

## ALASKA<sup>1</sup>

### *State Authority for Marine Protection*

#### Summary of State Authorities

The State of Alaska has four primary mechanisms that can be used to protect the marine environment— (1) establishment of fish reserve areas, refuges, and sanctuaries with approval by the legislature; (2) establishment of closed seasons and areas for fish; (3) establishment of game refuges, sanctuaries, range areas, and fish and game critical habitat areas; and (4) establishment of marine parks. The first two mechanisms encompasses state waters, while the latter two mechanisms can encompass both state uplands and state waters. Establishing multi-sector protection of marine resources for areas larger than 640 acres requires an act of the state legislature. It is therefore not surprising that many marine protected areas in Alaska are individually designated by statute. Many of the existing designations, especially those established by statute, include both a land and sea component.

|                                    | Fish Reserve Areas, Fish Refuges, and Fish Sanctuaries           | Closed Seasons and Areas  | Game Refuges, Game Sanctuaries, Range Areas & Fish & Game Critical Habitat Areas  | Marine Parks   |
|------------------------------------|--|---|---|--|
| Legal requirement                  | Allows designation of fishery reserves, refuges, and sanctuaries | Allows designation of open and closed seasons and areas for fish take | Designates areas as refuges, sanctuaries, & habitat areas                         | Designates areas as marine parks                     |
| Citation                           | Alaska Stat. § 16.05.251(a)(1)                                   | Alaska Stat. § 16.05.251(a)(2)  | Alaska Stat. §§ 16.20.010 – 16.20.690 (1960 & onward <sup>2</sup> )               | Alaska Stat. §§ 41.21.300 et seq. (1983 - 2008)      |
| Designation authority              | Board of Fisheries, subject to approval by the legislature       | Board of Fisheries  | Board of Fisheries and Board of Game can nominate subject to legislative approval | By statute   |
| Management & enforcement authority | Alaska Department of Fish & Game (ADFG), Board of Fisheries      | ADFG, Board of Fisheries  | Board of Fisheries & Board of Game, ADFG  | Alaska Department of Natural Resources (ADNR) & ADFG |
| Jurisdiction & boundaries          | State waters   | State waters  | State land and waters   | State land and waters                                |
| Prohibited uses                    | None identified by statute                                       | None identified by statute  | Incompatible uses   | Commissioner may prohibit or restrict                |

<sup>1</sup> This state chapter is part of a 23-state assessment of state and local authority for marine protection. It should be read in conjunction with the Executive Summary, Introduction and Methodology Chapters in order to fully understand the scope and approach. Other chapters are available at [www.eli-ocean.org/mpa](http://www.eli-ocean.org/mpa).

<sup>2</sup> The 1960 date refers to the establishment of the Walrus Islands State Game Sanctuary in 1960. Other areas were established at other points in time. For example, critical habitat areas were established from 1972 to 1989. For an overview of MPA establishment in Alaska, see Alaska Department of Fish and Game, Marine Protected Areas Task Force [hereinafter MPA Task Force], *Marine Protected Areas in Alaska: Recommendations for a Public Process*, Table E2 (2002), available at <http://www.adfg.alaska.gov/static/lands/protectedareas/pdfs/5j02-08.pdf>.

|                | Fish Reserve Areas, Fish Refuges, and Fish Sanctuaries | Closed Seasons and Areas   | Game Refuges, Game Sanctuaries, Range Areas & Fish & Game Critical Habitat Areas | Marine Parks  |
|----------------|--|----------------------------|--|---|
|                |  |                            |  | incompatible uses by regulation <sup>3</sup>  |
| Permitted uses | None identified by statute                             | None identified by statute | None identified by statute   | “Reasonable access...for lawful hunting, fishing, trapping and recreational purposes, and other lawful purposes” <sup>4</sup> |

### Overarching Considerations

The Alaska Constitution recognizes the importance of conservation and allows the Alaska State Legislature to designate “special purpose sites,” including “areas of natural beauty or of historic, cultural, recreational, or scientific value.”<sup>5</sup> The Legislature may reserve these sites from the public domain to manage and preserve them. The authority of the Legislature to designate special purpose sites, along with its role in allowing development of natural resources, provides a state constitutional basis for establishing marine protected areas.

In accordance with Alaska’s classification of lands provisions, the Commissioner of Natural Resources may not close an area to multiple purpose use or otherwise classify the land so as to preclude “mining, mineral entry or location, mineral prospecting, or mineral leasing” if the affected area contains more than 640 contiguous acres, except when such classification is necessary for purposes of utility, transportation or similar infrastructure projects.<sup>6</sup>

### Fish Reserve Areas, Refuges, and Sanctuaries and Closed Seasons and Areas

Alaska’s Board of Fisheries (Board)—a seven-member board appointed on a rotating basis by the governor—has two key authorities related to establishing and managing marine protected areas: (1) authority to establish fish reserve areas, refuges, and sanctuaries by regulation subject to legislative approval—a broad mechanism that could restrict all activities; and (2) to establish open and closed seasons and areas for fish conservation and development purposes—a fishery-specific authority.<sup>7</sup> As explained by the State:

The legislative approval requirement of AS 16.05.251(a)(1) creates an important distinction between the authority to set apart a fish reserve area and the Board’s more familiar authority to restrict the taking of fish generally. The authority to set apart a reserve implies a power to regulate activities other than just the taking of fish in the reserve area. A regulation that involved only restrictions on taking fish in a specific area could likely be accomplished under the Board’s authority to set closed seasons, closed areas, and zero harvest levels without relying on the authority to set apart fish reserve areas, sanctuaries and refuges. Similarly, an MPA

<sup>3</sup> Alaska Stat § 41.21.306(a)

<sup>4</sup> Alaska Stat § 41.21.306(d)

<sup>5</sup> ALASKA CONST. art. VIII, § 7.

<sup>6</sup> Alaska Stat. § 38.05.300.

<sup>7</sup> Alaska Stat. §§ 16.05.251(a)(1), (2) (2012).

intended to protect habitat from degradation caused by fishing gear could likely be accomplished under the Board's authority to regulate fishing gear and methods.<sup>8</sup>

Closed seasons and areas, while single-sector and typically gear-specific, provide the most extensive marine protection in the state.<sup>9</sup> In accordance with the state's administrative procedure law, any person can petition the Board to have a regulation amended, adopted or repealed, unless a specific statute prohibits it.<sup>10</sup> The fisheries code states that if a person petitions the Board to amend, adopt or repeal a regulation and the Board wishes to deny the petition, it must do so by including a written explanation of the denial within 30 days after denying such petition. In addition, as authorized by Section 16.05.260, the Joint Board of Fisheries and Game created 82 local advisory committees throughout the state that provide opinions and recommendations on management of fish and game resources.<sup>11</sup> These requirements provide a mechanism for citizen engagement in the marine protection establishment and management process under the authority of the Board of Fisheries.

### **Game Refuges, Sanctuaries, Range Areas, and Fish and Game Critical Habitat Areas**

Several fish and wildlife refuges are designated by statute, of which a large number include tidal lands, submerged land, and water. First, Alaska has adopted the federal National Wildlife Refuge designations in the state as state refuges as well.<sup>12</sup> Many of these are island and coastal refuges, including for example the Aleutian Islands Refuge, Hazen Bay Refuge, Nunivak Island Refuge, etc. Second, Alaska has adopted additional state refuges, such as the Anchorage Coastal Wildlife Refuge. This refuge, like others, is to be managed "as a state game refuge for the protection of waterfowl, shorebirds, salmon, and other fish species, and their habitat and for the use and enjoyment of the people of the state."<sup>13</sup> For designated reserves, the Board of Fisheries or Board of Wildlife is to adopt regulations governing "take" in the reserve considering conservation and protection needs.<sup>14</sup>

In addition to fish and wildlife refuges, Alaska has designated state game sanctuaries. In particular, the Walrus Islands have been designated as a sanctuary because it is the "sole remaining place in the state where walrus haul out on land."<sup>15</sup> Past haul-out grounds have been abandoned "due to excessive molestation and slaughter."<sup>16</sup> This sanctuary includes the state waters surrounding it.

Fish and game critical habitat areas are established by recommendations from the Boards of Fisheries and Game and legislative approval "to protect and preserve habitat areas especially crucial to the perpetuation of fish and wildlife, and to restrict all other uses not compatible with that primary purpose."<sup>17</sup> Several areas that protect both land and ocean resources are identified by statute, including

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<sup>8</sup> State of Alaska, Comments on "Marine Protected Areas in Alaska: Recommendations for a Public Process," Regional Information Report No. 5J02-09 (Oct 14, 2002) (comment from State of Alaska, Department of Law providing a legal review of the report "Marine Protected Areas in Alaska"), available at <http://www.adfg.alaska.gov/FedAidPDFs/RIR.5J.2002.09.pdf>.

<sup>9</sup> See, e.g., Marine Conservation Institute, SeaStates.US 2013, Alaska, at [seastates.us/states/AK.html](http://seastates.us/states/AK.html); see also David Witherell & Doug Woodby, *Application of Marine Protected Areas for Sustainable Production and Marine Biodiversity Off Alaska* (2005).

<sup>10</sup> Id. § 16.05.251(c); see Alaska Stat. § 44.62.220 (providing the right to petition for a regulation amendment, adoption, or repeal under the Alaska Administrative Procedure Act).

<sup>11</sup> See Alaska Department of Fish and Game, *Advisory Committees*, at <http://www.adfg.alaska.gov>. Also, in 2002, the Alaska Marine Protected Areas Task Force developed a report to the Board of Fisheries, *Marine Protected Areas in Alaska: Recommendations for a Public Process*. MPA Task Force, *supra* note 2.

<sup>12</sup> Id. §16.20.030(a) (2012).

<sup>13</sup> § 16.20.031(a) (2012)

<sup>14</sup> § 16.20.075 (2012).

<sup>15</sup> § 16.20.090(a)(1) (2012).

<sup>16</sup> *Id.*

<sup>17</sup> § 16.20.500 (2012).

the Port Moller critical habitat area and Port Heiden critical habitat area.<sup>18</sup> Each year, the Commissioner for Natural Resources is required to submit a list of additional critical habitat areas to the legislature.<sup>19</sup>

### Marine Parks

In Alaska, the primary purposes of marine parks are to maintain natural, cultural, and scenic values; maintain fish and wildlife resources and lawful existing uses of marine and coastal resources; and to promote and support recreation and tourism in the state.<sup>20</sup> However, allowable uses include “[r]easonable access...for lawful hunting, fishing, trapping and recreational purposes, and other lawful purposes.”<sup>21</sup> Commercial fishing is included as an allowable use. Several MPA sources exclude marine parks as part of the MPA system in Alaska.<sup>22</sup>

The Alaska Department of Natural Resources (DNR) is responsible for management of the marine parks system.<sup>23</sup> The Department of Fish and Game retains authority for management of fish and game resources in the parks; however, it must consult with the Department of Natural Resources before adopting regulations.<sup>24</sup>

In creating a management plan for each marine park unit, the DNR Commissioner must consult a diverse set of stakeholders, including the Department of Fish and Game, local municipalities and private landowners, the U.S. Forest Service, and organizations concerned with conservation, recreation, and tourism.<sup>25</sup> The DNR Commissioner also must consult with proximately located Alaska Native corporations that own historical or cultural sites.<sup>26</sup>

Thirty-four sites in Alaska are designated as Marine Parks.<sup>27</sup> In addition to marine parks, the State of Alaska has many state parks that protect coastal terrestrial habitat. In the Bristol Bay region, for example, the Wood-Tikchik State Park is the largest state park in the U.S., part of the Nushagak watershed, and includes major spawning habitat for salmon.

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<sup>18</sup> §§ 16.20.550 – 16.20.630 (2012).

<sup>19</sup> § 16.20.690 (2012) (stating that “[t]he commissioner shall submit a list of additional critical habitat areas to the legislature annually).

<sup>20</sup> Alaska Stat. § 41.21.300 (a)(1)-(3) (2012).

<sup>21</sup> Alaska Stat § 41.21.306(d)

<sup>22</sup> See e.g., National Marine Protected Area Center, Alaska Marine Protected Area Map, *available at* [http://www.atsea.org/doc/NOAA-AlaskaMPAsMap8\\_09.pdf](http://www.atsea.org/doc/NOAA-AlaskaMPAsMap8_09.pdf); see also Marine Conservation Institute, SeaStates.US 2013, Alaska, *at* [seastates.us/states/AK.html](http://seastates.us/states/AK.html).

<sup>23</sup> § 41.21.302(a) (2012).

<sup>24</sup> § 41.21.302(b) (2012).

<sup>25</sup> Declaration of Purpose, AS § 41.21.302 (c).

<sup>26</sup> § 31.21.302(g).

<sup>27</sup> See Alaska Stat. §41.21.304 (designating the following as marine park units of the Alaska state park system: Bettles Bay, Oliver Inlet, Sawmill Bay, Shoup Bay, South Esther Island, Surprise Cove, Chilkat Islands, Ziegler Cove, Horseshoe Bay, Sullivan Island, Shelter Island, Saint James Bay, Taku Harbor, Funter Bay, Joe Mace Island, Thoms Place, Beecher Pass, Dall Bay, Security Bay, Boswell Bay Beaches, Canoe Passage, Decision Point, Driftwood Bay, Entry Cove, Granite Bay, Kayak Island, Jack Bay, Safety Cove, Sandspit Point, Sunny Cove, Thumb Cove, Magoun Islands, Big Bearaby Bear Bays, and Juneau Islands).

*Evaluation of State Authorities<sup>28</sup>*

| FACTORS                      | Fish Reserve Areas, Fish Refuges, & Fish Sanctuaries        | Closed Seasons and Areas                    | Game Refuges, Game Sanctuaries, Range Areas & Fish & Game Critical Habitat Areas | Marine Parks  |
|------------------------------|---|---|--|---|
| <b>Legal Regime</b>          | ★★★★<br>Regulatory  | ★★★★<br>Regulatory                          | ★★★★<br>Regulatory   | ★★★★<br>Regulatory  |
| <b>Ocean Jurisdiction</b>    | ★★★★<br>All marine waters                                   | ★★★★<br>All marine waters                   | ★★★★<br>All marine waters  | ★★★★<br>All marine waters                                   |
| <b>Durability</b>            | ★★★★<br>Indeterminate                                       | ★★<br>Indeterminate                         | ★★★★ <sup>29</sup><br>In perpetuity  | ★★★★<br>In perpetuity                                       |
| <b>Consistency</b>           | ★★★★<br>Indeterminate                                       | ★★<br>Indeterminate                         | ★★★★<br>Mandates year-round protection   | ★★★★<br>Mandates year-round protection                      |
| <b>Habitat</b>               | ★★<br>Fisheries focus                                       | ★★<br>Fisheries focus                       | ★★<br>Species focus  | ★★★<br>Habitat protection is one of the goals               |
| <b>Sector</b>                | ★★★<br>Authorizes multi-sector                              | ★<br>Authorizes single-sector               | ★★★<br>Authorizes multi-sector   | ★★★★<br>Mandates multi-sector but substantial exclusions    |
| <b>Enforcement</b>           | ★<br>No MPA-specific enforcement by statute                 | ★<br>No MPA-specific enforcement by statute | ★<br>No MPA-specific enforcement by statute                                      | ★<br>No MPA-specific enforcement by statute                 |
| <b>Extent (scope)</b>        | ★★<br>Multi-site, no expansion without legislative approval | ★★★★<br>Multi-site with expansion possible  | ★★<br>Multi-site, no expansion without legislative approval                      | ★★<br>Multi-site, no expansion without legislative approval |
| <b>Process for expansion</b> | ★★<br>No MPA-specific public process                        | ★★<br>No MPA-specific public process        | ★★<br>No MPA-specific public process   | ★★<br>No MPA-specific public process                        |

*Local Authority for Marine Protection*

**Summary of Local Authorities**

Alaska, as a home-rule state, gives local government the authority to exercise all legislative powers that are not otherwise prohibited by law or home rule charter. In addition, boroughs and some municipalities have authority to manage tidal and submerged lands out to three miles from shore. However, several statutory provisions severely constrain local government authority in the marine environment. First, the power to manage fish and wildlife is retained by the state. Also, as previously stated, all multi-sector protected areas larger than 640 acres must be designated by an act of legislation.

<sup>28</sup> For an explanation of the evaluation matrix and criteria, please see the Introduction and Methodology Chapters.

<sup>29</sup> A statutory designation of a protected area without a regulatory means for amendment is considered “in perpetuity” for purposes of this evaluation matrix.

Finally, localities lost some planning authority previously held under the state’s Coastal Management Program when the State allowed the Alaska Coastal Management Program to sunset in 2011.

|   | Land Use Management  | Tide and Submerged Land Authority                             |
|---|--|---|
| <b>Legal requirement</b>                      | Requires boroughs to develop land use plans and ordinances | Authorizes municipalities to manage tidal and submerged lands |
| <b>Citation<sup>30</sup></b>                  | Alaska Stat. § 29.40.010 et seq. (1959)                    | Alaska Stat. §§38.05.820-825 & §§38.10.010 et seq.            |
| <b>Designation authority</b>                  | Boroughs and municipalities                                | Municipalities  |
| <b>Management &amp; enforcement authority</b> | Boroughs and municipalities                                | Municipalities  |
| <b>Jurisdiction &amp; boundaries</b>          | Can include tidal and submerged lands                      | Tidal and submerged lands to 3-mile boundary                  |
| <b>Prohibited uses</b>                        | None specified in statute                                  | None specified in statute                                     |
| <b>Permitted uses</b>                         | None specified in statute                                  | None specified in statute                                     |

### Overarching Considerations

The Alaska Constitution provides the goal of “provid[ing] for maximum local self-government,”<sup>31</sup> and further states that “[a] home rule borough or city may exercise all legislative powers not prohibited by law or by charter.”<sup>32</sup> An examination of boundary maps of Alaska boroughs and census areas reveals that they include state marine waters.<sup>33</sup> However, the State of Alaska “has jurisdiction over all fish and game in the state except in those areas where it has assented to federal control.”<sup>34</sup>

### Land Use Management

Alaska statutes give some municipalities and boroughs authority over land use planning and regulation. First- and second-class boroughs are required to pass a comprehensive plan by ordinance<sup>35</sup> and to pass ordinances implementing the plan.<sup>36</sup> Such ordinances can relate to “zoning regulations restricting the use of land” and permit requirements, among others.<sup>37</sup>

In practice, boroughs and municipalities in Alaska have some approaches for protecting marine ecosystems. For example, Anchorage has established an Anchorage Wetlands Management Plan that includes enforceable policies and includes some coastal wetlands.<sup>38</sup> Barrow’s municipal code demonstrates another approach—it states that the city will retain ownership and management of lands

<sup>30</sup> The citation date provided is the earliest date of enactment and does not reflect subsequent amendments unless otherwise noted. The enactment date is meant to inform the reader of how long the protection authority has existed.

<sup>31</sup> Alaska Constitution Art. X §1.

<sup>32</sup> Alaska Constitution Art. X §11; *see also* § 29.04.010 (2012).

<sup>33</sup> Alaska Department of Labor and Workforce Development, Research and Analysis, *Boundary Maps*, at <http://laborstats.alaska.gov/census/maps.htm#bound> (last visited October 29, 2013).

<sup>34</sup> § 16.20.010 (2012).

<sup>35</sup> §29.40.030 (2012).

<sup>36</sup> §29.40.040.

<sup>37</sup> §29.40.040

<sup>38</sup> Municipality of Anchorage, Planning Division, Wetlands: Anchorage Wetlands Management Plan, Public Hearing Draft [hereinafter Draft Wetlands Plan] (Mar 2012), *available at* <http://www.muni.org/Departments/OCPD/Planning/Physical/EnvPlanning/Documents/AWMP-March2012PHD-5-6-12.pdf>. However, the Draft Wetlands Plan notes that past plans were developed as part of the state Coastal Zone Program—a program that sunset in 2011 and has not been reestablished.

that are required for public use and archeologically and/or historically significant or potentially significant.<sup>39</sup>

### Tide and Submerged Lands

Tide and submerged lands management is a subset of local land use management authority. Municipalities in Alaska have specific authority to manage and lease tide and submerged lands.<sup>40</sup> Such management must not unreasonably interfere with navigation or public access.<sup>41</sup> A look at Anchorage’s municipal code provides one example of how this authority has been used. Anchorage Tidelands Regulations set out the local regulations of tidelands and contiguous submerged lands from the mean high-water line out to three nautical miles from shore.<sup>42</sup> The regulations include the process for leasing of tidelands and a process for notifying the Commissioner of Fish and Game about any action that will pollute or obstruct state waters.<sup>43</sup> No conservation provisions were identified in the Anchorage municipal code for tidelands.

### Evaluation of Local Authorities

| FACTORS                      | Land Use Management  | Tide and Submerged Lands   |
|------------------------------|--|--|
| <b>Legal Regime</b>          | Planning and regulatory                         | Regulatory                                      |
| <b>Ocean Jurisdiction</b>    | Tidal and submerged lands to 3 miles            | Tidal and submerged lands to 3 miles            |
| <b>Durability</b>            | Indeterminate                                   | Indeterminate                                   |
| <b>Consistency</b>           | Indeterminate                                 | Indeterminate                                 |
| <b>Habitat</b>               | Byproduct = habitat (focused on development)  | Byproduct = habitat (focused on development)  |
| <b>Sector</b>                | Authorizes multi-sector                       | Authorizes multi-sector                       |
| <b>Enforcement</b>           | No MPA-specific enforcement                   | No MPA-specific enforcement                   |
| <b>Extent (scope)</b>        | No existing protected area identified but potential authority to establish limited protection                                    | No existing protected area identified but potential authority to establish limited protection                                      |
| <b>Process for expansion</b> | No protected-area-specific public process     | No protected-area-specific public process     |

<sup>39</sup> Barrow Municipal Code §13.04.030(A).

<sup>40</sup> § 38.05.825 (requiring the Commission to convey tide or submerged land to a municipality unless the public interest in retaining ownership clearly outweighs the municipality’s interest in obtaining the land); §38.05.820 (giving home rule cities and cities of the first class the ability to obtain land seaward of the mean high tide line); §38.10.010 et seq (2012) describing process for municipalities of less than 5,000 people to obtain authority over tide and submerged lands

<sup>41</sup> § 38.05.825

<sup>42</sup> Anchorage Municipal Code § 25.50.220.

<sup>43</sup> Anchorage Municipal Code § 25.50.110 et seq.