

Appendix D
Permitting of Instream Structures

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The discussion of in-stream structure permitting (Recommendation 4.5.2.3) included references to several detailed 'notes' or clarifications. These clarifications and the recommendation are:

Recommendation 4.5.2.3:

Permit applications for the construction, reconstruction and maintenance of instream structures must of necessity be considered on an individual basis by regulatory agencies consistent with statute's, the public interest and best professional judgment. However, it is the intent of the permitting agencies to follow these general guidelines:

1) New Structures And Major Reconstruction:

New structures must comply with all current habitat design and construction standards. No new structures which impede fish passages, result in overall reduction of fish habitat, present a hazard to public safety or diminish recreational opportunities, will be permitted.

2) Routine Maintenance and Minor Reconstruction of Existing Structures:

Permitting agencies will process permits for minor maintenance of existing structures, even if those structures do not strictly comply with current fish habitat standards, as long as (1) the original construction of the structure was authorized by an ADF&G or DOPOR permit and the structure, as built, conforms to the conditions of the original permit authorizing construction; and (2) the structure does not increase water velocities, does not substantially impede juvenile fish movement, provides productive fish habitat and does not constitute a hazard to public safety and recreation. Permitting agencies will work with applicants to incorporate fish habitat criteria into maintenance of existing projects.

3) Reconstruction of Existing Structures:

Reconstruction of existing projects which in the professional judgment of permitting agencies fully meet fish habitat and fish passage criteria and use sound construction techniques will be authorized. The reconstruction of projects which do not meet current criteria may be authorized if these projects can be modified to provide fish habitat, meet fish passage standards (0 - 2 fps), do not present a hazard to public safety or diminish recreational opportunities, and incorporate sound construction techniques.

4) Financial Incentives:

Permitting agencies should continue to provide financial incentives to encourage landowners to incorporate habitat protection and improvements to fish passage into existing structures, or to remove these structures where appropriate. If permitting agencies mandate the inclusion of fish habitat or fish passage measures into a previously authorized project, financial assistance should be provided by the State, subject to funding availability and legislative approval to grant funds to private projects (see Note 3).

NOTES:

1. Authorizations for man-made structures and stream bank alterations below ordinary high water of the Kenai River must protect, maintain or restore essential cover, water velocity, water quality and substrate, at those levels necessary to provide productive adult fish spawning and migration and juvenile rearing and migration. Because jetties, and metal, rock, cement, and wood bulkheads, boat harbors and canals do not provide productive fish habitat, provide fish traps and/or increase water velocities, the construction or expansion of those structures will not be authorized. Maintenance of jetties and smooth vertical bulkheads will not be authorized, but replacement with alternatives that provide fish habitat and allow unrestricted fish passage may be authorized.
2. Individual State statutes require that DNR and ADF&G review project applications and determine if they meet statutory criteria and the public interest, and cannot grant blanket pre-approval. The intention of the State is to gradually phase out or modify those existing projects on state lands and waters which do not provide productive fish habitat and which impede fish movements as these projects fail and need to be replaced, require substantial modifications, or reach the end of their design life. This process could take a relatively long period of time and the State intends to allow reasonable maintenance and minor reconstruction of most existing types of projects, even if they would not be currently permitted. However, it is not the State's intention to allow indefinite perpetuation of projects which do not meet fish habitat or passage criteria through minor maintenance and reconstruction. There is an expectation that land owners will be willing to work with the State to provide fish habitat and passage on these projects. Because jetties and smooth vertical bulkheads do not provide fish habitat, accelerate water velocities, and have been implicated as a cause of substantial bank erosion, the maintenance and reconstruction of these structures will not be authorized. There are feasible cost effective designs or alternative to these structures which provide good habitat and meet land owner objectives of access and restoration of unnaturally eroding banks.
3. Since 1993, the State of Alaska, US FWS, and the KPB have offered financial incentives to property owners to share the cost of constructing projects which both meet fish habitat criteria and meet landowners access and bank stabilization needs. This includes the retrofit of existing projects to enable them to better meet fish habitat criteria. In the case of jetties and groins, where there does not appear to be any means of mitigating or retrofitting to meet fish habitat criteria, the State has offered to pay the full cost of removing these structures and restoring the site. Many landowners have taken advantage of this opportunity, and others have not. The State has not forced landowners to remove the worst type of structures, but has also not allowed maintenance. State funding for cost share projects on the Kenai will end in the summer of 1998, unless additional funds are appropriated.

Projects below OHW are on public property and must be authorized to be there by permit. No property right is conveyed by the issuance of a permit, and no right of adverse possession exists on public lands. Private projects may remain on public property as long as it is determined that they are in the public interest. The State has no problem with paying a portion of or all of the cost of retrofitting an existing project to meet standards that meet public interests, if funding is available for that purpose. However, there is no guarantee that funding will be available in the future, and no way to commit the Legislature to appropriate funding to pay for projects. Additional funding has been requested for cost

share projects, but there is no guarantee it will be provided. However, the State does not feel that it is in the public interest to agree to pay the cost of replacing projects which were not authorized by the State and are not in the public interest, or agree to forego the opportunity to improve existing projects to meet fish habitat criteria, if the State does not have funding to pay for the improvements. This is particularly true if the owner has passed up opportunities for state funding, to pay for improvements for the last five years.

