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TO: David Harsila, President, Bristol Bay Fishermen's Association
FROM: Geoffrey Y. Parker
RE: Analysis of HB 199
DATE: April 6, 2017

Part I of this memorandum summarizes the current Anadromous Fish Act and HB 199 which would repeal and replace it. Part II discusses HB 199, often in relation to current law, and provides questions for legislators and others to consider.

## I. Summary of the Current Anadromous Fish Act and of HB 199

### A. Summary of the current Anadromous Fish Act.

The Anadromous Fish Act requires ADF&G to specify in regulation under the Administrative Procedure Act (APA) the "various rivers, lakes and streams or parts of them that are important for the spawning, rearing, or migration of anadromous fish."[1] The Act requires anyone who "desires to construct a hydraulic project, or use, divert, obstruct, pollute, or change the natural flow or bed of a specified river, lake, or stream, or to use wheeled, tracked, or excavating equipment or log-dragging equipment in the bed"[2] to notify ADF&G and if requested to provide "full plans and specifications" of the proposed construction, work, or use, and "complete plans and specifications" for the "proper protection of fish and game in connection with the construction or work, or in connection with the use."[3] If the project provides "proper protection of fish and game," then ADF&G approves the project, and if it does not, then ADF&G cannot approve the project.[4] This approval process makes the Act a permitting statute.

ADF&G implements the Act by publishing and annually updating the Anadromous Waters Catalog and Atlas, which identifies that portion of the rivers, lakes, and streams used by anadromous fish. ADF&G's habitat regulations, at 5 AAC Chap. 95, include those which implement the Act. They incorporate the Catalog and Atlas into regulation (5 AAC 95.011) and deem the mapped anadromous portions "important" for permitting purposes. The regulations identify the types of permit conditions which may be included to protect fish, wildlife and habitat[5] and require a permittee to mitigate fully any damages to fish, wildlife and habitats.[6]

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[1] AS 16.05.871(a).
[2] AS 16.05.871(b).
[3] AS 16.05.871(c).
[4] AS 16.05.871(d).
[5] 5 AAC 95.720(a) provides as follows:

> (a) To provide for the proper protection and management of fish and wildlife, and their habitats, the commissioner may include as conditions of the permit (1) the

They also (1) allow creation of general permits for routine matters,[7] (2) require performance bonds to secure performance of the conditions of a permit, [8] and (3) establish an appeal process for applicants to appeal denials. ADF&G uses forms and policy guidance to assist applicants for permits.[9] ADF&G does not afford notice and comment on the permits themselves. However, these functions sometimes occur indirectly when a project requires others permits and agencies work together so that they are considering the same project based on the same information.

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duration of the proposed activity, including any provision for changing the time period during which the permit is valid and any provision for changing the effective time period of the permit; (2) any other seasonal use restrictions on a specific activity; (3) limitation of the a real extent [sic, probably "areal" meaning flood extent] of the activity; (4) any provision for the mitigation of damage to fish or wildlife, or their habitats; (5) any provision to facilitate periodic monitoring of the proposed land or water use or activity by an authorized representative of the state, including inspection and sampling; (6) reporting requirements; (7) any provision for the posting of a performance bond or other surety as authorized in 5 AAC 95.950, necessary to ensure compliance with the provisions of this chapter or conditions of the permit; and (8) any other necessary condition.

[6] 5 AAC 95.900 provides as follows:

(a) Each permittee shall mitigate any adverse effect upon fish or wildlife, or their habitat, which the commissioner determines may be expected to result from, or which actually results from, the permittee's activity, or which was a direct result of the permittee's failure to (1) comply with a permit condition or a provision of this chapter; or (2) correct a condition or change a method foreseeably detrimental to fish or wildlife, or their habitat.

(b) Mitigation techniques must be employed in the following order of priority: (1) avoid an impact altogether by not taking a certain action or parts of an action; (2) minimize an impact by limiting the degree of magnitude of the action; (3) rectify the impact by repairing, rehabilitating, or restoring the affected environment; (4) reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action; (5) compensate for the impact by replacing or providing substitute resources or environments.

(c) The duty to mitigate in (a) of this section does not apply to unavoidable adverse effects upon fish or wildlife populations, or their habitat, arising from an overwhelming force of nature with consequences not preventable by due and reasonable precautions.

(d) The commissioner will, in his or her discretion, specify, by permit amendment, additional provisions for mitigating damage to fish and wildlife populations, and their habitat.

(e) Notwithstanding the expiration or revocation of a permit, a permittee is responsible for the obligations arising under the terms and conditions of the permit, and under the provisions of this chapter.

5 AAC 95.990(4) defines "mitigate" as meaning "to compensate fully for damage to fish and wildlife populations and their habitat by employing the most appropriate techniques."

[7] 5 AAC 95.770.

[8] 5 AAC 95.950.

[9] See 5 AAC 95.700, see also http://www.adfg.alaska.gov/index.cfm?adfg=uselicense.main.

Because the Catalog and Atlas are regulation, any person or agency seeking to remove a documented anadromous river, lake or stream from the Catalog and Atlas (so that a permit will not be required) can do so under the APA, at AS 44.62.220, by submitting a petition to ADF&G and stating the reasons. Under AS 44.62.230, ADF&G then either denies the petition within 30 days or provides public notice and comment on the proposed removal. Thus, if Pebble mine hopes to dam a *documented* anadromous headwater stream for tailings disposal, then the burden is on Pebble mine to justify removing the stream from the Catalog, Atlas and permitting process.

**B. Summary of HB 199.**

In 2016, several individuals asked the Board of Fisheries to recommend legislation to revise the Act. The Board wrote to the legislature urging it to enact legislation to improve (1) public involvement in the permitting process, and (2) standards for permitting.

HB 199 would repeal and replace the Anadromous Fish Act at AS 16.05.871. HB 199 would presume all permanent and seasonal surface waters (every river, stream, creek, rivulet, glacier, lake, pond, and wetland) are anadromous fish habitat regardless of whether they support anadromous fish or not. HB 199 would create two types of permits other than general permits: (1) minor permits for activities which "will not significantly adversely affect anadromous fish habitat,"[10] for which there would be notice but no comment;[11] and (2) major permits for activities which have "the potential to significantly adversely affect anadromous fish habitat," [12] for which there would be an assessment process with notice and comment. [13] Much of HB 199 focuses on major permits because they involve activities which could cause significant adverse effects. HB 199 bars major permits in certain situations. [14] Thus, notice and comment on major permits, and situations in which when major permits would not be issued, are key changes that would be made by HB 199.

However, as shown further below, many other provisions would weaken current law and regulations. Two provisions deserve mention at the outset. First, HB 199 eliminates coverage of the beds of anadromous waters. Second, HB 199 allows any person to request a site-specific determination that any documented or presumed anadromous water body, or portion of it, is "not important" anadromous fish habitat (so a permit would no longer be required), and the bill requires ADF&G to adopt regulations specifying how it will conduct such site-specific determinations.[15] Thus, if Pebble mine hopes to dam an anadromous headwater stream for tailings disposal, then Pebble would simply submit whatever is required under future regulations and ask ADF&G to conduct a site-specific determination. This may shift the burden to ADF&G.

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[10] HB 199, p. 4, lines 24-25.
[11] HB 199, p. 6, lines 16-20.
[12] HB 199, p. 4, lines 27-28.
[13] HB 199, p. 7, lines 12-18.
[14] HB 199, p. 10, lines 15-27.
[15] HB 199, p. 2, lines 7-12.

## II. Discussion of HB 199, often in Relation to Current Law, and Questions for Legislators and Others to Consider

### A. Introductory Topic and Questions.

#### 1. What are the problems HB 199 is trying to solve, and are there recent examples of ADF&G permits which should not have been granted?

These are fundamental questions for drafting legislation. The process needs to be improved, but those who advocate HB 199 need to identify the problems they seek to address and why the revisions they propose are better than alternatives or even existing law and regulations. I am unaware that proponents of HB 199 have offered examples of permits that should not have been granted.

Questions for legislators and others to consider:
(1) What are the problems HB 199 is trying to solve?
(2) Are there recent examples of ADF&G permits which should not have been granted?

### B. HB 199 creates three ways by which industry and others can evade permitting.

#### 1. HB 199 establishes a method to evade permitting.

As said, HB 199 would require ADF&G to adopt regulations specifying how it will conduct site-specific determinations that anadromous water is "not important," so as to remove it from coverage by the Act, and would allow any person to request a site-specific determination. That allows Pebble mine to request a determination that a headwater anadromous stream it might dam for tailings disposal is "not important." That amounts to a method to evade permitting.

Under the current law, ADF&G occasionally has removed water from the Catalog and Atlas when field work shows a continuous absence of previously present anadromous fish. However, HB 199 does not require field work to determine that anadromous waters are "not important" even though ADF&G requires field work to document anadromous waters as "important." Once a previously "important" anadromous water body, or portion of it, is re-determined "not important," it will be virtually impossible to declare it again "important." Once someone is allowed to undertake an activity without a permit, others will expect (and often deserve) the same treatment, and legal issues will arise if they are treated differently. Moreover, ample documentation from the Pacific Northwest and Alaska, including from Exxon Valdez studies, shows that salmon production depends on genetic diversity, that smaller stocks are critical to diversity, that a "portfolio effect" exists by which stocks in some watersheds, and even within streams or portions of streams, produce well under certain freshwater or marine conditions while others do well under other freshwater or marine conditions, and that loss of production occurs by erosion of smaller stocks first. Losing genetically distinct smaller stocks risks triggering the Endangered Species Act, which can affect mixed stock fisheries. So, given that the APA already allows anyone to petition to amend the Atlas and Catalog, creating an unnecessary additional system for determining anadromous water to be "not important" is a one-way street down which ADF&G, the public, and salmon should never go. That is, unless you're Pebble mine trying to foist HB 199 on the legislature.

Questions for legislators and others to consider:
(1) Allowing applicants to request headwaters to be determined "not important" anadromous water helps projects like Pebble mine, wouldn't it?
(2) Have anadromous waters blocked important projects?

**2. HB 199 does not protect the beds of anadromous waters, and thereby creates another way for some projects to evade permitting.**

The scope of the current statute includes activities which would (1) "change the . . . bed" of anadromous water, and (2) "use wheeled, tracked, or excavating equipment or log-dragging equipment in the bed."[16] However, HB 199 narrows the scope. It defines "anadromous fish habitat" as a "*surface* water body" and "adjacent riparian areas."[17] That excludes the bed. Accordingly, HB 199 would require a permit for only activities which "use, divert, obstruct, pollute, or otherwise affect a *water body*, or portion thereof, that is specified as important anadromous fish habitat."[18] That repeals existing language which requires a permit for activities which change the bed or use heavy equipment in the bed.

If a project needs to excavate the bed of anadromous waters, then excluding the bed helps the project. For example, if Pebble mine digs an open pit mine in a manner that initially avoids needing a fish habitat permit, and puts water extraction wells anticipated around the pit so as to extract contaminated groundwater for treatment, and those wells over time cause a headwater anadromous stream to disappear into the ground because of gravity, dry up, and no longer be surface water, then PLP could argue that it should be able to expand the pit to excavate and mine the bed with heavy equipment, and do so without having to "use, divert, obstruct, pollute, or otherwise affect" surface water that no longer exists. That would enable Pebble to evade the requirements for a fish habitat permit. Such a situation could arise if groundwater flow, which is difficult to understand correctly, is misunderstood at the outset. Implicit throughout HB 199 is an assumption that what ADF&G understands to be correct is in fact always correct. Legislation should not depend on such assumptions. That is why the Policy for the Management of Sustainable Salmon Fisheries (5 AAC 39.222), adopted by the Board of Fisheries, uses the "precautionary principle" (5 AAC 39.222(c)(5)) to err on the side of conservation when uncertainty arises, so as to avoid risks.

Questions for legislators and others to consider:
(1) Do you think excluding the beds could help projects like Pebble mine?
(2) Do you think that the "precautionary principle" should be incorporated into the statutory or regulatory regime for Anadromous Fish Act permits?

**3. By focusing on anadromous fish habitat while ignoring the fish themselves, HB 199 creates situations where some activities, such as blasting which can effect fish embryos and alevin in the beds, could evade permitting.**

The current statute requires ADF&G to approve or deny permits based on whether they

[16] AS 16.05.871(b).
[17] HB 199, p. 2, line 17 (italics added).
[18] HB 199, p. 4, lines 3-5 (italics added).

assure "proper protection of fish and game."[19] That includes the fish as well as their habitat in the water and in the beds. HB 199 would instead require ADF&G and permittees to "prevent or minimize the activity's adverse effects on anadromous fish habitat,"[20] and then "restore the affected anadromous fish habitat and take mitigation measures."[21] That addresses the habitat but not the fish themselves.

For example, ADF&G has a long history of requiring Anadromous Fish Act permits for seismic blasting near streams because pressure waves from the blasts can cause injury and mortality to fish in the water and embryos in the bed,[22] even though the pressure waves can leave those habitats intact. Although HB 199 refers to preventing adverse effects, its core standard is to minimize, restore and mitigate, because easy prevention occurs, difficult prevention may not, and many projects can be designed to avoid avoidable affects and minimize unavoidable effects. So, the existing standard (protection of fish and game and their habitats) is both broader and stronger that HB 199's proposed standard (minimize, restore and mitigate harms to anadromous fish habitat). HB 199's standard is narrower and weaker because it addresses habitat but ignores the fish themselves. That helps large scale mining, which requires a lot of blasting to excavate ore, and the oil and gas industry, which uses seismic blasting to explore for oil and gas.

Question for legislators and others to consider:
(1) Focusing only on habitat and ignoring the fish themselves allows mining and oil and gas operations, which currently need Anadromous Fish Act permits for blasting close to anadromous waters, to evade the permits, doesn't it?

## C. Other Topics and Questions.

### 1. Does the Forest Practices Act offer a better model for presuming that undocumented water is important anadromous fish habitat?

There are many thousands of undocumented anadromous waters and many thousands of non-anadromous waters in Alaska. HB 199 presumes, absent a site-specific determination, that every "naturally occurring permanent or seasonal surface water body and its adjacent riparian areas is important anadromous fish habitat."[23] The Forest Practices Act deals differently with the same issue. It provides, at AS 41.17.118(c), that "[i]n the absence of a site-specific determination by [ADF&G], the commissioner [of natural resources] shall presume . . . that a stream is anadromous if it is connected to anadromous waters that are without [ADF&G] documentation of a physical blockage and has a stream gradient of 8 percent or less." In other words, under the Forest Practices Act, a stream is presumed anadromous if (a) no documented physical blockage separates the undocumented stream from anadromous waters, and (b) if the undocumented stream has a gradient of 8 percent or less.

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[19] AS 16.05.871(c), (d).
[20] HB 199, p. 10, lines 13-14; see also p. 11, lines 1-2 (requiring a permittee to "limit adverse effects").
[21] HB 199, p. 11, lines 7-8.
[22] ADF&G, "Use of Explosives In or Near Stream Corridors," requiring permits under Anadromous Fish Act, http://www.adfg.alaska.gov/index.cfm?adfg=uselicense.explosives .
[23] HB 199, p. 2, lines 13-15.

An initiative modeled on HB 199 and which contains the overbroad presumption in HB 199 will virtually beg the legislature to revise such an enacted initiative.

Questions for legislators and others to consider:
(1) Is the approach of the Forest Practices Act a better approach?
(2) If not, why not?

**2. For major permits, HB 199 puts the applicant in charge of gathering field information; current law allows ADF&G to charge the applicant for that service.**

The existing statute allows ADF&G to require an applicant to submit "full plans and specifications of the proposed construction or work" and "complete plans and specifications for the proper protection of fish and game in connection with the construction or work, or in connection with the use."[24] In practice, applicants fill out a form and provide additional information requested. HB 199 would also require an applicant to fill out a form.[25] For minor and major permits, the applicant must provide "all information requested by [ADF&G] to reasonably assess the proposed activity's effects on anadromous fish habitat, including (1) the scope and duration of the proposed activity; and (2) mitigation measures planned for areas of affected anadromous fish habitat."[26]

However, HB 199 also provides that an applicant for a major permit "shall collect information *reasonably* requested" by ADF&G.[27] This language, which may refer to field work which can be costly, should be clarified. It creates a basis for disputes over costs.

The "powers and duties" of the Commissioner of Fish Game, at AS 16.05.050(15), include "to establish and charge fees equal to the cost of services provided by the department." Currently, ADF&G could inform an applicant that field work or data collection is necessary, and offer to perform the service so long as the applicant pays the cost. HB 199 would change this. It requires ADF&G to establish "reasonable fees"[28] instead of "fees equal to the cost." Because ADF&G is not a profit-making enterprise, reasonable fees may be less than full cost.

On a related matter, a radio station recently quoted Rep. Stutes as claiming that under HB 199 "the applicant is going to be required to substantiate the fact that it's not an anadromous stream and bear the cost of doing so as opposed to the state bearing those costs."[29]

Questions for legislators and others to consider:
(1) Why should legislation, such as HB 199, invite disputes over whether an ADF&G request is reasonable when under current law ADF&G can simply inform an applicant

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[24] AS 16.05.871(c).
[25] HB 199, p. 4, line 6.
[26] HB 199, p. 4, lines 9-11 (curiously, restoration is not mentioned here).
[27] HB 199, p. 7, lines 10-11 (italics added).
[28] HB 199, p. 12, lines 11-15.
[29] See http://kbbi.org/post/rep-stutes-introduces-bill-strengthen-protections-salmon-habitat.

that costly field work is necessary and offer to perform the service it so long as the applicant pays a fee equal to the cost?
(2) Doesn't it make more sense if regulations simply direct that no permits will be issued until all costs for "reasonably necessary" field work are paid, and then use the current administrative appeal process to settle disputes over whether a particular cost is "reasonably necessary?
(3) Where does HB 199 say that it requires an applicant to substantiate that a waterbody or portion of it is not anadromous, and bear the cost of doing so as opposed to the state bearing those costs?
(4) Why does HB 199 charge "reasonable fees" instead of full fees for services performed by ADF&G?
(5) Does requiring an applicant to perform costly field work to prove that some portion of a water body is not anadromous, and that therefore a permit is required, put the fox in charge of the hen house?

### 3. HB 199's provisions on reconsideration restrict current administrative and judicial review, and help industry, not salmon.

The current Act provides that a person or governmental agency denied a permit due to insufficient protection of fish and game may, within 90 days of receiving the notice of denial, initiate a hearing under the Administrative Procedure Act, at AS 44.62.370, and that the hearing is subject to AS 44.62.330--44.62.630.[30] ADF&G habitat regulations at 5 AAC 95.920 state that "[a]n interested person may initiate an appeal of a decision made under this chapter [5 AAC Chap. 95] in accordance with the provisions of AS 44.62.330 - 44.62.630 by requesting a hearing under AS 44.62.370." In other words, under current law, an "interested person" can appeal a determination that an anadromous river, lake or stream, or portion thereof, is "not important."

However, HB 199 would restrict all this. It would allow only a "person adversely affected" by a determination to request reconsideration and then appeal to Superior Court.[31]

First, the difference between the "interested person" standard and the "person adversely affected" standard is legally significant. Under the "interested person" standard, any person with a material interest in the matter, such as protection of fish and game, can obtain review. Under the "person adversely affected" standard, a person can only obtain review upon a showing that he or she is in fact adversely affected.[32] For example, the APA at AS 44.62.300 allows "[a]n interested person" to file an original action in court to challenge the validity of a regulation. Therefore, if Pebble mine wants to dam an anadromous stream in the Catalog and Atlas, and therefore seeks and obtains a site-specific determination that the stream is "not important" anadromous water, then an interested person can sue under the APA at AS 44.62.300 to challenge that determination because it amends the Catalog and Atlas which are regulation. However, under HB 199, a person would not file an original court action challenging the

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[30] AS 16.05.871(d).
[31] HB 199, p. 11, lines 18-29.
[32] See *Johns v. Com. Fisheries Entry Comm.*, 699 P.2d 334, 336-337 (Alaska 1985) (comparing more liberal "interested person" standard to more restrictive standard sought by CFEC and would require a showing that a person's interests are injured or adversely affected).

changed regulation. Instead, the person would request reconsideration and would have to show that he or she is adversely affected by the determination in order to proceed, and then if dissatisfied with the result, appeal to Superior Court sitting as an appellate court rather that court of original jurisdiction. When the Superior Court sits as a court of original jurisdiction, the parties get the benefits of discovery, production of evidence, use of expert witnesses, etc., and the record is created in the court. When the Superior Court sits as an appellate court and hears an appeal from a final agency action, the record under judicial review is already established by the agency, so generally there is no discovery, production of evidence, use of experts, or ability to otherwise supplement the record. These changes, to be made by HB 199 regarding who can obtain judicial review, and how that review occurs, restrict the public's current access to judicial review and help industry, including Pebble mine, not salmon.

Second, during the administrative reconsideration, HB 199 restricts the use of currently available procedures designed to assure that administrative hearings on determinations involving habitat and permitting are fair. For many types of administrative adjudications, the Administrative Procedure Act at AS 44.62.330 currently affords court-like procedures set out in AS 44.62.330 -- .630 (e.g., accusations and statements of issues, service of documents on parties, notice and time and place of hearing, subpoenas, depositions, matters concerning evidence and decisions, conduct of hearing, obtaining judicial review and scope of judicial review, oaths, impartiality, etc.). Currently AS 44.62.330(a)(27) applies these court-like procedures to the "Department of Fish and Game as to *functions relating to the protection of fish and game under AS 16.05.871*." (italics added) However, HB 199 amends AS 44.62.330(a)(27) to provide such court-like procedures to "Department of Fish and Game as to *functions relating to the protection of anadromous fish, other fish, and wildlife habitat under AS 16.05.871 - 16.05.901 where procedures are not otherwise expressly provided in AS 16.05.871 - 16.05.901*."[33] (italics and underscoring added) Because HB 199 expressly provides procedures for reconsideration,[34] the APA procedures set out in AS 44.62.330 -- .630 to assure fair proceedings would not apply.

Questions for legislators and others to consider:
(1) Why does HB 199 use the more restrictive "person adversely affected" standard instead of the current "interested person" standard?
(2) If Pebble mine requests and obtains a determination under HB 199 that an anadromous headwater stream is "not important" and can be dammed for tailings storage

[33] HB 199, p. 16, lines 2-5.

[34] HB 199, p. 11, line 18 – p. 12, line 2, provides that an adversely affected person must request reconsideration with 30 days of the determination at issue; that the commissioner must issue a written decision granting or denying the requested reconsideration within 30 days; that if the commission fails to do so, then the request is deemed denied; that if the request is granted, then the commissioner shall issue a final determination within 30 days; that the commissioner's determination upon reconsideration is the final agency decision for purposes of obtaining judicial review by appeal to Superior Court under the APA at AS 44.62.560 which establishes the record before the agency as the record under appellate review; that the person must appeal within 30 days of date the final agency determination is mailed or otherwise distributed, or the date the request for reconsideration is deemed denied by the commissioner's failure to act on the request; and that the appeal to Superior Court is limited to the issues presented to the commissioner in the request for reconsideration.

without an Anadromous Fish Act permit, then do you think a commercial fisher should be able to request reconsideration of that determination only if he or she can show that it adversely affects him or her?

**4. If ADF&G erroneously finds that an activity will not have significant adverse effects and issues a permit, but in fact such effects occur and cannot be prevented or restored, then the mitigation provisions of HB 199 will not operate.**

For minor and major permits, HB 199 provides:

> (b) When establishing permit conditions . . . , including permit stipulations and mitigation measures, the commissioner shall, in order of priority, require a permittee . . . to take the following actions: (1) limit adverse effects of the activity on anadromous fish habitat by changing the siting, timing, procedure, or other manageable qualities of the activity; (2) if the significant adverse effects of the activity cannot be prevented . . . , minimize the significant adverse effects of the activity by limiting the degree, magnitude, duration, or implementation of the activity; and (3) if the activity cannot be implemented in a manner that prevents significant adverse effects to anadromous fish habitat . . . , restore the affected anadromous fish habitat and take mitigation measures.
> (c) Permit conditions and mitigation measures under this section may not offset the activity's adverse effects by restoring, establishing, enhancing, or preserving another water body, other portions of the water body, or land. [35]

This precludes mitigation whenever ADF&G erroneously finds that significant adverse effects will not occur, but in fact do occur, and cannot be limited, minimized or the habitat restored. HB 199 assumes naively (1) that ADF&G will always be correct in anticipating significant adverse effects, (2) that data and science will always be certain, (3) that permittees will always comply with permit conditions, stipulations and mitigation measures, and (4) that all efforts to limit, minimize, restore and mitigate will be successful. Sometimes the wrong stuff happens. If ADF&G errs, if data is uncertain, if a permittee does not comply, or if efforts to limit, minimize, restore and mitigate fail or are uncertain, then the mitigation provisions of HB 199 will not operate. They will not operate because HB 199 does not allow mitigation to offset the adverse effects by restoring even other damaged portions of the water body. In pristine environments, such as the Bristol Bay drainages, virtually no damaged habitat exists to restore as mitigation. There, it makes sense to preclude such efforts because they destroy the natural environment in order to "mitigate" something. But, in places where ample damaged habitat exists, such efforts may make sense. In such areas, fishery conservation groups routinely undertake stream restoration projects, and many seem fairly successful.

So, if a project obtains a permit based on an erroneous finding that it will not cause significant adverse effects, but if ADF&G is wrong, or project operators do not comply, or the conditions and stipulations fail, such that significant adverse effects occur, then HB 199 lets the project escape costs of mitigation. For major projects, that is huge benefit and departure from

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[35] HB 199, p. 10, line 28 -- p. 11, line 11.

current regulations. As said in footnotes at the outset, current regulations require a permittee to "mitigate *any adverse effect upon fish or wildlife, or their habitat*, which the commissioner determines . . . actually results from . . . the permittee's activity, or which was a direct result of the permittee's *failure* to (1) comply with a permit condition or [the regulations]; or (2) correct a condition or change a method foreseeably detrimental to fish or wildlife, or their habitat,"[36] and "*to compensate fully for damage to fish and wildlife populations and their habitat.*"[37]

It should not escape attention that these current regulations and HB 199 differ on wildlife and wildlife habitat in the context of mitigation. The current regulations require a permittee to mitigate effects on wildlife and wildlife habitat as well as fish and fish habitat. HB 199 is narrower. It addresses only "anadromous fish habitat." And it then prohibits mitigation that would offset the activity's adverse effects on anadromous fish habitat by restoring even other damaged portions of the water body. On some major permits, that helps industry avoid major costs for mitigation.

Questions for legislators and others to consider:
(1) Does HB 199 assume that ADF&G will never err, that data will always be certain, that permittees will always comply, and that all conditions and stipulations will work as hoped? Isn't that wishful thinking?
(2) The Sustainable Salmon Management Policy, 5 AAC 39.222, uses the "precautionary principle" (5 AAC 39.222(c)(5)) essentially to err on the side of conservation when uncertainty arises, so as to avoid risks. Do you think that the "precautionary principle" should be incorporated into the statutory or regulatory regime for Anadromous Fish Act permits?
(3) Why do these provisions in HB 199 abandon current requirements for mitigation of effects on wildlife and wildlife habitat?

**5. Performance Bonds.**

HB 199 requires performance bonds for mitigation but not for restoration.[38]

Question for legislators and others to consider:
(1) Is this an oversight?

**D. Although HB 199 weakens the Anadromous Fish Act in many respects, if HB 199 forms the basis of an initiative, it will risk weakening the Act further.**

HB 199 addresses matters involving agency expertise, which should be in regulation, not statute. Legislative bodies establish agencies to marshal expertise, and therefore give them authority to adopt, or require them to adopt, regulations based on expertise in order make decisions. Attempting to put "supposed" expertise in statute, either by bill or initiative, invites legislators lacking expertise to inadvertently or deliberately weaken the Anadromous Fish Act.

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[36] 5 AAC 95.900(a).
[37] 5 AAC 95.990(4).
[38] HB 199, p. 9, lines 19-31.

HB 199 may not pass, so it may be the groundwork for an initiative that, if enacted, will invite legislation to revise the initiative. For example, in about 2000, the voters enacted an initiative which regulated discharges by cruise ships into Alaska waters. The legislature repealed the initiative. A somewhat similar situation occurred in about the 1980s and 1990s, when the legislature enacted several laws which substantively and procedurally weakened AS 38.05.035. It is a chief permitting statute of the Alaska Department of Natural Resources (DNR), just as the Anadromous Fish Act is for ADF&G. The legislature did so because it perceived that AS 38.05.035 afforded a means for environmental groups to overturn DNR decisions.

ADF&G's regulations which implement the Anadromous Fish Act could be improved. There are several ways to do so. ADF&G can do so, and HB 199 might help pressure ADF&G to do so. People can put pressure on the Board of Fisheries to urge ADF&G to do so. Citizens can draft regulations and file a petition with ADF&G under the Administrative Procedure Act to adopt the regulations,[39] and ADF&G must then either deny the petition within thirty days or schedule the matter for a public hearing. [40] Or, if all else fails, the legislature could enact a less risky, shorter bill that requires ADF&G to enact regulations to address certain topics currently unaddressed, such as notice and comment.

Questions for legislators and others to consider:
(1) Should the issues in HB 199 be addressed through regulations?
(2) After the Board of Fisheries wrote the legislature urging legislation, did you consider writing a letter to the Board asking why it did not send a letter to ADF&G asking for regulations?
(3) Do you think an initiative modeled on HB 199 risks the legislature responding by weakening the Anadromous Fish Act further?

## F. Drafting Issues.

### 1. Language regarding "significant adverse effects" and "substantial damage" is circular. It is also unclear whether it is declaratory or prohibitive.

A key but confusing provision of HB 199 regarding major permits is the following:

> (e) A proposed activity's significant adverse effects on anadromous fish habitat . . . cannot be prevented or minimized if the commissioner determines that the proposed activity is likely to cause substantial damage to anadromous fish habitat. A proposed activity is likely to cause substantial damage if
>
> (1) the proposed activity is likely to have significant adverse effects on anadromous fish habitat . . . ;
>
> (2) the proposed activity's significant effects cannot be minimized . . . or prevented; and
>
> (3) the significant adverse effects of the proposed activity are likely to affect anadromous fish habitat in such a manner that the habitat will not likely recover or be restored within a reasonable period to a level that sustains the water

[39] Administrative Procedure Act at AS 44.62.220.
[40] AS 44.62.230.

body's, or portion of the water body's, natural and historical levels of anadromous fish, other fish, and wildlife that depend on the health and productivity of that anadromous fish habitat.[41]

Some of this is twice circular. First, it says that "significant adverse effects" cause "substantial damage," and "substantial damage" occurs "if . . . significant adverse effects" occur. Second, it says that "significant adverse effects" which "cannot be prevented or minimized . . . cause substantial damage if . . . significant adverse effects cannot be minimized . . . or prevented." Statutes have to say something meaningful, and that does not!

This subsection is also unclear whether it is (a) declaratory and definitional, or (b) prohibitive. That is, does it *declare* that "significant adverse effects . . . cannot be prevented or minimized if the commissioner determines that the proposed activity is likely to cause substantial damage," and if so, then toward what end, or does it prohibit a person from preventing or minimizing such effects "if the commissioner determines that the proposed activity is likely to cause substantial damage." It needs clarification.

### 2. The proposed Sec. 16.05.877(a) is a definition, but other parts of HB 199 treat it as if it were operational.

The proposed Sec. 16.05.877(a) [42] is not framed as a definition but in fact defines the term "significant adverse effect." It is not operational because it does not direct anyone to do or not do something. However, other parts of HB 199 treat it as if it were operational. For example, HB 199 says: "the commissioner shall determine the proposed activity's potential effects on anadromous fish habitat under AS 16.05.877."[43] HB 199 repeatedly refers to a determination or decision "under AS 16.05.877." The section should be converted to a definition of "significant adverse effect." That will simplify matters because all instances of "under AS 16.05.877" can be deleted once the term "significant adverse effect" is converted to a definition.

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[41] HB 199, p. 7, line 27 – p. 8, line 9.

[42] HB 199, p. 5, lines 10-24. Sec. 16.05.877(a) would provide:

> (a) A proposed activity has the potential to significantly adversely affect anadromous fish habitat under AS 16.05.871 - 16.05.901 if the proposed activity, singly or in combination with other factors, will (1) impair the quality, quantity, or flow of water necessary for a water body to support anadromous fish habitat; (2) impede or prevent the safe, timely, and efficient upstream and downstream passage of anadromous fish to areas of anadromous fish habitat; (3) impair the quality or flow of a water body that is not anadromous fish habitat, but is necessary to preserve the quality or flow of a water body that is anadromous fish habitat; (4) reduce aquatic habitat diversity, productivity, stability, or function; (5) adversely affect other fish and wildlife that depend on the health and productivity of that anadromous fish habitat; or (6) violate any additional criteria, consistent with the requirements of AS 16.05.871 - 16.05.901, adopted by the commissioner by regulation.

[43] HB 199, p. 4, lines 17-18.

### 3. Other Definitional Matters.

HB 199 needs a definitional section to avoid the repeated statements that "In this section, 'anadromous fish habitat' has the meaning given in AS 16.05.871." Regarding "anadromous fish habitat," HB 199 needs to clarify the meaning of "adjacent riparian areas that contribute, directly or indirectly, to the spawning, rearing, migration, or overwintering of anadromous fish."[44] If that language appears in an initiative, the legislature is likely to revise it, because requiring ADF&G to map in the regulatory Atlas the riparian and wetland areas of all surface waters presumed to be anadromous is a substantially irrelevant exercise. Once the legislature decides to re-write the initiative, it may weaken the Act further.

Whereas the current statute refers to "rivers, lakes and streams," HB 199 use the term "water body."[45] Why this change was made is not apparent, but it raise the question of whether HB 199 means to include the ocean, which is also surface water used for migration and rearing. That, again, is drafting that if it appears in an enacted initiative cries out for the legislature revise the initiative and erode the Act further.

HB 199 bars use of a general permit if it relates to "industrial development." The term needs to be defined. It is raises issues. First, I wondered why industrial development gets the prohibition but not roads or timber harvest, which have a substantial history of harming salmonid habitat. Second, again, if HB 199 becomes the basis of an enacted initiative, then the preclusion is another likely target for legislative revision that may threaten the entire Act.

## CONCLUSION

The factual, legal, and political dimensions in this matter are broad, complicated, intertwined, and disserve careful analysis. Appearances can be deceiving. It is easy to think that something is good when it is not. HB 199 has at least the following nine major defects:

(1) HB 199 focuses only on surface waters and removes the beds of anadromous waters from coverage by the Act. This reduces the scope of protection and permitting.
(2) HB 199 would establish in regulation a method to determine that documented anadromous waters are "not important." This amounts to a method to evade permitting. This new method is unnecessary because the Administrative Procedure Act already provides a statutory process for citizens to petition agencies to amend regulations, including the Anadromous Waters Catalog and Atlas which are adopted into regulation.
(3) HB 199 creates an additional avenue for projects to evade permitting whenever agencies do not foresee that other events, such as water extraction wells around a mine pit, will dewater the beds of anadromous waters.
(4) HB 199 focuses on habitat and deletes the fish themselves from coverage by the Act. Doing so appears to allow blasting near anadromous streams to evade the Act.
(5) HB 199 presumes all surface waters are anadromous, when it could track the Forest Practices Act which presumes that a stream is anadromous if no documented physical blockage separates an undocumented stream from anadromous waters, and if the

[44] HB 199, p. 2, lines 17-19.
[45] HB 199, p. 2, line 28.

undocumented stream has a gradient of 8 percent or less. If HB 199 becomes the basis of an enacted initiative, this overbroad presumption will probably prompt the legislature to repeal or amend the presumption and then consider further eroding the scope of the Act.

(6) HB 199 replaces full fees for ADF&G doing field work with reasonable fees, and limits ADF&G to "reasonable requests" for an applicant to do field work, all of which puts the applicant in a better position to control the information that goes into decision-making.

(7) HB 199 limits access to administrative and judicial review by replacing the liberal "interested person" standard with the more restrictive "adversely affected" standard, and limits reconsideration procedures by amending the APA to eliminate those which assure fair hearings related to protection of fish and game under the Anadromous Fish Act.

(8) HB 199 limits access to the courts by replacing original court actions against ADF&G, which have all the benefits of discovery, production of evidence, expert witnesses and trial, with appeal to Superior Court based on the record before the agency.

(9) HB 199 bars mitigation of unforeseen significant adverse effects whenever prior damages to the same water body already exist.

Overall, HB 199 gives advocates of salmon what sounds nice but they really don't need, repeals what they need to keep and improve, and burdens them with what they need to avoid. For example: HB 199 gives advocates of salmon an unnecessarily overbroad presumption that all surface waters including mountain rivulets, glaciers and isolated wetlands are anadromous, but repeals authority to protect the beds documented anadromous waters and the fish themselves, and then creates multiple means for developers to evade permitting when their activities adversely affect documented anadromous waters, beds or the fish themselves. That lets the demons loose. The state does not need to presume that mountain top waters and glaciers are anadromous while it loses the advantages of a stable Catalog and Atlas of documented anadromous waters, when the Catalog and Atlas are the most fundamental jurisdictional regulations for enforcing the Act. Another example: HB 199 creates public notice and comment on major permits, but then reduces access to reconsideration and judicial review which follow from that process, and converts original litigation in the courts to administrative appeals. That lets salmon advocates speak but reduces their ability to challenge an agency decision. That is counterproductive to allowing citizens to be good citizens and requiring the government be good government.

Moreover, if HB 199 becomes the basis of an enacted initiative, then all demons will break loose. The presumption that all surface waters are anadromous, when compared to the Forest Practices Act, is tantamount to a gold-plated invitation to the legislature to rewrite the enacted initiative at the first opportunity. Then, those who supported such an initiative will have only themselves to blame for all the defects listed above which survive a legislative re-write. When the legislature re-writes a counterproductive initiative, those who supported it will be in a poor position to retrieve what they unknowingly gave up, such as ADF&G's jurisdiction over the beds of anadromous waters, and they will be unable to regurgitate the poison pills they unknowingly swallowed, such as the methods and means to evade permitting and the more limited access to courts. Then, the legislature may further restrict the Act.

I am sure the sponsors have good intentions, and I am equally sure this bill should not be further advanced.

I hope this analysis is helpful.