they could not proceed with activities that may affect the Preserve. However, the letter failed to notify the Owners that a decision on their permit application had already been made, despite clear evidence that Parks had internally decided not grant the permit.

Instead of being forthcoming with the Owners of its decision, in early February 2008, Parks raised a new argument – that the marina itself would become part of the Preserve as soon as it was connected to the Chilkat River. Not surprisingly, the Owners' promptly abandoned their plan to finish the marina's outlet to the river, and switched to demanding

reimbursement for construction costs incurred in asserted reliance on ADF&G and Parks' earlier conduct.

In June 2009, DNR then threatened the Owners with loss of their special use permit to operate their business within the Preserve if they did not fill the marina back in again.

DNR took several months to notify the Owners it would not approve the initial permit application to connect the marina to the Chilkat, despite earlier assurances by Parks staff that the permit would be forthcoming. Then, over a year-and-a-half after the Owners had applied for a permit, DNR threatened to pull their special use permit if they did not fill the marina back in. DNR performed inefficiently when it mishandled the decision-making process of whether to permit the Owners' project and failed to timely notify them of its change of heart on the project early on after it was clear DNR had no intention of permitting it.

After Parks told the Owners the marina, if approved, would be subject to Parks supervision and management, Mr. King then offered "circumstances under which a permit might have been authorized, should you have chosen to continue along that path as well as the requirements that are needed to restore the Chilkat River shoreline at this site." However, it is clear from Ms. Degernes' interview that it was highly unlikely any steps the Owners took would make the marina compatible with the Preserve. As Ms. Degernes stated, "We don't permit those kinds of activities." At the very least, Parks was inconsistent with the Owners. At most, Parks was deliberately disingenuous with the couple.

Allegation 3 Finding

DNR took over a year and a half to notify the Owners it would deny the initial permit application to connect the marina to the Chilkat, despite earlier assurances by Parks staff that the permit would be forthcoming. It likewise spent months in consultation with ADF&G on proposed recommendations to make the marina compatible with the Chilkat Bald Eagle Preserve Plan, despite evidence the agency would never permit the project. When negotiations with ADF&G failed, Parks took an additional three months to notify the complainants they had to fill the marina back in and restore the riverbank. From the time the Owners initially applied for the permit to connect the marina to the Chilkat and the time DNR threatened to pull their special use permit, over a year-and-a-half had elapsed with no final decision by DNR. This was inefficient. Consequently, the ombudsman proposes to find the allegation *justified*.

Agency Response to Allegation 3 Finding

Both agencies agreed "with the general finding that the State process in this matter was not well coordinated and took longer than was necessary or reasonable." However, they disagreed that the State agencies' inefficiencies contributed to the complainants' decision to dig the marina prior to final permitting approval, as the actions referenced did not commence until after the Owners had already dug the marina.

Ombudsman Comment

The argument presented by the agencies as to why their jointly inefficient conduct did not contribute to this situation is far from persuasive. Prior to the complainants digging the

marina, ADF&G Southeast Area Supervisor Jackie Timothy told the Owners she would modify their existing Habitat permit and to “go ahead and start digging and placing your logs in the marina.” Further, Ms. Timothy testified that she believed *all* of the DNR staff – Habitat Management and Permitting, Parks, and ACMP – agreed on the project. Ms. Timothy did not anticipate that the remaining permit process would be anything more than a formality. Ms. Timothy believed this because by all accounts, the Southeast DNR Parks staff supported the project, as evidenced by Joel Telford’s e-mail communications to Ms. Timothy and ACMP, as well as Mr. Eberhardt’s representations to ACMP that Parks would modify the existing Parks permit to allow the marina. This is confirmed in writing by ACMP’s October 5, 2007, letter to the Owners and Ms. Allee’s October 5, 2007 email to Ms. Timothy. (See evidence cited in Ombudsman Comment to Allegation 1 Finding.)

Once Ms. Degernes became involved in mid-November 2007, and after the Owners had already started the project with the blessings of Ms. Timothy, Mr. Eberhardt and Mr. Telford, Parks reversed course on its earlier support of the project. Despite this, neither Ms. Degernes, nor anyone else at Parks was up front with the Owners that the special use permit would be denied. Ms. Degernes apparently had advised Mr. Telford of the agency’s change in position as of November 29, 2007 when he wrote to ACMP, “[i]t doesn’t look like we are going to permit the project,” but he did not tell the Owners this, nor did Mr. Eberhardt or Ms. Degernes.

Again, as Ms. Degernes conceded during her interview with the ombudsman investigators, DNR would not have issued a permit to the Owners, “We don’t permit those kinds of activities.” Ms. Degernes was not upfront with the Owners about DNR’s change in position on the project for many months. Likewise, the Southeast DNR Parks staff was clearly not aware of Ms. Degernes new policy directive that DNR would not permit the marina or they would not have given their seal of approval. The evidence suggests that had Parks staff informed the Owners that DNR would not have permitted the project in October 2007 or shortly after they first applied for the project, the Owners would not have proceeded. Therefore, the ombudsman declines to change the finding; Allegation 3 will be closed as *justified*.

ALLEGATION 4: Unsupported by an adequate statement of reasons: The Department of Natural Resources failed to adequately explain to the complainants the agency’s reasons for opposing the connection of a private marina to the Chilkat River for commercial use operations.

The Owners asserted that the reasons given by DNR effectively denying their special permit request to connect their marina to the Chilkat River were unsupported by an adequate statement of reasons. The ombudsman policy and procedures manual defines *Unsupported by an adequate statement of reasons* at 4040(13):

- (A) the agency did not address or explain the complainant’s concerns directly and completely in the decision;
- (B) the agency did not plainly state the rule of law on which its decision was based;

(C) the agency's factual assertions and legal conclusions lacked sufficient support;

(D) the agency provided reasons for its decision that were not comprehensible; or

(E) the agency did not provide documentation appropriate to the decision.

DNR's Reasons for Not Supporting the Marina Project

DNR Deputy Director Chris Degernes indicated that her agency did not deny the Owners' permit application because the Owners withdrew it prior to the agency making a final decision. However, Ms. Degernes was also very clear in her interview with the ombudsman investigators that: "We [DNR] don't permit those kinds of activities."

Ms. Degernes cited her experience working on the Kenai River and familiarity with the Kenai River Management Plan as a factor in her decision effectively denying the Owners' permit application for a special use permit to operate a marina on the Chilkat River. Ms. Degernes' decision appeared also to rely heavily on the advice of ADF&G biologist Dean Hughes.

Ms. Degernes said there were several reasons why she believed the marina was not compatible to protect salmon resources in the Chilkat River. She expressed concern that a marina was a potential death trap for fish. This was her opinion based on "a lot of experience in this environment." Her primary experience was with the Kenai River Management Plan. She recognized that there were differences in the Kenai River Management Plan versus the Chilkat River Management Plan. However, while she acknowledged that neither plan specifically prohibits a marina on private property, she said that DNR would not permit the project.

Ms. Degernes said she relied on the expertise of Mr. Hughes, another ADF&G biologist because she had no confidence in the Southeast Regional biologists' opinions with respect to this particular project. She asserted the salmon fry would be trapped in the marina and the dissolved oxygen levels recorded by Ms. Timothy and Ms. Kanouse during their site visits were too low to sustain fish. She disagreed with ADF&G's conclusion that no fish had been trapped in the marina as documented by Ms. Kanouse during a winter 2009 site visit. Instead, Ms. Degernes asserted that any fish that may have been trapped in the marina died because of low oxygen levels and this is likely the reason Ms. Kanouse did not trap any fish in the marina.

Mr. Hughes likewise asserted that the marina was not good habitat. He said that the marina had several problems as fish habitat: lack of positive drainage, low dissolved oxygen levels, lack of protection for young salmon, and potentially high concentrations of hydrocarbons. Mr. Hughes also noted that the biggest problem with the marina was that ADF&G and DNR were not involved in its design.

In contrast, Ms. Timothy disputed that the marina was not good fish habitat and based her reasoning on the site visit data. Ms. Timothy did not share Ms. Degernes concerns that the issuance of a permit to the Owners would set bad precedent, potentially leading to further development of private marinas on the Chilkat. According to Ms. Timothy, there are many differences between the Kenai River and the Chilkat River. In fact, she

disagreed there was *any* similarity between the two water bodies, noting the Chilkat had very little privately owned property or development, unlike the heavily developed Kenai.

DNR's permit decision-making process also appeared to be strongly influenced by a local conservation group's threat of litigation over the Owners' marina. Lynn Canal Conservation appealed the Owners' commercial use permit in 2009 and asserted that the Owners violated their permit when the entrance to the marina was breached. In May 2009, Ms. Degernes specifically referred to the LCC appeal when she requested the Owners fill in the marina as a condition for renewing their commercial use permit. LCC's threat of litigation over the Owners' marina was clearly a controlling factor in DNR's decision-making process.

Allegation 4 Finding

Ms. Degernes gave reasons why the Owners' marina project was not good fish habitat and incompatible with the Chilkat Bald Eagle Preserve Management Plan. However, Ms. Degernes reliance on the Kenai River Plan appears to be misplaced given the clear differences between the two rivers and uses. Further, other than Ms. Degernes assertion that the marina was a potential death trap for fish, the ombudsman questions the reasonableness of this statement when there was no testing data supporting it. While Mr. Hughes clearly raised concerns about the use of a marina on the Chilkat, Ms. Timothy and Ms. Kanouse provided contrary study data indicating the marina was good fish habitat. Mr. Hughes's opinion did not appear to be based on any contrary testing data or studies of the marina that he had conducted when visiting the site. The factual assertions and conclusions that the marina was not good fish habitat lacked sufficient support.

The ombudsman questions DNR's reasoning when considering whether to approve the Owners' permit request. There did not appear to be enough evidence on either side that the marina was incompatible with the Preserve or Fish and Game standards. Ms. Degernes's stated reasons for not supporting the project and conclusions the marina was a fish-killing field or 'death trap' for fish lacked sufficient support and appear to be based on speculation and the threat of a LCC lawsuit. DNR should have provided additional evidence to support its conclusions. Consequently, the ombudsman proposes to find the allegation *justified*.

Agency Response to Allegation 4 Finding

The agencies' joint response indicated that they objected to the finding, stating in part,

[The Owner] withdrew the application . . . before the State had an opportunity to reach a final conclusion and issue a decision document. Even if one or more State personnel had indicated that issues would probably prevent approval, there is no State action until a decision document is issued. The State was continuing to seek a resolution that would allow the marina to operate with modifications to make it compliant with the Preserve Plan. It cannot properly be concluded that had the State decision process been completed that [he Owner] would have been denied a permit.

Ombudsman Comment

On December 6, 2007, Ms. Degernes directed Mr. Eberhardt to submit all Parks' permit issues for the Southeast Region to her for review and approval prior to his issuance of a permit. She stated in a December 6, 2007 memo to Mr. Eberhardt as follows: “[The Owners] should never have been given approval, tacitly or otherwise, to construct a marina adjacent to the Chilkat River . . .” She very clearly objected to the marina project as evidenced by her interview testimony with ombudsman investigators that “We [DNR] don't permit those kinds of activities.” Although she did not put this statement in writing to the Owners, she clearly stated the agency's position that the permit would not have been approved.

Instead of putting the decision in writing so the Owners could appeal it, Parks chose a different tactical maneuver: if the Owners breached the entrance to the marina, it would become part of the Preserve and subject to Parks control. This was an effective threat, resulting in the Owners withdrawing their special use permit application. Instead of denying a special use permit, Parks told the Owners that if they did get a permit, they would lose part of their real estate and be unable to use the marina as built. Therefore, Parks did not have to issue a decision denying the special use permit. And the Owners were left without an opportunity to appeal it.

Although the agencies' May 28, 2013, joint response states that, the State was continuing to seek a resolution to allow the marina's operation with modifications at the time the Owners withdrew their permit application, both Ms. Timothy and Ms. Degernes testified that the two agencies could not come to an agreement on joint recommendations. In other words, it is clear that continued negotiations between the two agencies on this issue were a futile effort. In the meantime, the Owners existing permits with both agencies were at stake.

When asked by the ombudsman to provide specific evidence supporting the statement that the agencies were continuing to seek a resolution that would allow the marina to operate within the Preserve, the agencies cited former Parks Director James King's March 21, 2008 letter to the Owners:

When park staff met with the [Owners] on February 14, 2008 one of the purposes of the meeting was to discuss what conditions might be applied to a permit for the marina in order for it to be consistent with the management plan for the Chilkat Bald Eagle Preserve. A March 21, 2008 letter (attached, file name: [NAME redacted] Marina Chilkat River Letter 032108) to the [Owners] from Director James King summarizes the conditions which the marina would have been subject to had it been permitted by the division and provides evidence that the state was engaged in finding a way to allow the marina to remain in place and to connect to the Chilkat River. The February 18, 2008 letter (attached, file name: [Owners] letter 2.18.08) to the state from the [Owners] is also consistent with these facts and demonstrates that the [Owners] made a choice to terminate the permitting process rather than attempt to bring the marina into compliance with conditions such as those discussed with the state.

The Owners' February 18, 2008, letter does not refer to any conditions offered by Mr. King or other DNR staff to make the marina compatible when he met with the Owners in

early February 2008. It states in part, “We were also told by the Director of Parks, that the cribbing and boat launch are not conducive to the Preserve’s management plan.” The Owners’ letter does not appear to provide evidentiary support for DNR’s position that continued efforts were being made with the Owners to make the marina compatible with the Preserve. Instead, it points out that Parks objected to the materials that had been used by the Owners and the construction of a boat launch.

DNR’s March 21, 2008, letter to the Owners was not written until approximately a month *after* Mr. King had met with the Owners and informed them that once the berm was breached, it would be subject to Parks management. He did not write this letter until after the Owners had already withdrawn the application for a special use permit. It was only at this point that Parks chose to put in writing to the Owners “the circumstances under which a permit might have been authorized.” (Former Parks Director James King’s March 21, 2008, letter to the Owners).

While the ombudsman acknowledges DNR’s objections to this finding, the evidence suggests that Ms. Degernes clearly made a decision not to approve the permit in late 2007, though she avoided putting this decision in writing to the Owners, thus effectively denying them their right to appeal her decision. A year-and-a-half later, instead of denying the permit application, DNR essentially threatened the Owners that *if* the permit was approved to breach the bank, their private marina would become subject to Parks’ management. Not surprisingly, the Owners withdrew their permit application. The ombudsman declines to change her findings on Allegation 4 and closes it as ***justified***.

Under 21 AAC 20.210, investigation of a complaint with multiple allegations that results in some allegations being found *justified* and some *not supported* or *indeterminate* results in a finding of *partially justified* for the complaint taken as a whole.

Therefore, the ombudsman proposes to find Complaint J2009-0217 against Fish and Game to be ***justified*** by evidence uncovered in this investigation.

The ombudsman proposes to find Complaint J2009-0224 filed against the Department of Natural Resources Division of Parks and Outdoor Recreation to be ***partially justified***.

RECOMMENDATIONS

As a result of this investigation, the ombudsman proposed two recommendations:

Recommendation 1: Agency Response and Ombudsman Comment

Recommendation 1: DNR and ADF&G should each pay one-third of the expenses incurred by the Complainants for excavation and construction of the marina, restoration of the riverbank, and filling in of the marina.

The Owners relied on the affirmation of Ms. Timothy that they could start to dig the marina prior to the issuance of any required permits. Mr. Telford and Mr. Eberhardt appeared to be on board with the project and by all appearances, a Parks permit was forthcoming. Based on this, the Owners began excavation and construction of the marina on their property.

Although Ms. Timothy asserts a fish habitat permit was not required at that time, she knew the intent of the project--to connect the marina to the Chilkat River. Mr. Telford

and Mr. Eberhardt knew this as well. Later on, DNR upper management changed its position, backed away from supporting the project, and then threatened to take away the Owners' commercial use permit if they did not fill in the marina, almost a year-and-a-half after the project was initially proposed by the Owners.

Although the ombudsman recognizes the Owners are familiar with the permitting process given their years of experience dealing with state agencies in the operation of their tour business, they wasted approximately \$40,000 on this project. The Owners have since filled in the marina and are utilizing the space as a parking lot. Some of these expenses could have been avoided had Parks not provided contrary assurances to the Owners that their permit was forthcoming, and Ms. Timothy had not given the Owners' the "go-ahead" to start digging.

The ombudsman believes that Parks, Habitat, and the Owners shared the blame for this waste. Accordingly, the ombudsman recommended that DNR and ADF&G partially compensate the Owners for their losses.

Agency Response

Both agencies rejected the recommendation to pay any portion of the complainants' costs for the marina project. The response states in part,

The State fully accepts the proposed findings on deficiencies in communication, coordination, and timeliness, but none of these findings provides a legal basis under which the State is legally liable for damages in this matter. While the State regrets that its performance and customer service in the matter was subpar, the State must also consider its fiscal responsibility to the public in general. The State does not consider cost sharing with [the Owners] on this project to be an appropriate use of the public treasury.

Ombudsman Comment

One legal theory that may justify payment to the Owners is promissory estoppel. The doctrine of promissory estoppel is a basis for imposing contractual liability upon a party and is based upon the concept that one party's reasonable reliance upon the other party's promise is legally sufficient to enforce the promise.

Alaska adopted the law of promissory estoppel as set out under the Restatement (Second) of Contracts § 90 (1981) in Glover v. Sager, 667 P.2d 1198, 1202 (Alaska 1983). Section 90 reads in relevant part:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of a promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

The Alaska Supreme Court reformulated the Restatement into a four-part test:

- (1) an actual promise that induces the action or forbearance;
- (2) the action or forbearance was actually foreseen or reasonably foreseeable;
- (3) the action or forbearance amounted to a substantial change or position; and

(4) enforcement of the promise is necessary in the interests of justice.

Alaska Trademark Shellfish, LLC v. State, Department of Fish and Game, 172 P.3d 764 (Alaska 2007), citing Zeman v. Lufthansa German Airlines, 699 P.2d 1724, 1284 (Alaska 1985).

Both the ombudsman definition of unfair (Ombudsman Policies and Procedures at 4040(3)) and the legal theory of promissory estoppel embody a similar concept-- an act violated some principle of justice and because of this injustice, the person adversely affected is entitled to a remedy.

Applying the promissory estoppel elements to this case, the State could have been found liable to the Owners for damages they incurred by relying on Ms. Timothy's e-mail directive to "go ahead and start digging and placing your logs in the marina."²¹ Ms. Timothy further indicated in her October 2007 e-mail that she would modify their existing Habitat permit, implying that there were no problems, at least from ADF&G's perspective, to move forward with the marina project. Ms. Timothy should have reasonably expected that the Owners would act on these statements. In reliance on these statements, the Owners did act on them, ultimately to their financial detriment.

Early on, DNR also took the position that no new Parks permit was necessary for the Owners' marina project. Instead, Parks would modify the existing Parks permit. See, ACMP Erin Allee's October 5, 2007 letter to the Owners stated in relevant part,

OPMP has consulted with the Department of Natural Resources-Alaska State Parks and Outdoor Recreation (ASPOR) and Office of Habitat Management and Permitting (OHMP) regarding this project. ***ASPOR notified OPMP that the existing park permit would be modified to reflect this marina.*** OHMP notified OPMP that a Title 41 Fish Habitat Permit would be required and that they have received this application. [Emphasis added].²²

This letter, which was sent to the Owners, confirms *in writing* that Parks, specifically Mr. Eberhardt, intended to modify the Owners' existing Parks permit. Parks later proposed that the Owners fill out a new special use permit to breach the bank, after the Owners had previously been told their existing permit would only be modified. (See November 7, 2007, e-mail from Joel Telford to the Owners). Even then, Mr. Telford clearly indicated Parks would approve the marina project, "Upon the conclusion of the ACMP review for the marina project, Parks is prepared to issue a special use permit H-0711 to allow them

²¹ The ombudsman recognizes that due to statute of limitations restrictions, the complainants may be time barred from bringing a lawsuit against the State under this legal theory. See, AS 09.10.053. "Unless the action is commenced within three years, a person may not bring an action upon a contract or liability, express or implied . . ."

²² The Department of Natural Resources Office of Project Management and Permitting (OPMP) was responsible for evaluating applications for projects potentially affecting the Alaska Coastal Management Plan (ACMP). Ms. Allee was an ACMP Project Specialist for OPMO and the person responsible for helping to coordinate review of the proposed project. References to ACMP or OPMP in this report are intended to be synonymous.

[the Owners] to breach the bank and connect their marina to the Preserve.” (See November 6, 2007 email from Joel Telford to Erin Allee and Jackie Timothy).

Up until Ms. Degernes directed Mr. Eberhardt to forward all permit issues to her attention for review (on December 6, 2007), Mr. Eberhardt had the authority to modify the existing Parks permit or to approve the DNR special use permit, as did Mr. Telford, during Mr. Eberhardt’s absence from the office. Mr. Eberhardt and Mr. Telford discussed the marina project with Ms. Timothy in early October 2007, prior to Ms. Timothy’s e-mail directive to go ahead and dig, and also with the Owners, indicating Parks support of the project and intention to permit it. Both Mr. Eberhardt and Mr. Telford should have reasonably expected that the Owners would act on these statements and move forward with the project. In reliance on Parks’ support and documented intention to permit the project, the Owners began construction of the marina.

Based on this evidence, had the Owners pursued litigation against the State, a jury might have found in their favor and awarded them damages. For this reason, and in the interest of fairness, the ombudsman recommended the agencies consider paying for a portion of the Owners’ project expenses. The agencies joint response rejects the recommendation on grounds that (1) the State is not legally liable, and (2) compensating the Owners “does not serve a public purpose.”

The ombudsman recognizes that the question of legal liability cannot be resolved outside of court and acknowledges that the Owners may be time barred from filing suit against the State. However, the ombudsman maintains that a public purpose is served when an agency has accountability for its errors. Both agencies have accepted that their staff was deficient in their communication, coordination, and timeliness in this matter, and yet accept no responsibility for the thousands of dollars of expenses incurred by the Owners in large part because of SOA employees’ assurances. Acknowledgement without responsibility is empty.

The ombudsman recommends that the agencies involved recognize the public purpose in remaining accountable to the individuals who rely on those agencies and reconsider their rejection of Recommendation 1. The ombudsman’s recommendation remains unchanged.

Recommendation 2

Recommendation 2: DNR should provide additional training to its staff concerning statewide policy permitting restrictions, especially when more than one division or department are involved in a project, to ensure consistent information in turn is provided to the public.

Ms. Degernes stated with certainty that Parks would have never permitted the Owners’ marina. However, Mr. Eberhardt, Southeast Regional manager, and Park Ranger Telford, apparently were unaware of this policy restriction. Accordingly, Parks needs to notify all DNR staff involved with the permitting process, in particular the Regional Managers, what types of projects will not be permitted within Parks-regulated areas to avoid wrong information being passed to the public. This disconnect between Parks upper management and its regional manager could have been avoided at the outset had a coordinated meeting between all persons involved with the project taken place early on. Instead, it occurred a year-and-a-half afterwards.

Agency Response

The agencies' joint response to Recommendation 2 stated as follows,

. . . the State fully recognizes that there are lessons to be learned from this project. Not only does the State accept the proposed recommendations regarding training for employees involved with multi-agency project approvals, such efforts have already be[en] conducted and will continue in the future. The State is committed to providing excellent customer service to permit applicants and regrets that issues occurred in the . . . marina project that contributed to an unsuccessful project.

The agencies' response to this recommendation did not specify how it had complied with Recommendation 2. Therefore on June 4, 2013, the ombudsman requested additional information from the agencies concerning the specific steps that have been taken to improve the approval/permitting process for similar projects in the future, as well as the staff training that has been implemented since the Owners' marina project. On June 20, 2013, the agencies provided a joint supplemental response providing additional details:

The Division of Parks & Outdoor Recreation has centralized the processing of special park use permit applications such as the one the Owners submitted to develop a marina within the Chilkat Bald Eagle Preserve. The more complex SUP [Special Use Permit] applications are now handled by either staff in the director's office or by the Natural Resource Specialist who works out of the Gilman River Center in Soldotna and who also processes commercial use permit applications for the entire division. The division has formalized the preparation of written determinations for special park use permit applications such as the one submitted by the Owners. The written determinations summarize the statutory, regulatory and policy framework that applies to decisions regarding whether to issue a permit and if so, what kinds of stipulations should apply. The written determination also provides the state's analysis on whether the criteria outlined in 11 AAC 18.025(c) are met.

. . .

The Division of Habitat has developed and utilizes "Draft Working Guidelines" as a tool to guide and improve the permitting process and increase permitting consistency among staff and regions. In addition, all Fish Habitat Permits include the following language: "

This letter constitutes a permit issued under the authority of AS 16.05.871 and must be retained on site during project activities. Please be advised that this determination applies only to activities regulated by the Division of Habitat; other agencies also may have jurisdiction under their respective authorities. This determination does not relieve you of your responsibility to secure other permits; state, federal, or local. You are still required to comply with all other applicable laws." In transmitting the Fish Habitat Permit to the applicant, specifically when Habitat staff are aware that other agency authorizations are needed for the project, staff also include a

reminder to the applicant “to make sure you have all authorizations before proceeding.”

. . .

Within the Division of Parks and Outdoor Recreation training on procedures for permitting, including permits that encompass multi agency approvals, is ongoing with discussions occurring during monthly teleconferences and more in depth reviews of procedures occurring at twice yearly in person manager’s meetings which are attended by area superintendents, director’s office staff and the Natural Resource Specialist working at the Gilman River Center. Although Recommendation 2 of the preliminary report focused on DNR, the ADF&G Division of Habitat has also addressed the need for staff training on multi-agency project authorizations. As mentioned, the Division of Habitat utilizes the “Draft Working Guidelines” to ensure focused and consistent permit application reviews, and also includes the cited language referencing and reminding the applicant of additional authorizations that may be needed. In addition, staff training is a daily and ongoing effort within the Division of Habitat, and includes weekly manager teleconferences and twice yearly in-person supervisor/manager’s meetings.

The DNR and ADF&G response to Recommendation 2 fulfills the intent of the recommendation. Therefore, this recommendation is closed as rectified.

* * * * *

FINDING OF RECORD ON ALLEGATIONS AGAINST ADF&G

The ombudsman closed this investigation against ADF&G as a *justified* complaint. ADF&G rejected Recommendation 1 that it pay any portion of the Owners’ incurred costs associated with the marina project. Therefore the ombudsman will recommend that the complainants present a claim and this finding to the Division of Risk Management and if necessary to the Alaska Legislature to seek compensation. The ombudsman is aware that the complainants have already presented a claim to Risk Management and been rejected. The ombudsman encourages Risk Management to review this finding and reconsider its response.

ADF&G accepted Recommendation 2 that it provide additional training to its staff to improve the multi-agency permitting process. According to the agencies’ joint response, the agencies have conducted and will continue to conduct staff training for employees involved with multi-agency project approvals, which may prevent similar problems from recurring. Accordingly, the complaint against ADF&G is deemed partially rectified.

FINDING OF RECORD ON ALLEGATIONS AGAINST DNR

The ombudsman closed this investigation against DNR as a *partially justified* complaint, based on a justified finding for Allegations 1, 3 and 4, and an unsupported finding for Allegation 2. A partially justified finding is appropriate in a complaint having multiple allegations where at least one allegation is found justified and at least one allegation unsupported or indeterminate. Despite DNR’s request that the finding in Allegation 4 be modified, which the ombudsman has declined to do, according to the agencies’ joint response, the agencies have conducted and will continue to conduct staff training for

employees involved with multi-agency project approvals which may prevent similar problems from recurring. This satisfies the intent of Recommendation 2.

DNR declined to partially compensate the complainants for DNR's part in misleading them; the ombudsman's response to DNR's rejection of Recommendation 1 was clearly outlined above. As in Recommendation 1 for ADF&G, the ombudsman will likewise recommend that the complainants present this finding and a claim to the Division of Risk Management and if necessary, to the Alaska Legislature to seek compensation. As above, the ombudsman is aware that the complainants filed an earlier claim with Risk Management but encourages Risk Management to review this finding carefully and reconsider its response. Accordingly, the complaint against DNR is deemed *partially rectified*.

* * *

Complaint J2009-0217 against the Department of Fish and Game will be closed as *justified* and *partially rectified*.

Complaint J2009-0224 against the Department of Natural Resources will be closed as *partially justified* and *partially rectified*.

Ombudsman Complaint J2009-0217 –
Ombudsman Complaint J2009-0224
Finding of Record

- 50 -

July 18, 2013

Ombudsman Complaint J2009-0217 –
Ombudsman Complaint J2009-0224
Finding of Record

- 51 -

July 18, 2013

Ombudsman Complaint J2009-0217 –
Ombudsman Complaint J2009-0224
Finding of Record

- 52 -

July 18, 2013

Ombudsman Complaint J2009-0217 –
Ombudsman Complaint J2009-0224
Finding of Record

- 53 -

July 18, 2013