IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

COOK INLETKEEPER, *et al.*, Plaintiff, v. COMMISSIONER DOUGLAS VINCENT-LANG, in his official capacity, *et al.*, Defendant.	Case No. 3AN-21-05627CI

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Kachemak Bay and Fox River Flats Critical Habitat Areas (collectively "the CHAs") are wildlife-rich areas located near Homer, Alaska. In 2001, the Department of Fish and Game ("the Department") adopted 5 AAC 95.310, a regulation prohibiting personal watercraft ("PWC") use in the CHAs. In 2020, approximately twenty years later, the Department repealed 5 AAC 95.310. Subsequently, Plaintiffs filed this lawsuit in May 2021, challenging the repeal of the regulation arguing that the Department lacked statutory authority to repeal 5 AAC 95.310, the repeal violated the Administrative Procedure Act, and the repeal violated the Alaska Constitution.[1]

Having considered parties' cross motions for summary judgment, oppositions, and replies thereto, the Court finds that the Department exceeded its statutory authority when

[1] *See generally* Complaint (May 4, 2021); *see also* Plaintiffs' Motion for Summary Judgment at 5-6 (April 7, 2023) (hereinafter "Plaintiffs' Motion").

it repealed 5 AAC 95.310. Accordingly, the Court **GRANTS** Plaintiffs' Motion for Summary Judgment.

Background

I. Kachemak Bay and Fox River Flats Critical Habit Areas

In 1972, the Alaska state legislature established critical habitat areas ("CHAs") "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."[2] Kachemak Bay is home to one of the most productive marine ecosystems in the Cook Inlet and is also subject to a range of human use and activity such as fishing, hunting, wildlife watching, kayaking, boating, diving, and photography.[3] In order to protect and preserve Kachemak Bay, the Alaska Legislature created two overlapping CHAs that encompass most of the bay; Fox River Flats critical habitat area ("Fox River Flats CHA") and the Kachemak Bay critical habitat area ("Kachemak Bay CHA").[4] The Fox River Flats CHA was one of the original group of eight such areas that were established in 1972.[5] The Kachemak Bay CHA which partially overlaps with the Fox River Flats CHA, was established later in 1974.[6]

The Kachemak Bay CHA encompasses approximately 222,000 acres of the tidelands and submerged lands and waters excluding the area directly surrounding the

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[2] AS 16.20.500.
[3] Defendants' Motion for Summary Judgment at 3-4 (April 7, 2023) (hereinafter "Defendants' Motion").
[4] *Id.* at 3.
[5] Plaintiffs' Motion at 6.
[6] *Id.* at 6-7.

Port and Harbor of Homer.[7] This area is "a rich marine environment" due to "the circulatory pattern in the [protected] bay," which allows it to sustain "higher concentrations of fin fish, shell fish, [and] other marine mammals than similar nearby waters."[8] The Kachemak Bay CHA abuts and partially overlaps with Kachemak Bay State Park, which provides additional opportunities for camping, hiking, and wildlife viewing.[9] There is no public access via road; visitors can only reach Kachemak Bay State Park via the waters of the Kachemak Bay CHA by watercraft or seaplane.[10]

The Fox River Flats CHA lies at the head of Kachemak Bay and includes approximately 7,100 acres of freshwater rivers, wetlands, and tide flats.[11] The Fox River Flats CHA contains tidelands, marshes, mud flats, shallow water, grasses, and sedges and is home to "large concentrations of waterbirds" like "migratory bird, ducks, geese, [and] shorebirds," as well as moose, bear, and salmon.[12]

III. Management Plan Established for the CHAs

Approximately twenty years after the creation of the Kachemak Bay and Fox River Flats CHAs, the Department — along with other state and federal agencies — established the Kachemak Bay and Fox River Flats Critical Habitat Areas Management Plan ("Management Plan") in 1993.[13] This Management Plan was formally adopted by

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[7] Defendants' Motion at 3.
[8] Plaintiffs' Motion at 7.
[9] Defendants' Motion at 4.
[10] *Id.*
[11] *Id.* at 3.
[12] Plaintiffs' Motion at 8.
[13] *Id.* at 8-9.

regulation (5 AAC 95.610) in 1994.[14]

The purpose of the Management Plan is "to provide consistent long-range guidance to [the Department] and other agencies involved in managing the [CHAs.]"[15] 5 AAC 95.610 provides that ADF&G "will use [the Management Plan] in determining whether proposed activities in the [CHAs] are compatible with the protection of fish and wildlife, their habitats, and public use of the [CHAs]."[16] The Management Plan "presents management goals for the [CHAs] and resources and identifies policies to be used in determining whether proposed activities within the [CHAs] are compatible with the protection of fish and wildlife, their habitats and public use of the [CHAs]."[17] Notably, "[t]he plan does not apply to hunting or fishing regulations which are the authority of the Boards of Fish and Game."[18]

The Department is not the only agency with "management responsibilities within the [CHAs]."[19] "Any use, lease, or disposal of resources on state land in the [CHAs] requires Alaska Department of Natural Resources (DNR) authorization."[20] Additionally, the DNR Division of Parks and Outdoor Recreation manages Kachemak Bay State Park, which partially overlaps with the Kachemak Bay CHA "along most of the south shore of the Kachemak Bay from Tutka Bay north to Aurora Lagoon and Chugachik Island."[21] As

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[14] *Id.* at 9.
[15] Kachemak Bay and Fox River Flats Critical Habitat Areas Management Plan at 1.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*at 2.
[20] *Id.*
[21] *Id.*

a result, activities within the state park must be authorized by the DNR Division of Parks and Outdoor Recreation."[22]

The Management Plan for these areas was developed after an extensive public planning process and in collaboration with various federal, state, and municipal entities, and established policies that guide management decisions, including the issuance of special area permits for proposed activities within the CHAs.[23] The policies help to achieve the two core goals set forth by the Management Plan: (1) the maintenance and enhancement of fish and wildlife populations; and (2) the maintenance and enhancement of public use of fish, wildlife, and CHA lands and waters.[24]

IV. Prohibition of Personal Watercraft Use Within the CHAs.

Beginning in 1999, the Department considered possible regulatory actions regarding the use of PWCs in the Kachemak Bay and Fox River Flats CHAs.[25] To that end, the Department formed an interagency planning team and solicited informal public comment on the issue.[26] As part of this process, the Department directed staff to conduct a literature review to assess the possible impacts of PWC on fish and wildlife.[27] This literature review concluded that "the characteristics of [PWC] use . . . may make them more disruptive and polluting than conventional watercraft."[28] "[T]he higher noise levels,

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[22] *Id.* at 2.
[23] Defendants' Motion at 5.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 6-7.
[28] Plaintiffs' Motion at 11.

faster speeds, erratic movements, the PWC's ability to enter shallower water, and their tendency to operate in groups [are] reasons why PWC impact wildlife to a greater degree than conventional motorboats."[29]

In 2001, the Department opted to adopt a regulation prohibiting PWC use within the CHAs.[30] The regulation was codified at 5 AAC 95.310:

> 5 AAC 95.310. Personal watercraft use prohibited.
> (a) A person may not operate personal watercraft within the following legislatively designated areas:
> (1) Fox River Flats Critical Habitat Area established in AS 16.05.580.
> (2) Kachemak Bay Critical Habitat Area established in AS 16.05.590.
> (b) In this section, "personal watercraft" means a vessel that is
> (1) less than 16 feet in length;
> (2) propelled by a water-jet pump or other machinery as its primary source of motor propulsion; and
> (3) destined to be operated by a person sitting, standing, or kneeling on the vessel, rather than by a person sitting or standing inside it.[31]

The prohibition on PWC within the CHAs went into effect in May 2001; this decision was also made in consultation with DNR, which itself promulgated a similar regulatory prohibition of its areas in May 2001.[32]

V. Repeal of 5 AAC 95.310.

The Department issued public notice of the proposed repeal on December 5, 2019,

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[29] *Id.*
[30] Defendants' Motion at 6.
[31] *Id.* at 6-7.
[32] Plaintiffs' Motion at 11.

listing as the statutory authority AS 16.05.020, 16.20.500, 16.20.580, and 16.20.590.[33] Rick Green, the Special Assistant to the Commissioner of the Department, was designated as the point of contact for questions and submission of public comments.[34] The initial public notice indicated that public comment period would remain open until January 6, 2020, however, the Department subsequently extended the public comment period until January 21, 2020.[35]

According to the Department, the Commissioner considered retaining the PWC ban in the Fox River Flats CHA as well as the possibility of implementing a no wake zone through the Management Plan, but ultimately, he decided to move forward with repealing 5 AAC 95.310 in its entirety given that the Management Plan process was still underway.[36]

In the explanation for the Commissioner's decision to repeal 5 AAC 95.310, he concluded that evidence of potential impacts to habitat did not justify imposing a burden on public access to the CHAs:

> ... 5 AAC 95.310, the ban on personal watercraft, is an overburdensome regulation not supported by any scientific studies that have documented impacts to Kachemak Bay or similar environments and a key part of our stated mission is to improve access to the Critical Habitat Area for fishing, hunting, recreating, and wildlife viewing. Because of the lack of scientific data specific to PWCs in similar environments, the evolution of emissions and noise reduction, and the advancements of other watercraft blurring the lines of a PWC,

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[33] Defendants' Motion at 9.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 9-10.

> there appears to be no difference between the use of PWC and other watercraft regarding the potential impacts to habitat within these special areas. Therefore, repeal of the prohibition of PWCs is justified.[37]

The Commissioner signed the adoption order repealing 5 AAC 95.310 on November 20, 2020.[38] The Office of the Lieutenant Governor certified the filing of the regulations according to the provisions of AS 44.62.040-.120 on December 10, 2020, and the repeal went into effect on January 9, 2021.[39]

VI. Procedural History

Plaintiffs initiated this case in May 2021 and subsequently, the parties agreed to a simultaneous summary judgment briefing schedule.[40] The Court heard oral argument for these motions on June 26, 2023.

Legal Standard

Summary judgment is warranted where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law."[41] A "material fact is one upon which resolution of an issue turns."[42] But Alaska has a "lenient standard for withstanding summary judgment" and this standard "serves the important function of preserving the right to have factual questions resolved by a trier of fact only after following the procedures of a trial."[43] All reasonable inferences must be drawn in

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[37] *Id.* at 11-12.
[38] *Id.* at 10.
[39] *Id.*
[40] Plaintiffs' Motion at 24.
[41] Alaska Rule of Civil Procedure 56.
[42] *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 519 (Alaska 2014) (citing *Sonneman v. State,* 969 P.2d 632, 635 (Alaska 1998)).
[43] *Christensen*, 335 P.3d at 520-21 (quoting *Shaffer v. Bellows*, 260 P.3d 1064, 1069 (Alaska 2011)).

favor of the non-moving party.[44]

A party seeking summary judgment has the initial burden of proving, through admissible evidence, that there are no genuine issues of material facts and that the moving party is entitled to judgment as a matter of law.[45] Once the moving party makes a prima facie showing of its entitlement to judgment, the burden shifts to the non-moving party to demonstrate the existence of a disputed genuine issue of material fact.[46] In order to succeed, the non-moving party must "set forth specific facts showing that [it] could produce evidence reasonably tending to dispute or contradict the movant's evidence and thus demonstrate that a material issue of fact exists."[47] "To create a genuine dispute of material fact there must be more than a scintilla of contrary evidence."[48] Additionally, the proffered evidence must "directly contradict the moving party's evidence."[49]

When reviewing the validity of a regulation, "[courts] presume that regulations are valid and . . . place the burden of proving otherwise on the challenging party."[50] Alaska courts review an agency's regulation for whether it is "consistent with and reasonably necessary to implement the statutes authorizing [its] adoption."[51] Toward this end [courts] consider: (1) whether [the agency] exceeded its statutory authority in promulgating the regulation; (2) whether the regulation is reasonable and not arbitrary; and (3) whether the

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[44] 335 P.3d at 520 (citing *Lockwood v. Geico Gen. Ins. Co.*, 323 P.3d 691, 696 (Alaska 2014)).
[45] *Christensen*, 335 P.3d at 517.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 518.
[49] *Id.* at 516.
[50] *Manning v. State, Dep't of Fish & Game*, 355 P.3d 530, 534 (Alaska 2015).
[51] *Id.*

regulation conflicts with other statutes or constitutional provisions.[52]

The first step is to "determine whether the legislature delegated to the administrative agency the authority to promulgate regulations."[53] "Determining the extent of an agency's authority involves the interpretation of statutory language, a function uniquely within the competence of the courts."[54] As a result, courts apply "[their] independent judgment to the question of the authority to adopt regulations."[55]

After determining whether "the agency acted within the scope of its delegated power, [courts] then consider whether the regulation is consistent with and reasonably necessary to implement the statutes authorizing its adoption and whether it is reasonable and not arbitrary."[56] "In making the consistency determination, the court exercises its independent judgment, unless the issue involves agency expertise or the determination of fundamental policy questions on subjects committed to an agency."[57] "In cases involving agency expertise or fundamental policy questions, [courts] employ a rational basis standard under which [they] defer to the agency's determination so long as it is reasonable."[58]

The question of whether 5 AAC 95.310 is consistent with the authorizing statutory provisions is ultimately a question of statutory interpretation to which the Court should

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[52] *Id.* at 534–35.
[53] *O'Callaghan v. Rue*, 996 P.2d 88, 94 (Alaska 2000).
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 94-95.

apply its independent judgment. Whether the regulation is necessary to implement the statute involves fundamental policy determinations which [courts] review using a rational basis standard.

Discussion

Plaintiffs argue that the repeal of 5 AAC 95.310 violates the legislature's direction "to restrict all other uses not compatible with" "protect[ing and preserving] . . . fish and wildlife" within the CHAs.[59] Defendants argue that the Department did not exceed its statutory authority when it repealed 5 AAC 95.310. Further, they maintain that the Department repealed 5 AAC 95.310 consistent with its other regulatory obligations within the CHAs.

The Court agrees with parties that there are no issues of material fact and summary judgment is appropriate. As addressed in detail below, the repeal of 5 AAC 95.310 was invalid because: (1) the Department acted outside the scope of its delegated authority when it repealed 5 AAC 95.310 and (2) the repeal of 5 AAC 95.310 is inconsistent with the authorizing statutory provisions. Since the Court finds that the Department exceeded its statutory authority when it repealed 5 AAC 95.310, the Court does not need to address Plaintiffs' other arguments.

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[59] Plaintiffs' Motion at 28-29. Further, Plaintiffs argue Defendants' justification for repealing the regulation shows that they acted arbitrarily as a matter of law by disregarding: (1) the scientific literature; (2) their own subject matter experts; (3) the existing and proposed revised Management Plan; (4) the Department's cooperative agreement with DNR; and (5) the unique physical characteristics of the two CHAs.

I. The Department acted outside the scope of its delegated authority when it repealed 5 AAC 95.310.

Administrative agencies are created by statute "and therefore must find within the statute the authority for the exercise of any power they claim."[60] As a result, an agency may only promulgate regulations within the scope of its legislative authority.[61]

Here, as a threshold matter, Defendants argue that the Court's "inquiry into an agency's statutory authority to regulate applies to the adoption, not the repeal, of a regulation"[62] and the Commissioner had authority to repeal the Department's regulation prohibiting PWC use because the Commissioner had authority to adopt the regulation in the first place.[63] This is not a persuasive argument given that Alaskan law clearly directs that an administrative agency must "find within the [authorizing] statute the authority for the exercise of *any* power they claim."[64] As a result, even though the Department repealed, not promulgated the regulation at issue, it still must have had either express or implied statutory authority to do so.[65]

A. The Department does not have either express or implied statutory authority to repeal 5 AAC 95.310.

An agency's "[s]tatutory authority to promulgate rules may be either express or

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[60] *Alaska State Comm'n for Hum. Rts. v. Anderson*, 426 P.3d 956, 962–63 (Alaska 2018) citing *McDaniel v. Cory*, 631 P.2d 82, 88 (Alaska 1981).
[61] *Id.*
[62] Defendants' Motion at 39 citing AS 44.62.020 ("To be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.")
[63] *Id.* at 38 (referring to Count IV in Complaint); *see also* Defendants' Opposition to Plaintiffs' Motion at 6 ("However, while courts must consider an agency's statutory authority to promulgate a regulation, it makes little sense to do the same when an agency repeals a regulation because administrative agencies have inherent power to repeal their own regulations, so long as they follow the proper procedure and do not do so arbitrarily.").
[64] *Alaska State Comm'n for Hum. Rts.*, 426 P.3d at 962–63.
[65] Whether the Department had statutory authority to promulgate 5 AAC 95.310 is not before this Court. But the Court notes that 5 AAC 95.310 is the only standalone regulation of its kind for any CHA.

implied."[66] For example, in *Chevron U.S.A. Inc. v. LeResche*, although no statutory provisions provided the Commissioner of the Department of Natural Resources (DNR) direct authority to adopt regulations requiring land use permits for oil and gas exploration on state land and require permitholders to submit relevant data to DNR, the court held that the Commissioner of DNR had implied authority to promulgate the challenged regulations.[67] The court found that the statutes allowing the Commissioner to establish reasonable procedures and adopt rules and regulations necessary to carry out the Alaska Land Act, when read in conjunction with a statutory provision governing oil and gas, gave the Commissioner implied authority to adopt the challenged regulations.[68]

The *Chevron* court reasoned that since the Alaska legislature gave the Commissioner the responsibility to "to maximize State return from State owned oil and gas resources through careful planning, including pre-sale analysis of tracts proposed for lease" and "[s]uch planning and pre-sale analyses require the Commissioner to have access to the most reliable geological and geophysical data available," that the challenged regulations which required land use permits and sharing of certain relevant data with DNR were "reasonably necessary to insure that the planning process is carried out responsibly."[69]

Additionally, in *O'Callaghan v. Rue*, the court found that the Commissioner of

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[66] *O'Callaghan*, 996 P.2d at 95.
[67] *Chevron U.S.A. Inc. v. LaResche*, 663 P.2d 923, 928 (Alaska 1983).
[68] *Id.*
[69] *Id.*

Fish and Game had implied authority to promulgate salmon roe stripping regulations under the statute which outlined the Commissioner's general powers and functions combined with provisions of the salmon waste law which delegated express rulemaking powers to the Commissioner.[70] Central to the court's analysis was the fact that the salmon waste law "explicitly delegates to the Commissioner the authority to enforce and interpret the law."[71] The court found that since the statute "reflect[s] a clear legislative intent that regulations should be adopted under [the salmon waste law] and that the Commissioner is the official responsible for the law's implementation . . . [t]ogether with the Commissioner's general authority to manage fishery resources in the state, this statute delegates rulemaking authority to the Commissioner."[72]

Here, the Department argues that it had "both impl[ied] and express statutory authority to adopt the regulation prohibiting PWC use in CHAs."[73] They argue that "AS 16.05.020 directs the Commissioner of the Department to 'manage, protect, maintain, improve, and extend the fish, game and aquatic plant resources of the state in the interest of the economy and general well-being of the state' and vests the Commissioner with the 'necessary power to accomplish' that goal."[74] Defendants argue that the statutory grant of "necessary power" in AS 16.05.020 implies rulemaking authority of the Commissioner.[75]

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[70] *O'Callaghan*, 996 P.2d at 95-96.
[71] *Id.* at 95.
[72] *Id.* at 95-96. ("Because the legislature granted the Commissioner authority to promulgate rules under AS 16.05.020 and 16.05.831, we hold that the Commissioner has the authority to promulgate the regulation in question.")
[73] Defendants' Motion at 40.
[74] *Id.*
[75] *Id.*

Additionally, the Department argues that the Commissioner's power to promulgate 5 AAC 95.310, and to repeal it, is expressed through the CHA statutes and regulations.[76] The statutory purpose of CHAs is "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."[77] The Department implements this statutory directive "in two ways: (1) through regulation of takings of fish and wildlife within CHAs and, (2) through regulation and permitting of land use within the CHAs."[78]

According to the Department, "[t]he Boards conserve and protect CHAs through regulation of hunting, trapping, and fishing, and the Commissioner has permit authority over activities that the Department determines may affect fish or game or their habitat within CHAs."[79] As a result, the Department argues that "the Commissioner may therefore restrict uses that are incompatible with the protection and preservation of critical habitat."[80] The Commissioner "exercises his discretion to restrict uses and activities through various mechanisms including determining which uses or activities require special area permits, approving or denying special area permits, issuing general permits to the public at large, and adopting management plans for CHAs."[81] The Department argues when it promulgated 5 AAC 95.310 in 2001, the Commissioner

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[76] *Id.*
[77] *Id.* citing AS 16.20.500.
[78] *Id.*
[79] *Id.* at 40-41.
[80] *Id.*at 41.
[81] *Id.*

validly implemented his authority to restrict use through rulemaking.[82] They argue with this same authority, the Commissioner validly repealed 5 AAC 95.310 in 2020.[83]

Plaintiffs argue that "the legislature's *specific* statutory directive to [the Department] is to 'to restrict all other uses [that are] not compatible with th[e] primary purpose' of 'protect[ing] and preserv[ing] . . . fish and wildlife' within the CHAs."[84] Further, Plaintiffs argue "[t]his specific statutory language overrides the Commissioner's general authority, and confirms that Defendants acted outside the scope of their authority when repealing the prohibition on PWS [use] within the CHAs because there is no evidence that the repeal protects fish and wildlife."[85]

Here, AS 16.05.020 outlines generally the functions of the Commissioner, directing him to "manage, protect, maintain, improve, and extend the fish . . . resources of the state in the interest of the economy and general well-being of the state" and giving him the "necessary power to accomplish" those directives.[28] While the Department argues that "the statutory grant of 'necessary power' in AS 16.05.020 implies rulemaking authority of the Commissioner,"[86] the Alaska Supreme Court has previously interpreted this statute as "grant[ing] the Commissioner broad authority 'relat[ing] principally to administration and budgeting,' while primary rulemaking authority is allocated to the Board."[87]

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[82] *Id.*
[83] *Id.*
[84] Plaintiffs' Reply in Support of Motion for Summary Judgment at 8.
[85] *Id.*
[86] Defendants' Motion at 40.
[87] *O'Callaghan*, 996 P.2d at 95.

This case is distinguishable from both *O'Callaghan* and *Chevron*. Unlike in *O'Callaghan*, where specific sections of the authorizing statute "reflect[ed] a clear legislative intent that regulations should be adopted under [the authorizing statute] and that the Commissioner [was] the official responsible for the law's implementation," in the present case, the legislative history of AS 16.20.510, the statute dealing with regulations in CHAs does not indicate that the legislature intended to give the Commissioner authority to adopt standalone regulations for conservation and protection purposes within CHAs.[88] Rather, as the Department itself contends "[t]he Boards conserve and protect CHAs through regulation of hunting, trapping, and fishing, and the Commissioner has permit authority over activities that the Department determines may affect fish or game or their habitat within CHAs."[89] The Commissioner "exercises his discretion to restrict uses and activities through various mechanisms including determining which uses or activities require special area permits, approving or denying special area permits, issuing general permits to the public at large, and adopting management plans for CHAs."[90]

In *Chevron* the court held that the Commissioner of DNR had implied authority to promulgate the challenged regulations because the regulations at issue were both within the legislature's grant of authority to the Commissioner and were reasonably necessary to ensure that those responsibilities were carried out. Here, the Commissioner of the

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[88] *Id.* ("Subsections (b) and (c) reflect a clear legislative intent that regulations should be adopted under AS 16.05.831 and that the Commissioner is the official responsible for the law's implementation. Together with the Commissioner's general authority to manage fishery resources in the state, this statute delegates rulemaking authority to the Commissioner.").
[89] *Id.* at 40-41.
[90] *Id.*

Department is authorized to restrict uses within CHAs through deciding if specific activities require permits and issuing applicable permits. Through that process, the Commissioner is able to ensure that his responsibility to "protect and preserve" the CHAs and "restrict all other uses not compatible with that primary purpose" is carried out.

As a result, the Court finds that the Commissioner does not have implied statutory authority to repeal 5 AAC 95.310.

II. The repeal of 5AAC 95.310 is inconsistent with the authorizing statute.

"A regulation must be consistent with the statute it interprets or implements."[91] Regulations are presumptively valid and will be upheld as long as they are "consistent with and reasonably necessary to implement the statutes authorizing their adoption."[92] But reasonable necessity is not a requirement separate from consistency.[93] "If it were, courts would be required to judge whether a particular administrative regulation is desirable as a matter of policy."[94]

An agency can exceed its statutory authority "either by pursuing impermissible objectives or by employing means outside its powers."[95] "A regulation may be invalid if it is fundamentally inconsistent with the legislative intent underlying the controlling statute."[96] "To the extent that a regulation is inconsistent with statutory law, the executive branch agency that promulgated the regulation has exceeded the rule-making power

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[91] *Frank v. State*, 97 P.3d 86, 91 (2004).
[92] *Interior Alaska Airboat Ass'n, Inc. v. State, Bd. of Game*, 18 P.3d 686, 689 (Alaska 2001).
[93] *Id.*
[94] *Id.*
[95] *Grunert v. State*, 109 P.3d 924, 929 (Alaska 2005)
[96] *Id.* at 932.

delegated by the legislature."[97] "Thus, when a regulation conflicts with a statute, it is the regulation that must yield."[98]

To determine if a regulation is consistent with the controlling statute, "[courts] look to the act's history and legislative purposes."[99] For example, in *Kelso v. Rybachek*, the court found that the agency "complied with the legislative intent" of the authorizing statutory provisions which granted the State "broad discretion in developing water quality regulations," when it adopted the challenged water reclassification regulation.[100] Since the legislature gave the Department authority to establish water quality standards, establish classes of waters based on quality, and modify those classifications, the *Kelso* court found the challenged regulation which reclassified certain water bodies was "in accordance with th[os]e purposes."[101]

Conversely, in *Grunert v. State*, the court found that a regulation creating a cooperative fishery and allocating a quota of salmon to that fishery fundamentally contradicted the intended purpose of the authorizing statutory provisions.[102] The court examined the legislative history of the authorizing statute and found that "[t]he repeated references to participation and dependence throughout the [authorizing statute]

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[97] *Frank,* 97 P.3d at 91.
[98] *Id.*
[99] *Grunert,* 109 P.3d at 932.
[100] *Kelso v. Rybachek*, 912 P.2d 536, 540 (1996) ("The legislature has empowered the Department to 'adopt regulations . . . providing for control, prevention, and abatement of air, water, or land or subsurface land pollution[.]'").
[101] *Id.*
[102] *Grunert*, 109 P.3d at 932-36 ("Before this regulatory scheme accomplishes such radical departure from the historical model of limited entry fisheries in Alaska and the spirit of the Limited Entry Act, however, we conclude that the legislature must first authorize the board to approve cooperative salmon fisheries."

demonstrate that a central premise of the statutory scheme is that the permit holder is an individual who will fish."[103] Because the challenged cooperative fishery scheme allowed people who were not actually fishing to benefit from the fishery resource, the court held that the challenged regulation was "fundamentally at odds" with the authorizing statute's purpose.[104]

Plaintiffs argue that the Alaska legislature established CHAs throughout Alaska in the 1970s "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."[105] Plaintiffs argue that repeal of 5 AAC 95.310 violates the law because it does not "protect and preserve" the "fish and wildlife" within those CHAs and it is inconsistent with the legislature's directive to "restrict *all* other uses not compatible with that primary purpose."[106]

Defendants argue the repeal of 5 AAC 95.310 complies with this legislative purpose because "the Commissioner had inherent authority to remove the PWC ban when he determined PWC use *was* compatible with habitat protection."[107] Further, the Department contends, "[w]ithin the scope of this authority, the Commissioner permissibly determined that 5 AAC 95.310 lacked a reasonable basis and was not necessary for the proper protection of fish and wildlife and their habitat."[108]

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[103] *Id.* at 934.
[104] *Id.* at 926.
[105] Complaint at 14 citing AS 16.20.500.
[106] *Id.*
[107] Defendants' Opposition to Plaintiffs' Motion at 6-7.
[108] *Id.*

Unlike *Kelso*, where the legislature granted DNR broad discretionary authority to adopt regulations and standards related to water quality, here, the Department's discretionary authority within the CHAs is much more constrained. Since the Alaska legislature directed the Department "to protect and preserve" the "fish and wildlife" within the CHAs at issue, "and to restrict *all* other uses not compatible with that primary purpose,"[109] any exercise of the Department's rulemaking authority must be consistent with this statutory directive. Even though the legislature gives the Commissioner authority to "manage, protect, maintain, improve, and extend the fish . . . resources of the state in the interest of the economy and general well-being of the state" and gives him the "necessary power to accomplish"[110] those directives, within the CHAs, the legislature clearly and unequivocally directs the Department to regulate primarily with the goal of protection and conservation in mind.[111] As a result, the Department must promulgate and repeal regulations within the CHAs in accordance with these specific statutory directives.

The legislature chose to designate the areas within the CHAs as "especially crucial to the perpetuation of fish and wildlife" approximately 50 years ago.[112] The authorizing statute, AS 16.20.500, reflects that purpose by repeatedly referencing habitat and wildlife protection. Like *Grunert*, where the court found that the challenged fishery regulation

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[109] AS 16.05.020
[110] *Id.*
[111] *See* Exhibit 8, Plaintiffs' Motion (1974 Senate Journal) at 1008-1009 (demonstrating the Senate Resources Committee specifically found "that Kachemak Bay, Alaska, is a marine habitat area especially crucial to marine life").
[112] *See* Exhibit 6, Plaintiffs' Motion (1972 House Journal) at 1790-91 (expressing a desire that the enactment of AS 16.20.500 "would . . . allow only those uses which are compatible with the continued maintenance of high quality habitat for the State's renewable wildlife resource").

was inconsistent with a central premise of the statutory scheme which repeatedly referenced participation and dependence, here, the repeal of 5 AAC 95.310 is inconsistent with the central premise of AS 16.20.500 which repeatedly directs the Department to "to restrict all other uses not compatible" with protecting and preserving the CHAs' fish and wildlife.[113]

As a result, the Court finds that the Department acted outside of the scope of its statutory authority when it repealed 5 AAC 95.310.

Conclusion

The Court finds that the Commissioner of the Department of Fish and Game did not have statutory authority to repeal 5 AAC 95.310 and the repeal was inconsistent with the authorizing statute. Accordingly, the Court **GRANTS** Plaintiffs' Motion for Summary Judgment and directs the Department to reinstate the prohibition on PWC within the CHAs.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 16th day of November, 2023.

ADOLF V. ZEMAN
Superior Court Judge

I certify that on November 16, 2023 a copy of the following was mailed/faxed/hand delivered to each of the following at their addresses of record
J. Lindemuth; S. Kendall; S. Gottstein; A. Peterson; V. Lamantia; N. Star; M. Smilde
Administrative Assistant CVR

[113] *See* AS 16.20.500.

apply its independent judgment. Whether the regulation is necessary to implement the statute involves fundamental policy determinations which [courts] review using a rational basis standard.

Discussion

Plaintiffs argue that the repeal of 5 AAC 95.310 violates the legislature's direction "to restrict all other uses not compatible with" "protect[ing and preserving] . . . fish and wildlife" within the CHAs.[59] Defendants argue that the Department did not exceed its statutory authority when it repealed 5 AAC 95.310. Further, they maintain that the Department repealed 5 AAC 95.310 consistent with its other regulatory obligations within the CHAs.

The Court agrees with parties that there are no issues of material fact and summary judgment is appropriate. As addressed in detail below, the repeal of 5 AAC 95.310 was invalid because: (1) the Department acted outside the scope of its delegated authority when it repealed 5 AAC 95.310 and (2) the repeal of 5 AAC 95.310 is inconsistent with the authorizing statutory provisions. Since the Court finds that the Department exceeded its statutory authority when it repealed 5 AAC 95.310, the Court does not need to address Plaintiffs' other arguments.

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[59] Plaintiffs' Motion at 28-29. Further, Plaintiffs argue Defendants' justification for repealing the regulation shows that they acted arbitrarily as a matter of law by disregarding: (1) the scientific literature; (2) their own subject matter experts; (3) the existing and proposed revised Management Plan; (4) the Department's cooperative agreement with DNR; and (5) the unique physical characteristics of the two CHAs.

I. The Department acted outside the scope of its delegated authority when it repealed 5 AAC 95.310.

Administrative agencies are created by statute "and therefore must find within the statute the authority for the exercise of any power they claim."[60] As a result, an agency may only promulgate regulations within the scope of its legislative authority.[61]

Here, as a threshold matter, Defendants argue that the Court's "inquiry into an agency's statutory authority to regulate applies to the adoption, not the repeal, of a regulation"[62] and the Commissioner had authority to repeal the Department's regulation prohibiting PWC use because the Commissioner had authority to adopt the regulation in the first place.[63] This is not a persuasive argument given that Alaskan law clearly directs that an administrative agency must "find within the [authorizing] statute the authority for the exercise of *any* power they claim."[64] As a result, even though the Department repealed, not promulgated the regulation at issue, it still must have had either express or implied statutory authority to do so.[65]

A. The Department does not have either express or implied statutory authority to repeal 5 AAC 95.310.

An agency's "[s]tatutory authority to promulgate rules may be either express or

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[60] *Alaska State Comm'n for Hum. Rts. v. Anderson*, 426 P.3d 956, 962–63 (Alaska 2018) citing *McDaniel v. Cory*, 631 P.2d 82, 88 (Alaska 1981).
[61] *Id.*
[62] Defendants' Motion at 39 citing AS 44.62.020 ("To be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.")
[63] *Id.* at 38 (referring to Count IV in Complaint); *see also* Defendants' Opposition to Plaintiffs' Motion at 6 ("However, while courts must consider an agency's statutory authority to promulgate a regulation, it makes little sense to do the same when an agency repeals a regulation because administrative agencies have inherent power to repeal their own regulations, so long as they follow the proper procedure and do not do so arbitrarily.").
[64] *Alaska State Comm'n for Hum. Rts.*, 426 P.3d at 962–63.
[65] Whether the Department had statutory authority to promulgate 5 AAC 95.310 is not before this Court. But the Court notes that 5 AAC 95.310 is the only standalone regulation of its kind for any CHA.

implied."[66] For example, in *Chevron U.S.A. Inc. v. LeResche*, although no statutory provisions provided the Commissioner of the Department of Natural Resources (DNR) direct authority to adopt regulations requiring land use permits for oil and gas exploration on state land and require permitholders to submit relevant data to DNR, the court held that the Commissioner of DNR had implied authority to promulgate the challenged regulations.[67] The court found that the statutes allowing the Commissioner to establish reasonable procedures and adopt rules and regulations necessary to carry out the Alaska Land Act, when read in conjunction with a statutory provision governing oil and gas, gave the Commissioner implied authority to adopt the challenged regulations.[68]

The *Chevron* court reasoned that since the Alaska legislature gave the Commissioner the responsibility to "to maximize State return from State owned oil and gas resources through careful planning, including pre-sale analysis of tracts proposed for lease" and "[s]uch planning and pre-sale analyses require the Commissioner to have access to the most reliable geological and geophysical data available," that the challenged regulations which required land use permits and sharing of certain relevant data with DNR were "reasonably necessary to insure that the planning process is carried out responsibly."[69]

Additionally, in *O'Callaghan v. Rue*, the court found that the Commissioner of

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[66] *O'Callaghan*, 996 P.2d at 95.
[67] *Chevron U.S.A. Inc. v. LaResche*, 663 P.2d 923, 928 (Alaska 1983).
[68] *Id.*
[69] *Id.*

Fish and Game had implied authority to promulgate salmon roe stripping regulations under the statute which outlined the Commissioner's general powers and functions combined with provisions of the salmon waste law which delegated express rulemaking powers to the Commissioner.[70] Central to the court's analysis was the fact that the salmon waste law "explicitly delegates to the Commissioner the authority to enforce and interpret the law."[71] The court found that since the statute "reflect[s] a clear legislative intent that regulations should be adopted under [the salmon waste law] and that the Commissioner is the official responsible for the law's implementation . . . [t]ogether with the Commissioner's general authority to manage fishery resources in the state, this statute delegates rulemaking authority to the Commissioner."[72]

Here, the Department argues that it had "both impl[ied] and express statutory authority to adopt the regulation prohibiting PWC use in CHAs."[73] They argue that "AS 16.05.020 directs the Commissioner of the Department to 'manage, protect, maintain, improve, and extend the fish, game and aquatic plant resources of the state in the interest of the economy and general well-being of the state' and vests the Commissioner with the 'necessary power to accomplish' that goal."[74] Defendants argue that the statutory grant of "necessary power" in AS 16.05.020 implies rulemaking authority of the Commissioner.[75]

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[70] *O'Callaghan*, 996 P.2d at 95-96.
[71] *Id.* at 95.
[72] *Id.* at 95-96. ("Because the legislature granted the Commissioner authority to promulgate rules under AS 16.05.020 and 16.05.831, we hold that the Commissioner has the authority to promulgate the regulation in question.")
[73] Defendants' Motion at 40.
[74] *Id.*
[75] *Id.*

Additionally, the Department argues that the Commissioner's power to promulgate 5 AAC 95.310, and to repeal it, is expressed through the CHA statutes and regulations.[76] The statutory purpose of CHAs is "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."[77] The Department implements this statutory directive "in two ways: (1) through regulation of takings of fish and wildlife within CHAs and, (2) through regulation and permitting of land use within the CHAs."[78]

According to the Department, "[t]he Boards conserve and protect CHAs through regulation of hunting, trapping, and fishing, and the Commissioner has permit authority over activities that the Department determines may affect fish or game or their habitat within CHAs."[79] As a result, the Department argues that "the Commissioner may therefore restrict uses that are incompatible with the protection and preservation of critical habitat."[80] The Commissioner "exercises his discretion to restrict uses and activities through various mechanisms including determining which uses or activities require special area permits, approving or denying special area permits, issuing general permits to the public at large, and adopting management plans for CHAs."[81] The Department argues when it promulgated 5 AAC 95.310 in 2001, the Commissioner

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[76] *Id.*
[77] *Id.* citing AS 16.20.500.
[78] *Id.*
[79] *Id.* at 40-41.
[80] *Id.*at 41.
[81] *Id.*

validly implemented his authority to restrict use through rulemaking.[82] They argue with this same authority, the Commissioner validly repealed 5 AAC 95.310 in 2020.[83]

Plaintiffs argue that "the legislature's *specific* statutory directive to [the Department] is to 'to restrict all other uses [that are] not compatible with th[e] primary purpose' of 'protect[ing] and preserv[ing] . . . fish and wildlife' within the CHAs."[84] Further, Plaintiffs argue "[t]his specific statutory language overrides the Commissioner's general authority, and confirms that Defendants acted outside the scope of their authority when repealing the prohibition on PWS [use] within the CHAs because there is no evidence that the repeal protects fish and wildlife."[85]

Here, AS 16.05.020 outlines generally the functions of the Commissioner, directing him to "manage, protect, maintain, improve, and extend the fish . . . resources of the state in the interest of the economy and general well-being of the state" and giving him the "necessary power to accomplish" those directives.[28] While the Department argues that "the statutory grant of 'necessary power' in AS 16.05.020 implies rulemaking authority of the Commissioner,"[86] the Alaska Supreme Court has previously interpreted this statute as "grant[ing] the Commissioner broad authority 'relat[ing] principally to administration and budgeting,' while primary rulemaking authority is allocated to the Board."[87]

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[82] *Id.*
[83] *Id.*
[84] Plaintiffs' Reply in Support of Motion for Summary Judgment at 8.
[85] *Id.*
[86] Defendants' Motion at 40.
[87] *O'Callaghan*, 996 P.2d at 95.

This case is distinguishable from both *O'Callaghan* and *Chevron*. Unlike in *O'Callaghan*, where specific sections of the authorizing statute "reflect[ed] a clear legislative intent that regulations should be adopted under [the authorizing statute] and that the Commissioner [was] the official responsible for the law's implementation," in the present case, the legislative history of AS 16.20.510, the statute dealing with regulations in CHAs does not indicate that the legislature intended to give the Commissioner authority to adopt standalone regulations for conservation and protection purposes within CHAs.[88] Rather, as the Department itself contends "[t]he Boards conserve and protect CHAs through regulation of hunting, trapping, and fishing, and the Commissioner has permit authority over activities that the Department determines may affect fish or game or their habitat within CHAs."[89] The Commissioner "exercises his discretion to restrict uses and activities through various mechanisms including determining which uses or activities require special area permits, approving or denying special area permits, issuing general permits to the public at large, and adopting management plans for CHAs."[90]

In *Chevron* the court held that the Commissioner of DNR had implied authority to promulgate the challenged regulations because the regulations at issue were both within the legislature's grant of authority to the Commissioner and were reasonably necessary to ensure that those responsibilities were carried out. Here, the Commissioner of the

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[88] *Id.* ("Subsections (b) and (c) reflect a clear legislative intent that regulations should be adopted under AS 16.05.831 and that the Commissioner is the official responsible for the law's implementation. Together with the Commissioner's general authority to manage fishery resources in the state, this statute delegates rulemaking authority to the Commissioner.").
[89] *Id.* at 40-41.
[90] *Id.*

Department is authorized to restrict uses within CHAs through deciding if specific activities require permits and issuing applicable permits. Through that process, the Commissioner is able to ensure that his responsibility to "protect and preserve" the CHAs and "restrict all other uses not compatible with that primary purpose" is carried out.

As a result, the Court finds that the Commissioner does not have implied statutory authority to repeal 5 AAC 95.310.

II. The repeal of 5AAC 95.310 is inconsistent with the authorizing statute.

"A regulation must be consistent with the statute it interprets or implements."[91] Regulations are presumptively valid and will be upheld as long as they are "consistent with and reasonably necessary to implement the statutes authorizing their adoption."[92] But reasonable necessity is not a requirement separate from consistency.[93] "If it were, courts would be required to judge whether a particular administrative regulation is desirable as a matter of policy."[94]

An agency can exceed its statutory authority "either by pursuing impermissible objectives or by employing means outside its powers."[95] "A regulation may be invalid if it is fundamentally inconsistent with the legislative intent underlying the controlling statute."[96] "To the extent that a regulation is inconsistent with statutory law, the executive branch agency that promulgated the regulation has exceeded the rule-making power

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[91] *Frank v. State*, 97 P.3d 86, 91 (2004).
[92] *Interior Alaska Airboat Ass'n, Inc. v. State, Bd. of Game*, 18 P.3d 686, 689 (Alaska 2001).
[93] *Id.*
[94] *Id.*
[95] *Grunert v. State*, 109 P.3d 924, 929 (Alaska 2005)
[96] *Id.* at 932.

delegated by the legislature."[97] "Thus, when a regulation conflicts with a statute, it is the regulation that must yield."[98]

To determine if a regulation is consistent with the controlling statute, "[courts] look to the act's history and legislative purposes."[99] For example, in *Kelso v. Rybachek*, the court found that the agency "complied with the legislative intent" of the authorizing statutory provisions which granted the State "broad discretion in developing water quality regulations," when it adopted the challenged water reclassification regulation.[100] Since the legislature gave the Department authority to establish water quality standards, establish classes of waters based on quality, and modify those classifications, the *Kelso* court found the challenged regulation which reclassified certain water bodies was "in accordance with th[os]e purposes."[101]

Conversely, in *Grunert v. State*, the court found that a regulation creating a cooperative fishery and allocating a quota of salmon to that fishery fundamentally contradicted the intended purpose of the authorizing statutory provisions.[102] The court examined the legislative history of the authorizing statute and found that "[t]he repeated references to participation and dependence throughout the [authorizing statute]

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[97] *Frank,* 97 P.3d at 91.
[98] *Id.*
[99] *Grunert,* 109 P.3d at 932.
[100] *Kelso v. Rybachek*, 912 P.2d 536, 540 (1996) ("The legislature has empowered the Department to 'adopt regulations . . . providing for control, prevention, and abatement of air, water, or land or subsurface land pollution[.]'").
[101] *Id.*
[102] *Grunert*, 109 P.3d at 932-36 ("Before this regulatory scheme accomplishes such radical departure from the historical model of limited entry fisheries in Alaska and the spirit of the Limited Entry Act, however, we conclude that the legislature must first authorize the board to approve cooperative salmon fisheries."

demonstrate that a central premise of the statutory scheme is that the permit holder is an individual who will fish."[103] Because the challenged cooperative fishery scheme allowed people who were not actually fishing to benefit from the fishery resource, the court held that the challenged regulation was "fundamentally at odds" with the authorizing statute's purpose.[104]

Plaintiffs argue that the Alaska legislature established CHAs throughout Alaska in the 1970s "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."[105] Plaintiffs argue that repeal of 5 AAC 95.310 violates the law because it does not "protect and preserve" the "fish and wildlife" within those CHAs and it is inconsistent with the legislature's directive to "restrict *all* other uses not compatible with that primary purpose."[106]

Defendants argue the repeal of 5 AAC 95.310 complies with this legislative purpose because "the Commissioner had inherent authority to remove the PWC ban when he determined PWC use *was* compatible with habitat protection."[107] Further, the Department contends, "[w]ithin the scope of this authority, the Commissioner permissibly determined that 5 AAC 95.310 lacked a reasonable basis and was not necessary for the proper protection of fish and wildlife and their habitat."[108]

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[103] *Id.* at 934.
[104] *Id.* at 926.
[105] Complaint at 14 citing AS 16.20.500.
[106] *Id.*
[107] Defendants' Opposition to Plaintiffs' Motion at 6-7.
[108] *Id.*

Unlike *Kelso*, where the legislature granted DNR broad discretionary authority to adopt regulations and standards related to water quality, here, the Department's discretionary authority within the CHAs is much more constrained. Since the Alaska legislature directed the Department "to protect and preserve" the "fish and wildlife" within the CHAs at issue, "and to restrict *all* other uses not compatible with that primary purpose,"[109] any exercise of the Department's rulemaking authority must be consistent with this statutory directive. Even though the legislature gives the Commissioner authority to "manage, protect, maintain, improve, and extend the fish . . . resources of the state in the interest of the economy and general well-being of the state" and gives him the "necessary power to accomplish"[110] those directives, within the CHAs, the legislature clearly and unequivocally directs the Department to regulate primarily with the goal of protection and conservation in mind.[111] As a result, the Department must promulgate and repeal regulations within the CHAs in accordance with these specific statutory directives.

The legislature chose to designate the areas within the CHAs as "especially crucial to the perpetuation of fish and wildlife" approximately 50 years ago.[112] The authorizing statute, AS 16.20.500, reflects that purpose by repeatedly referencing habitat and wildlife protection. Like *Grunert*, where the court found that the challenged fishery regulation

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[109] AS 16.05.020
[110] *Id.*
[111] *See* Exhibit 8, Plaintiffs' Motion (1974 Senate Journal) at 1008-1009 (demonstrating the Senate Resources Committee specifically found "that Kachemak Bay, Alaska, is a marine habitat area especially crucial to marine life").
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was inconsistent with a central premise of the statutory scheme which repeatedly referenced participation and dependence, here, the repeal of 5 AAC 95.310 is inconsistent with the central premise of AS 16.20.500 which repeatedly directs the Department to "to restrict all other uses not compatible" with protecting and preserving the CHAs' fish and wildlife.[113]

As a result, the Court finds that the Department acted outside of the scope of its statutory authority when it repealed 5 AAC 95.310.

Conclusion

The Court finds that the Commissioner of the Department of Fish and Game did not have statutory authority to repeal 5 AAC 95.310 and the repeal was inconsistent with the authorizing statute. Accordingly, the Court **GRANTS** Plaintiffs' Motion for Summary Judgment and directs the Department to reinstate the prohibition on PWC within the CHAs.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 16th day of November, 2023.

ADOLF V. ZEMAN
Superior Court Judge

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[113] *See* AS 16.20.500.