

Introduced by: Mayor  
Date: 01/22/08  
Hearing: 02/19/08  
Action: Postponed until 04/01/08  
Action: Enacted as Amended  
Vote: 7 Yes, 2 No, 0 Absent

**KENAI PENINSULA BOROUGH  
ORDINANCE 2008-03**

**AN ORDINANCE AMENDING KPB 14.40 AND KPB 20.16 TO REQUIRE SPECIAL PERMIT CONDITIONS FOR THE DESIGN AND CONSTRUCTION OF ANADROMOUS WATERBODY CROSSINGS AND RIGHTS-OF-WAY ACCESSING WATERBODIES**

**WHEREAS**, borough right-of-ways which access waterbodies have been subjected to use detrimental to the right-of-way, the waterbody, and adjacent property; and

**WHEREAS**, crossing of streams by vehicular traffic has caused damage to fish habitat; and

**WHEREAS**, under AS 41.14.870-.895, it is a class A misdemeanor to use a wheeled or tracked vehicle in the bed of a river, lake or stream specified as important for the spawning, rearing or migration of anadromous fish pursuant to AS 41.14.870 without state approval; and

**WHEREAS**, people with interests in sport, commercial, and fish habitat protection have testified to both the importance of limiting the number of stream crossings and having stable well-constructed stream crossings to prevent deleterious effects of vehicular crossings on fish streams and adjacent habitat; and

**WHEREAS**, improperly placed or constructed vehicular stream crossings can cause habitat degradation from erosion, increased contaminants entering anadromous streams, loss of habitat connectivity, and negative cumulative impacts of habitat loss or alteration; and

**WHEREAS**, improved compliance with existing state and federal laws governing anadromous stream crossings may likely benefit anadromous fish passage and prevent further degradation of riparian habitat; and

**WHEREAS**, the Kenai Peninsula's anadromous waters are a vital ecological and economical component of life on the peninsula; and

**WHEREAS**, the peninsula has the most heavily fished waters in the state of Alaska supporting both a sport and commercial fishery industry and associated businesses; and

**WHEREAS**, the heavy use of the anadromous waters of the peninsula and the adjacent lands can have a negative impact on the fish streams, the fish, and riparian habitat; and

**WHEREAS,** Kenai Peninsula Borough Comprehensive Plan Goal 5.1, Objectives 1 (E) and 2 (D) include recommendations for design upgrades and repair of streets, culverts, and bridges to accommodate a 100-year flood event and mitigate adverse impacts on resources; and

**WHEREAS,** Kenai Peninsula Borough Comprehensive Plan Goal 7.2, Objectives 2 (E) & (F) recommend expanding the riparian buffer zone and increasing the list of protected anadromous streams in order to further the protection of fish habitat; and

**WHEREAS,** the planning commission at its meeting of November 13, 2007, endorsed protection of anadromous fish stream crossings; and

**WHEREAS,** at its meeting of January 28, 2008, the planning commission recommended enactment subject to amendment; and

**WHEREAS,** the RSA board held a work session on the ordinance attended by the public, agency personnel, and members of the planning commission where several amendments were discussed and are herein incorporated;

**NOW, THEREFORE, BE IT ORDAINED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:**

**SECTION 1.** That KPB 14.40.060(D) is deleted as follows:

**14.40.060. Permit application and conditions.**

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[D. WATER BODIES. PERMITS WILL NOT BE ISSUED TO CONSTRUCT ANY PART OF A ROAD OR DRIVEWAY WITHIN THE RIGHT-OF-WAY WHERE THE DRIVEWAY OR ROAD WILL BE PARALLEL AND WITHIN 50 FEET OF A BANK OF A WATERCOURSE OR SHORE OF A LAKE UNLESS NECESSARY FOR ACCESS TO A LOT WHERE NO REASONABLE ALTERNATIVE ACCESS EXISTS OR UNLESS THE ROAD IS FOR ACCESS TO A BRIDGE OR PUBLIC FACILITY, WATER BODY OR WATERCOURSE.]

**SECTION 2.** That KPB 14.40.061 is hereby enacted as follows:

14.40.061. Additional requirements for waterbody access and crossing permits.

A. Stream crossing permit conditions.

1. A project-specific permit issued pursuant to KPB 14.40.040-.060 is required for waterbody crossings where a dedication crosses a waterbody catalogued as important to the protection of anadromous fish under AS 41.14.870(a), which shall be renumbered as AS 16.05.871 effective July 1, 2008, as now enacted or hereinafter amended.

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2. Project-specific permits for crossing an anadromous waterbody within a dedicated right-of-way will only be issued upon receipt by the RSA of an applicant's completed applications for project permits to the United States Army Corps of Engineers and Alaska Department of Natural Resources Office of Habitat Management and Permitting, changed after July 1, 2008 to the Alaska Department of Fish and Game Division of Habitat. It shall be the sole responsibility of all applicants for project-specific permits to ensure compliance with all applicable state and federal law, including permitting requirements.
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3. Anadromous waterbody crossings and approaches shall be designed to withstand a 100-year flood event as defined by KPB 21.06.020(K). The crossing shall be designed by a licensed professional civil engineer. The design shall be presented to the RSA board for review and approval prior to construction. The engineer shall certify that the crossing and approaches are constructed to withstand a 100-year flood event.
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4. Project specific permits issued pursuant to KPB 14.40.060 that permit work within a right-of-way within 250ft of the ordinary high water mark on both sides of a dedicated crossing of an anadromous waterbody catalogued under AS 41.14.870(a), renumbered as AS 16.05.871 effective July 1, 2008, shall require a crossing to be constructed within the dedicated right-of-way as a permit condition.
- B. Waterbodies. Right-of-way construction permits pursuant to KPB 14.40.040-.060 will not be issued to construct any part of a road or driveway or other development within the right-of-way where the construction or development will be parallel and within 100 feet of the ordinary high water mark of a watercourse or lake unless necessary for access to a lot where no reasonable alternative access exists or unless the road is for access to a bridge or public facility, waterbody, or watercourse.
- C. Development conditions for rights-of-way accessing water bodies. No development within 100 feet of the high water mark of a waterbody within a right-of-way providing access to the waterbody may occur without a permit. All permits issued under this section shall be submitted to the RSA board for its consideration. A written RSA staff report shall be provided to the RSA board with every permit application. The staff report shall include comments from the Planning Department. The RSA board shall make written findings to support denial or issuance of the permit. There must be facts which support the following standards in order to issue a waterbody public access permit.
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1. Any development in the right-of-way will not be detrimental to the waterbody, or any potential detriment is mitigated by conditions placed on the permit;
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2. Any development in the right-of-way will not be detrimental to adjacent public or private property; and

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3. The public benefit of development in the right-of-way outweighs the potential detriment to the public interest caused by the development. Any detriment to the public interest must be mitigated through permit conditions to the maximum extent reasonably possible.

**SECTION 3.** That KPB 14.40.280 is hereby amended as follows:

**14.40.280. Definitions.**

The following definitions are applicable to these regulations.

- A. “Applicant” means the person requesting a right-of-way use permit from the borough.
- B. “Borough” means the Kenai Peninsula Borough.
- C. “Anadromous waterbody” means any waterbody catalogued pursuant to AS 29.45.870 and after July 1, 2008, AS 16.05.871, as important to the spawning, rearing or migration of anadromous fish.
- D[C]. “Contractor” is defined as set forth in AS 08.18.171(4).
- E[D] “Construction,” “right-of-way construction,” or “construction of right-of-way” means the improving, building, erection, assembly, alteration, demolition, or repair (including, but not limited to, dredging, culvert placement or replacement) of roads, streets, trails, paths, and other improvements in rights-of-way, or near rights-of-way which physically impact the rights-of-way.
- F[E]. “Dedicated road right-of-way” or “right-of-way” means a right-of-way dedicated on a plat for road, street, or utility purposes in accordance with the platting requirements of the Kenai Peninsula Borough, or such rights-of-way as have been specifically granted [AND DEDICATED TO SUCH USE BY THE BOROUGH] by easement or dedicated by statute, excluding rights-of-way within the boundaries of an incorporated city.
- G. “Development” means any human-caused change to improved or unimproved right-of-way, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations, storage of materials or use of the right-of-way.
- H[F]. “Director” means the roads director of the Kenai Peninsula Borough, unless otherwise specified.
- I[G]. “Maintenance” is defined as work performed on a routine basis to maintain a road in its originally constructed condition, (or subsequently improved condition), or to prevent deterioration of the road. Maintenance does not include road construction or improvement.

J[H]. “Operator” means the person operating or driving vehicles or equipment, who may or may not be the owner of the vehicle or equipment.

K. “Ordinary high water mark” means the line on the shore or bank established by the fluctuation of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

L[I]. “Permittee” means the person granted a right-of-way use permit by the borough.

M[J]. “Recipient” means a person issued a citation or charging document from the Kenai Peninsula Borough.

N[K]. “Road” means in this chapter a right-of-way which has undergone improvement by construction and placement of material making the surface of the right-of-way suitable for motor vehicles which may lawfully travel on state highways.

O[L]. “Trail” means clearing or construction of a right-of-way for access by pedestrians, bikes, horses, all-terrain vehicles, snow machines, or other motorized vehicles which are designed primarily for off-road use.

P[N]. “Waterbody” means any permanent body of water, including any creek, canal, river, lake or bay, or any other body of water, natural or artificial.

Q[M]. “Watercourse” means a running stream of water fed from natural or permanent sources such as rivers, creeks, glaciers, and rivulets which flows in a particular direction, though it need not flow continuously, and may be periodically dry. It must flow in a definite channel, having a bed or banks, and usually discharge itself into another stream or water body. It must be more than mere surface drainage.

**SECTION 4.** That KPB 20.16.045 is hereby enacted as follows:

20.16.045. Dedication and construction of anadromous waterbody crossings.

A. Where a dedication crosses a waterbody within the Kenai Peninsula Borough Road Service Area catalogued as important to the protection of anadromous fish under AS 41.14.870(a), renumbered as AS 16.05.871 effective July 1, 2008, additional right-of-way dedication or slope easements may be required by the planning commission as necessary in order for construction to meet the criteria of KPB 14.40.061(B).

B. Where a dedication is proposed over an existing road crossing a waterbody within the Kenai Peninsula Borough Road Service Area catalogued as important to the protection of anadromous fish under AS 41.14.870(a), renumbered as AS 16.05.871 effective July 1, 2008, the road and crossing must be brought up to the permitting standards established by KPB 14.40.061(B) prior to planning commission approval of the final plat.

C. For plats with existing roads crossing anadromous waterbodies as described in subsection (B) above, the applicant shall have three years from the approval of the preliminary plat to have the final plat approved where the plat dedicates a road across a waterbody which time frame may be extended by the planning director if the extension is requested prior to the termination of the initial three-year period for final plat approval or any previously granted extension, and if there has been no change in the design of the subdivision's road system since preliminary plat approval. Extensions may only be granted for one year at a time.

D. The Road Service Area shall inspect and provide certification to the planning department that waterbody crossings meet the permitting requirements of KPB 14.40.061(B) prior to the planning commission's approval of the final plat.

**SECTION 5.** KPB 20.16.046 is hereby enacted as follows:

20.16.046. Dedications parallel to waterbodies.

Where dedications are proposed within 100 feet of a waterbody, the requirements of KPB 14.40.061(B) shall be complied with as part of the subdivision design.

**SECTION 6.** That this ordinance takes effect immediately upon its enactment.

**ENACTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS 1ST DAY OF APRIL, 2008.**

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Grace Merkes, Assembly President

ATTEST:

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Sherry Biggs, Borough Clerk

Yes: Fischer, Gilman, Long, Martin, Smith, Sprague, Superman

No: Knopp, Merkes

Absent: None