

**ALASKA STATE LEGISLATURE
HOUSE SPECIAL COMMITTEE ON FISHERIES**

March 26, 2003

6:36 p.m.

MEMBERS PRESENT

Representative Paul Seaton, Chair
Representative Peggy Wilson, Vice Chair
Representative Dan Ogg
Representative Ralph Samuels
Representative Ethan Berkowitz
Representative David Guttenberg

MEMBERS ABSENT

Representative Cheryll Heinze

OTHER LEGISLATORS PRESENT

Representative Les Gara
Representative Beth Kerttula
Representative Bill Williams
Representative Kelly Wolf

COMMITTEE CALENDAR

EXECUTIVE ORDER 107 - TRANSFER OF HABITAT FUNCTIONS FROM ADF&G
TO DNR

- HEARD

PREVIOUS ACTION

No previous action to record

WITNESS REGISTER

TOM IRWIN, Commissioner
Department of Natural Resources (DNR)
Juneau, Alaska

POSITION STATEMENT: Testified during the hearing on EO 107,
explaining the reorganization and answering questions previously
submitted for response.

KEVIN DUFFY, Commissioner
Alaska Department of Fish & Game (ADF&G)

Juneau, Alaska

POSITION STATEMENT: Testified during the hearing on EO 107, answering questions previously submitted for response.

NANCY WELCH, Deputy Director
Division of Mining, Land and Water
Department of Natural Resources (DNR)

POSITION STATEMENT: Testified on EO 107 and referred to charts to help explain the reorganization involved with the proposed changes to the departments.

KERRY HOWARD, Deputy Director
Division of Habitat and Restoration
Alaska Department of Fish & Game (ADF&G)
Juneau, Alaska

POSITION STATEMENT: Answered questions pertaining to EO 107.

KEVIN BROOKS, Director
Administrative Services
Alaska Department of Fish & Game (ADF&G)

POSITION STATEMENT: Testified on EO 107, answering questions pertaining to administrative changes.

DALE KELLY, Executive Director
Alaska Trollers Association
Juneau, Alaska

POSITION STATEMENT: Testified on EO 107, expressing concerns that the permitting process remain a good one, and that the commissioner's authority be re-engaged.

EARL CHAMPION
Silver Bay Logging
Hoonah, Alaska

POSITION STATEMENT: Testified on EO 107, suggesting that "one-stop shopping" would minimize delays in permitting.

PAUL SHADURA, President;
Acting Executive Director
Kenai Peninsula Fishermen's Association
Kenai, Alaska

POSITION STATEMENT: Testified on EO 107, expressing concerns over how the system will function effectively; asked questions such as how DNR will respond to recommendations made by the Board of Fisheries.

FRANK RUE
Juneau, Alaska

POSITION STATEMENT: Referred to his previous work experience for both DNR and ADF&G and testified on behalf of himself in opposition to EO 107.

CATHERINE POHL

Juneau, Alaska

POSITION STATEMENT: Testified in strong opposition, urging the committee to overturn EO 107.

STEVE ALBERT, Habitat Biologist
Division of Habitat and Restoration
Alaska Department of Fish & Game (ADF&G)
Eagle River, Alaska

POSITION STATEMENT: Testified on the tangible and intangible costs involved with EO 107.

BOB CHURCHILL, Member
Anchorage Fish and Game Advisory Committee;
Member, Executive Board
Alaska Fly Fishers
Anchorage, Alaska

POSITION STATEMENT: Testified on EO 107, expressing the need for accountability to be established under the proposed structure.

CLEM TILLION, Consultant
Aleut Enterprise Corporation
Adak, Alaska

POSITION STATEMENT: Testified in support of EO 107.

PAULA TERRELL
Alaska Marine Conservation Council
Juneau, Alaska

POSITION STATEMENT: Expressed concerns pertaining to EO 107, pointing out differences between single versus multiple permitting, and DNR's versus ADF&G's mission statements.

SETH LITTLE
Alaska Center for the Environment
Anchorage, Alaska

POSITION STATEMENT: Testified in opposition to EO 107, urging the legislature to disapprove EO 107.

BRUCE BAKER, President
Board of Directors
Southeast Alaska Conservation Council (SEACC)
Juneau, Alaska

POSITION STATEMENT: Testified in opposition to EO 107, asking that consideration be given to the long-term health of renewable resources.

GEOFFREY PARKER, Vice President
State Council of Trout Unlimited;
Counsel to Alaska Sportfishing Association
Anchorage, Alaska

POSITION STATEMENT: Testified in opposition to EO 107, offering suggestions on how to improve it.

ACTION NARRATIVE

TAPE 03-19, SIDE A

Number 0001

CHAIR PAUL SEATON called the House Special Committee on Fisheries meeting to order at 6:36 p.m. Representatives Seaton, Ogg, Samuels, Guttenberg, and Berkowitz were present at the call to order. Representative Wilson arrived as the meeting was in progress. Also present were Representatives Gara, Kerttula, Williams, and Wolf.

EXECUTIVE ORDER 107 - TRANSFER OF HABITAT FUNCTIONS FROM ADF&G TO DNR

Number 0100

CHAIR SEATON announced that the only order of business was Executive Order (EO) 107, Transfer of Habitat Functions from ADF&G to DNR. He clarified that the goal of tonight's hearing was to identify the process, procedure, and structure that EO 107 would be creating at the Department of Natural Resources (DNR), to identify problems with that process and to determine improvements to ensure that habitat and fisheries will be protected within DNR.

Number 0307

CHAIR SEATON explained that the Alaska Department of Fish & Game (ADF&G) and DNR would be responding to a list of questions that had previously been compiled and submitted by the House Special Committee on Fisheries. [The meeting's agenda consisted of the following panels testifying before the committee: DNR, ADF&G, members of industry, former state officials and experts, and public interest groups.]

Number 0630

TOM IRWIN, Commissioner, Department of Natural Resources (DNR), expressed appreciation for receiving the questions in advance. He introduced staff who would testify during the meeting. He said Commissioner Duffy would address the questions first and that he himself would follow up.

Number 0705

KEVIN DUFFY, Commissioner, Alaska Department of Fish & Game (ADF&G), provided the following testimony:

On February 12th, the governor introduced Executive Order 107, transferring the permitting functions of the [Division of Habitat and Restoration ("Habitat Division")] to the DNR. Other functions of the Habitat Division, including some of the research, refuge management, and special projects, will remain in the ADF&G. The administration believes that moving this function into the DNR creates a more effective permitting process. Contrary to some of the opinions that have been expressed in previous hearings, we believe this move will not negatively affect the protection of fish and wildlife habitats. Alaska statutes and regulations protecting habitat are not being loosened. The same protection afforded habitat throughout the state will remain, whether along the coastal areas or in Alaska's vast interior.

Number 0819

COMMISSIONER DUFFY asked and answered the following questions from his written testimony, which read in part as follows [original punctuation provided, with some formatting changes]:

Question 2: How many Habitat biologists are being lost. How will the remaining biologists be organized around the state?

The number of habitat biologists transferred to DNR was not a random process, but rather the work product of a very intense work group that evaluated region-by-region work loads, staff time dedicated to research associated with permitting, and regional differences in the amount of public participation for permitting issues. The number of Habitat Biologist IV, III, and

IIs and support staff was carefully selected based on past and present workloads within each region to adequately address permitting needs. Enclosed is a copy of the organizational chart showing the various offices proposed in the Office of Habitat Management and Permitting in the Department of Natural Resources.

Also included are spreadsheets that list the number and location of habitat biologists that will be transferred to DNR, those remaining at [ADF&G], and those positions that will be laid off or deleted. The following is an overview of the positions and functions that will be transferred and those remaining at Fish and Game:

Functions Moving to DNR: 27 Habitat Biologists and a total of 36 total positions.

- Title 16 fish passage and anadromous fish stream permitting
- Anadromous Waters Catalog (regulatory function)
- Project-related research and monitoring
- Consistency reviews, land use plan reviews, review of 6217 documents, coastal boundaries atlas
- Forest Resources and Practices Act permitting

Functions internally within the department moving from Habitat and Restoration Division to Sport Fish: 14.5 Habitat Biologists; 19.5 total positions. One half indicates a part-time position.

- Fish stream surveys and database
- Various research and restoration projects (e.g., stream bank restoration manuals and assistance, ATV study and mapping)
- Oil spill contingency plan reviews
- ACMP [Alaska Coastal Management Program] support to ADF&G Commissioner
- Special Areas Permitting
- Kachemak Bay National Estuarine Research Reserve (an additional 6.5 Habitat and Fish Biologists; 10.5 total positions)

Internal Functions moving to the Division of Wildlife Conservation: 3 Habitat Biologists; 4.5 total positions include:

- Access Defense
- CARA/SWG [Conservation and Reinvestment Act]
- North Slope Grizzly Project

Functions Moving to the Division of Commercial Fisheries: 3 Habitat Biologists whose functions include:

- LTF [Log Transfer Facility] Dive Survey
- Mariculture Leases
- Invasive Species

EVOS [Exxon Valdez Oil Spill] (1 position) - staying within ADF&G

- ARLIS [Alaska Resources Library and Information Service] Librarian

Number 1112

COMMISSIONER DUFFY continued presenting his written questions and answers, which read in part [original punctuation provided, with some formatting changes]:

Layoffs

In addition, we eliminated 30 Full Time and 5 non-permanent positions - 23 are currently filled. A number of positions that were eliminated were management and administrative in nature. We also added an area office in the Mat-Su Valley and eliminated two others in Ketchikan and Sitka. Collective bargaining agreements dictate which employees are given layoff notices. Consequently, staff with the least seniority or who were in single positions that were eliminated received lay off notices that will become effective May 1st.

Number 1202

Question 3: Specifically, how will permitting be expedited and maintain standards with less biologists?

Will biologists visit each stream site before permitting Title 16 permits? Is there a commitment by the Department of Natural Resources that there would continue to be the same level of permit monitoring, compliance and enforcement as previously existed under ADF&G?

A goal of Executive Order 107 is to improve permit efficiency. The organizational structure within DNR for the Office of Habitat Management and Permitting as well as the Office of Project Management and Permitting under the deputy commissioner will more closely align the functions of the habitat biologists, the Alaska Coastal Management Program, and the large project permitting teams. The closer working relationship will increase communication and "problem solving" that should expedite reviews and permit issuance - especially for those projects requiring permits from more than one state agency.

Number 1317

COMMISSIONER DUFFY continued with the next question [original punctuation provided, with some formatting changes]:

Question 4: How does funding for the new DHMP [Division of Habitat, Management & Permitting] compare to past Habitat Div. Funding levels?

Over the last 10 years, Division of Habitat and Restoration's authorized budget has increased from \$4.36 million to \$8.81 million. However, the division only spent \$4.0 to \$6.1 million, respectively. The FY [fiscal year] 2004 proposed budget requests \$7.37 million to be authorized; this includes only \$2.0 million of General Fund. That comparison is attached on a spreadsheet.

Number 1401

COMMISSIONER DUFFY addressed question 22, noting that Commissioner Irwin would be responding to the other questions:

Question 22: Can DNR use federal Dingle-Johnson monies or only Fish and Game?

The Act (16 U.S.C. § 777 et seq) defines "state fish and game agency" broadly enough to cover DNR. The Act also speaks in the singular that one could presume that it meant for only one such agency in each state.

Number 1429

COMMISSIONER IRWIN testified that he's seen firsthand that DNR maintains a balance between what should be held for multiple use - including habitat - and what is developed. In addition, he said, based on his personal experience with the development of property both at Fort Knox and True North, when development is allowed on state land, DNR limits that development to a footprint that minimizes the overall impact.

Number 1554

COMMISSIONER IRWIN referred to written testimony and responded to the remaining questions as follows [original punctuation provided, with some formatting changes]:

Question 1: Who will the Deputy Commissioner be?

Dick LeFebvre holds the existing position of Deputy Commissioner for DNR. At this point, it is unclear whether an additional Deputy Commissioner may be needed for the increased workload associated with the transfer of two existing programs to DNR - Habitat and Coastal Zone Management - plus the proposed Office of Project Management and Permitting. I think the committee would expect us to approach it from this standpoint. I don't think that you add and hope you can fill the work. In business you find out if you have the workload and then add to it. We understand there may be a necessity and consequently we're being straightforward. At this time Dick LeFebvre is Deputy Commissioner.

Number 1690

Question 5: Commissioner Irwin has stated that agencies work together more efficiently when they are housed under the same departmental structure. Specifically, how will the DHMP issue permits more efficiently? How will this intra-agency efficiency between DNR and DHMP be superior to the efficiencies

experienced between DNR, ADF&G, and the Habitat and Restoration Division?

You have likely heard me reference the Fraser Institute Report and the overall perception mining companies have of Alaska. The Fraser Report's figure 3, "Investment Attractiveness Index," encompasses all the parameters such as infrastructure, policy, regulations, land issues, wilderness, Native claims, tax regime, et cetera, that led to that conclusion. I'm convinced the habitat move will increase the overall efficiency of the permitting process by increasing communication and providing the teamwork necessary and then further defining the regulatory "sideboards" that will provide the investment community with additional certainty. This is one element in changing the "perception" the investment community has of doing business in Alaska. By moving the permitting portion of Habitat to DNR, Alaska's statutes and regulations protecting habitat are not being loosened and the same protection afforded habitat throughout the state (coastal and interior) will remain.

Number 1817

COMMISSIONER IRWIN addressed the next question:

Question 6: There has been a great deal of talk about the slow turnover time for permits when multiple agencies are involved. Can you explain the different procedural approach DNR will take with respect to the permitting of single-agency and multiple-agency projects?

A large percentage of the habitat permits are what can be framed as single agency - where no other state authorization is needed for the project to proceed. These single-agency permits can be issued by a habitat biologist while performing a field inspection or issued in the office after consideration of the proposal. While the balance of permit authorizations may be lesser in number, typically the permits needed from more than one agency are associated with larger projects that require more time for acquiring information, reviewing alternatives to the proposal, or other considerations. We expect that certain

efficiencies will be gained by having project managers in the department that can keep the flow of information necessary to make timely decisions.

Executive Order 107 is the mechanism to move a portion of the Division of Habitat and Restoration to DNR to further refine and facilitate the permitting process, not to subsume one permit under another. The managed "multiple-agency" review, modeled after the Large Mine Permitting Team concept, expedites the issuance of "multiple permits" by establishing closer communication between disciplines to resolve issues and solve problems. Conflicting requirements between disciplines can normally be resolved among the multi-program team to ensure the resource being considered is protected and the spirit of the law is met. In the event of a conflict that cannot be resolved within the permitting team or by the project manager, the issue would be elevated to the director of the Office of Project Management and Permitting and the director of the Office of Habitat Management and Permitting for resolution. Further elevation, depending on the particular issue, might involve the deputy commissioner and then the commissioner.

Number 2039

COMMISSIONER IRWIN continued:

Question 7: Why is there such a time delay in issuing water usage permits by DNR? Specifically, what procedures will ensure that Title 16 permits are free from similar delays?

The Division of Mining, Land & Water Director, Bob Loeffler, states that there is NOT a significant time delay in issuing water use permits. Typical DNR temporary water rights (outside the coastal zone) are issued within 20 days: the 20 days includes an agency review period. Typical water right permits (outside the coastal zone) are issued within 60 days. That 60 days includes time-consuming procedures that Title 16 permits lack including: a) an agency review period, b) time for neighbors to receive notice of the water right application by certified mail, and c) a public review period. It also includes time for staff to respond to the public's comments, and to write a brief

decision as well as the permit. Title 16 permits do NONE of these: no agency comment, no certified mail requirements, no public notice, and no requirement for a decision. In general, resource agency authorizations vary in their complexity, statutory requirements, and notice provisions; it is not appropriate to compare one permit to another in terms of cycle time. Instead, the department looks for ways to become more efficient in processing applications.

Number 2216

COMMISSIONER DUFFY testified:

Question 8: Will the new DHMP and the Deputy Commissioner have a separate and different mission statement than the Department of Natural Resources? What is the mission statement?

It is interesting that we pulled out DNR's mission statement relative to the new OHMP [Office of Habitat Management and Permitting] of the Deputy Commissioner. We do not believe that the missions of the two are or should be different. In fact, Article VIII of the Alaska Constitution requires all the resource agencies "to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest." Further, the constitution makes it clear that "fish, forests, [and] wildlife . . . shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses." Resource development is an important part of the state's economy and it is our goal to ensure that any economic opportunity is developed and preserved for all Alaskans, both now and in the future.

Number 2333

COMMISSIONER IRWIN asked and answered the next question as follows:

Question 9: AS 16.05.870 says the Department of Fish and Game must provide for "proper protection" of fish streams. Will the Deputy Commissioner define "proper protection?" If so, how?

The Legislature has not chosen to enact a definition of "proper protection," but could do so in the future. The Department of Fish & Game, in administering this permit program in the past, has also chosen not to attempt a regulatory definition of the standard. The standard has an inherently discretionary element that would be difficult to reduce to a simple definition. Since Executive Order 107 does not change the law, but merely moves it from one department to another, we do not believe that there is any emphasis or management intent than to give fish streams "proper protection" or that the term needs further definition.

Number 2436

COMMISSIONER IRWIN continued:

Question 10: Considering the mission statements of DNR and the new DHMP, will federal agencies (EPA, Dep. Of Interior) accept the DHMP permits without additional federal permitting?

The legal relationships between the state and federal governments on habitat management issues will not change. Also note that in chapter 124 of the 2002 Session Laws, both DNR and ADF&G Habitat have conservation as part of their statutory mission:

"The mission of the Division of Habitat and Restoration is to protect, maintain, enhance, and restore habitat for fish and wildlife consistent with sound CONSERVATION and sustained yield principles.

"The mission of the Department of Natural Resources is to develop, CONSERVE, and maximize the use of Alaska's natural resources consistent with the public interest."

Number 2542

COMMISSIONER IRWIN testified:

Question 11: What is the legal relationship between the Deputy Director and the Commissioner in reference to the permit appeals process? Will DNR develop appeals regulations with respect to in-stream permits? What will those regulations include?

Attached is the answer to this question that was addressed by the Department of Law for the Senate Resources Committee. Also included are several charts that depict the external appeal process as well as the internal conflict resolution between the Division of Forestry and the Office of Habitat Management and Permitting. I'd like Nancy Welch to go over those charts for us.

Number 2639

NANCY WELCH, Deputy Director, Division of Mining, Land and Water, Department of Natural Resources (DNR), referred to three charts contained in the committee packet: "[AS 16.05.840] ("840") Permits -- Appeal Procedures," "[AS 16.05.870] ("870") Permits -- APA Appeal Procedures," and "Conflict Resolution Between Forestry and Habitat"; she labeled those charts "A, B, and C," respectively. She noted that boxes color-coded in red referred to the "decision makers," and said that regarding 840 permits, in most cases, those don't go through an appeals process.

Number 2839

MS. WELCH referred to the second chart, "870 permits -- APA Appeal Procedures." She explained that this "trumps the statutory provision that we have for appeals in our regulatory process." She pointed out that neither ADF&G nor DNR has its own hearing officer; regardless of who the hearing officer is, he/she makes a recommendation to the commissioner, who, in this case, is the final administrative decision maker. That decision can be appealed in court. An APA appeal procedure, much like a judicial process, allows for evidentiary information. She noted that not many 870 permits go through that process.

Number 3019

MS. WELCH concluded by referring to the chart, "Conflict Resolution Between Forestry and Habitat," which was similarly color-coded. A conflict would be directed to the state forester and the division director of habitat and restoration, and if resolution wasn't reached, it would be taken to the commissioners. If resolution wasn't reached at that level, if it was in the coastal zone, it would go to the Coastal Policy Council; otherwise, it would go to the governor's office for resolution. She referred to the left-hand side of the chart, "After Transfer" and pointed out that the decision maker would

be the state forester for situations involving the so-called Forest Practices Act (FPA); otherwise, it would be handled by the division director. If resolution wasn't reached, the commissioner would be the final decision maker for the administration process. She added that with the transfer, the governor's office is not involved, and a layer at the level of division director would be eliminated.

Number 3233

COMMISSIONER IRWIN continued addressing question 11 as follows:

DNR has department-wide appeal regulations; thus no additional regulations are required for 840 permits. Appeals of 870 permits will continue to be governed by the Administrative Procedure Act, although some of the DNR appeal regulations are applicable. After further study, DNR may decide to amend its appeal regulations in 11 AAC 02 to provide specific guidance on 870 permit appeals.

Number 3255

COMMISSIONER IRWIN continued:

Question 12: Considering the potential passage of HB 86, would there be any appeals process without "new scientific information or newly recognized local traditional knowledge?"

There has already been an amendment since the initial set of questions was posed to DNR. It is, therefore, only speculative at this time as to what effect HB 86 will have on DNR's appeals process, if any. Further, any effect on appeal rights would presumably be the same regardless of whether EO 107 went into effect.

Number 3442

COMMISSIONER IRWIN testified:

Question 13: Since the Commissioner is a part of the appeals process for permits issued by the Deputy Commissioner, is the commissioner effectively eliminated as arbitrator between DHMP and the Chief Forester?

The commissioner, by statute, is the principal executive officer of the department. As such, the commissioner is not legally precluded from being involved in the matters of the department. Executive Order 107 was crafted with the intent of the commissioner being the final arbiter of internal disputes between the Offices of Habitat Management & Permitting and the Division of Forestry. This conflict resolution provides an excellent example of the permit streamlining expected by the transfer of Title 16 permitting to DNR. Moreover, I can participate in a variety of decisions that are assigned by statute to the Director of the Division of Lands.

Additionally, the position of Deputy Commissioner in the statutes is not a new idea. "Through administrative reorganization, the Department of Natural Resources has eliminated the division of lands. Duties and responsibilities given to the division of lands under Alaska Statutes Title 38, have been assigned to the deputy commissioner for operations, who has been given the additional title 'director of lands.'"

Number 3520

COMMISSIONER IRWIN addressed the next question:

Question 14: Will public notices be required for all of the new permits now issued by DNR? Will DNR include the in-stream permits under the public notice provisions of AS 38.05.945?

Under Executive Order 107, the law regarding public notices for anadromous stream permits and fishway permits will not change in any way. Nor does DNR expect to include 840 or 870 permits under the provisions of AS 38.05.945. Since public notices under this statute are required for disposals of state interest, by their very nature, 840 and 870 permits are excluded from this notice requirement.

However, I would expect that 840 and 870 permits would receive public notice when associated with a "major project." Major projects are given public notice primarily because of the scope of the project, the

resources that may be impacted, or the variety of authorizations that may be required and their associated statutory requirements for notice. As a matter of course, any notice that is published typically lists the agency authorizations that may be required for the project to be approved. Accordingly, we foresee that the most significant fish stream permits would receive "public notice," even though there is not a statutory requirement to do so.

Number 3650

COMMISSIONER IRWIN testified:

Question 15: Because the Forest Practices Act only applies to state lands, will there continue to be any authority for salmon stream buffers on federal lands?

The Forest Resources Practices Act applies to more than just state lands. Under AS 41.17.119, it applies to "other public land." Under AS 41.17.900, it expressly applies to state, municipal, private and federal lands. Nothing changes by virtue of the reorganization.

Number 3732

COMMISSIONER IRWIN continued:

Question 16: What is the Memorandum of Understanding between DNR-DHMP and ADF&G?

Frankly we haven't had time to sit down and work on that; none has yet been drafted.

I'd like to make an additional comment: With this administration and the cooperation between commissioners, this will be beneficial to the state because we understand that we have responsibilities to protect and to respect certain areas. It's been a privilege to work with Commissioner Duffy.

Number 3812

COMMISSIONER IRWIN continued:

Question 17: Would the DNR Commissioner continue the historical practice of the Fish and Game Commissioner to delegate the authority for making the initial permitting decisions to the habitat biologists? Would these decisions therefore become subject to the process for appeals to the DNR Commissioner?

The execution of daily activities, including permit issuance, is not expected to be any different than any other programs administered by DNR. Historically, decision-making is delegated to the lowest level that is prudent. And that's good business. DNR does not plan any change with the current delegations to habitat biologists. Such decisions would be subject to appeal to the commissioner.

In ADF&G, there was no formal structure for an internal appeal of 840 permits, but in DNR there is a structure - see 11 AAC 02 - and that would be followed. As mentioned earlier, with respect to 870 permits, the appeal process is governed by the Administrative Procedure Act at the ADF&G and will continue to be governed by that law when transferred to DNR.

Number 3933

COMMISSIONER IRWIN testified:

Questions 18: Under EO 107, the DNR Commissioner or the Deputy Commissioner would have broad discretion to interpret the Anadromous Fish Act. For example, the Commissioner/Deputy Commissioner would "determine the waters in the state that are important for the rearing, spawning, and migration of anadromous fish," and the DNR Commissioner/Deputy Commissioner would decide what constitutes "important habitat," and what constitutes "proper protection" for the rearing, spawning, and migration of anadromous fish in "important" streams. Similar discretion is afforded under the Fishway Act. Given the differing mandates of the Department of Natural Resources and the Department of Fish and Game, what safeguards would prevent this discretion from becoming unduly conflicted or compromised because it would now reside with the DNR Commissioner/Deputy Commissioner?

Both ADF&G and DNR have conservation as part of their core mission. Broadly speaking, the Alaska Statutes assign ADF&G management of fish and wildlife populations and assign DNR management of the land, tideland, parkland, forest, and so on that fish and wildlife inhabit. In the past, there have been some exceptions to this broad division, including the assignment of management of stream bottoms to ADF&G in AS 16.05.840 and AS 16.05.870. EO 107 will change management of these submerged lands to DNR, eliminating a divergence between ownership and control and bringing this area into the more general management pattern used in Alaska. In many of DNR's missions, like those of other agencies, there are competing values to be balanced. This does not create a conflict. Note that the opinion furnished to members of the committee by the Legislative Counsel concurs in the absence of a conflict.

Number 4147

COMMISSIONER IRWIN continued with his testimony:

Question 19: The National Oceanic and Atmospheric Administration (NOAA) under the Department of Commerce has a similar structure as is being proposed by EO 107. For example, NOAA Fisheries is responsible for both the promotion of fisheries in federal waters and the protection of fisheries resources. It has been suggested that this has caused increased litigation, introduced costly delays, and contributed to agency gridlock. How would DNR avoid similar problems?

The statutory role of NOAA is so different from those of state agencies, and the federal laws giving rise to litigation are so different from Alaska law, that it is difficult for us to pursue this comparison. Moreover, while there is litigation surrounding federal fisheries management, we are not aware that this would be lessened by splitting the management function among competing agencies. If the member of the committee submitting this question has more specific information on NOAA that it wishes to have us examine, we would be happy to review it.

Number 4302

COMMISSIONER IRWIN continued by asking and answering the next question:

Questions 20: The Governor and the Acting Commissioner of Fish and Game - now, the Commissioner of Fish and Game - and the Commissioner of the Department of Natural Resources have assured the public on several occasions that "the same level of environmental protection will continue to be provided for Alaska's fish and wildlife." Under EO 107, the Habitat Division authority for issuing permits and for the monitoring, compliance and enforcement of these permits would now be the responsibility of DNR, with fewer biologists.

Is there a commitment by the Governor that the habitat biologists who are being transferred from the Alaska Department of Fish and Game would be "housed" in the newly formed Office of Habitat Management and Permitting?

That is the plan that has been outlined [by] the governor and as presented on the organizational chart enclosed in the committee packets.

Number 4456

CHAIR SEATON asked about the deputy commissioner's not being listed on the chart.

COMMISSIONER IRWIN explained that the commissioner and deputy commissioner were "lumped together."

Number 4532

COMMISSIONER IRWIN continued:

Questions 21: Is there a commitment by the Department of Natural Resources to require the State Forester to grant "due deference" under the Forest Practices Act to the Office of Habitat Management and Permitting on issues relating to the harvest of trees from within the 66 foot stream buffers on salmon streams on private land?

Under Section 23 of Executive Order 107, the State Forester is still required to give due deference to

the deputy commissioner - who will supervise a staff of habitat biologists - as it relates to fish habitat, including variations to riparian standards, designation of alternative site-specific riparian protection plans, and road location decisions within riparian areas. The legislative mandate has not changed, other than to assign the lead responsibility to an agent within DNR.

Number 4658

COMMISSIONER IRWIN addressed question 23 [question 22 had previously been answered by Commissioner Duffy]:

Question 23: Within DNR, how will positions be filled once a biologist leaves the position and how do we guarantee that biologist will be hired to fill vacant positions? Presently, personnel in ADF&G have Position Control Numbers [PCNs] and Personnel Description Questionnaires [PDQs] that define the requirements for the position and the duties of the job. When a vacant position becomes available the PCN hiring requirements and PDQ responsibilities can be rewritten. Therefore, DNR can, after a period of time, rewrite these positions to have non-biologist - environmental engineers, foresters, or water quality backgrounds - fill them.

TAPE 03-19, SIDE B

Number 4643

COMMISSIONER IRWIN continued with question 23:

After a period of time, biologists could represent a small group in DNR, as opposed to the 20-30 biologists who are being transferred today. What assurances can we have that prohibits this long-term reduction in force of people who care about the resources and are knowledgeable about them?

DNR plans to leave these positions classified as habitat biologists. As DNR's missions and measures are driven in large part by legislative budget approvals and statute amendments, I cannot guarantee that the program or the people that manage that program won't change over time. I do believe, however, that the scientific knowledge, skills, and

abilities that these habitat biologists bring to DNR are necessary for the proper management and protection of habitat.

Number 4603

COMMISSIONER IRWIN concluded with the last question:

Question 24: How will the structure of DNR be formed to avoid targeted budget reductions? Next year the governor could eliminate the whole DNR budget for biologists if Executive Order 107 creates a separate layoff structure in DNR. Again, biologists would be reduced in number and after a number of years duties could be transferred to people in other Divisions of DNR who are less qualified.

DNR cannot make itself immune from budget cuts enacted by the legislature, and does not seek to do so. The administration supports a strong, adequately funded habitat protection program.

Number 4450

CHAIR SEATON thanked the commissioners and pointed out that the questions came from a number of sources. He referred to the meeting's agenda and announced that the next panels would be DNR and ADF&G.

Number 4236

REPRESENTATIVE BERKOWITZ asked if thought had been given to keeping all of the biologists by simply moving them from ADF&G to DNR.

COMMISSIONER IRWIN replied that a lot of discussion had been focused on what was needed in DNR to accomplish the work. Based on workload efficiencies recommendations were made that led to the following: "This is what we need at this time." He said he was very aware of the need for evaluating whether there were too many or too few employees to get the job done correctly, and that ultimately it was his responsibility [to make those decisions].

Number 4140

KERRY HOWARD, Deputy Director, Division of Habitat and Restoration, Alaska Department of Fish & Game (ADF&G), added that in an ideal world, all of the biologists could move to DNR. However, as part of the reorganization, the expectation was that there would be a reduction in staff. Therefore, this methodical approach took into consideration which functions were statutorily required, which could be moved, and which could remain at ADF&G.

REPRESENTATIVE BERKOWITZ asked what the habitat biologists had recommended to Commissioner Duffy regarding facilitating this move and ensuring that the quality of work would be continued at DNR.

Number 4030

COMMISSIONER DUFFY responded that he'd not met with the habitat biologists in the Southeast region. He explained that Commissioner Irwin was planning to meet with the biologists because under EO 107 those permitting responsibilities would be transferred to DNR. Therefore, rather than dialoguing about the past, the idea was for Commissioner Irwin to meet with the habitat biologists going to DNR to begin creating a working relationship. Commissioner Duffy added that he had talked with habitat biologists about the move, and expressed his hope was that their professional expertise would continue at DNR.

REPRESENTATIVE BERKOWITZ asked Commissioner Irwin about the biologists' recommendations regarding whether the proposed staffing levels under EO 107 would adequately safeguard the habitat.

COMMISSIONER IRWIN replied that he'd received input from biologists who didn't agree with the move and input regarding things that need to get done. He said that he clearly heard the message that "change is very hard when you get down to the individual level." He said he respects individuals and their feelings, and that, in turn, he hopes it's recognized that he needs good habitat biologists in order to make this work.

Number 3732

REPRESENTATIVE OGG referred to [chart B] regarding 870 permits, and asked about the pathway to a hearing officer in the existing structure versus the pathway after the transfer.

Number 3655

MS. WELCH replied that the existing structure depicted that some of the area and regional offices had habitat biologists, so "regardless of where they're housed, they actually make the decision." She explained that whoever makes the decision in the red box then continues on to the yellow box.

CHAIR SEATON asked if the habitat biologists' positions currently at ADF&G were exclusively involved in permitting or involved multiple activities.

COMMISSIONER DUFFY responded that those positions involved multiple activities.

CHAIR SEATON asked if, due to the changes from EO 107, the biologists would exclusively be involved in habitat permitting.

MS. HOWARD responded that habitat biologists at ADF&G perform an array of duties that depend on the individual biologist and his/her position, noting that no two positions are exactly the same. With the move of a portion of the habitat division to DNR, she said that, inevitably, some of the duties would change. She stated that while one of the predominate duties of the biologists at DNR will be to do 840 and 870 fish stream permitting, other duties will include associated research and activities such as review of land use plans, FPA, ACMP consistency reviews, and so forth. In response to Chair Seaton's question, Ms. Howard said that she didn't think that any of the positions at DNR would be single-focused because all of the duties envisioned as moving to DNR would have to be assumed and completed.

Number 3338

REPRESENTATIVE GUTTENBERG commented that rather than issuing an executive order, this could have been an internal organization with a governmental coordination policy. He asked why the decision to use an executive order was made and wondered if there was a more efficient way of achieving the same objectives.

Number 3555

COMMISSIONER DUFFY replied that the governor's office had made a decision to pursue this in an expedited fashion through this executive order. He explained that since that decision was made and this proposed policy call was rolled forward to the legislature, the focus has been on creating a permitting

structure that would be maintained for certain activities in ADF&G and in DNR, primarily Title 16, and that the concern has been on having an adequate number of people moving to DNR to continue the permitting function. He stated that the intent of the administration was to move quickly on a policy call, to evaluate it, to rule out a comprehensive program, and then to move forward so that a new permitting structure would be in place for fiscal year 2004.

REPRESENTATIVE GUTTENBERG replied that the administration was making changes in other departments but in different ways and asked if, with the loss of more than 30 percent of the habitat and restoration staff, there would be a loss of credibility with the federal government regarding programs or projects that wouldn't get done due to the loss of so many staff.

COMMISSIONER DUFFY replied no, there haven't been giant red flags in either of the departments, relative to the federal government's concern over this transfer of Title 16 permitting responsibility to DNR. He noted that over time, assessments will reveal whether additional activities will be necessary to ensure the efficiency of the permitting system.

REPRESENTATIVE GUTTENBERG questioned whether habitat protection and restoration was being left out of the organizational equation given that the habitat focus would be on permitting.

CHAIR SEATON wondered if this question pertained to the chart regarding transferring staff to the Division of Sport Fish and the Division of Commercial Fisheries.

REPRESENTATIVE GUTTENBERG expressed concern with the [Division of Habitat and Restoration's] focus on permitting, suggesting that this might put the relationship with the federal government at risk.

REPRESENTATIVE BERKOWITZ inquired about the percentages of time biologists spend on various duties such as permitting, restoration, and research.

Number 2835

MS. HOWARD, in response to an earlier question from Chair Seaton, explained that habitat biologists currently perform an array of duties and a biologist might spend 10 percent of his/her time on restoration, 30 percent on land-use planning, and the remainder on permitting. With the staff going to DNR,

permitting of 840 and 870 streams will be a critical component but review of land use plans, the Tongass Land Management Plan Revisions, ACMP consistency reviews, and an array of other land-use planning and review activities will also be important components. She referred to Commissioner Duffy's desire to establish clear communication pathways between habitat biologists whether working at DNR or ADF&G and regardless if the focus is on permitting or on land use plan reviews. Ms. Howard said that both commissioners want to have a memorandum of understanding (MOU) between biologists at DNR and ADF&G.

Number 2702

MS. HOWARD continued that regarding the relationship with federal agencies, the Division of Habitat and Restoration currently has between 60 and 100 memorandums of agreement/understanding with various entities, and many of those are federal agencies; obviously these will need to be revised, updated, and edited. For example, regarding a MOU which expired March 15th pertaining to fish passage issues in Southeast, a forest service official wrote to Commissioner Duffy this week and said, "We are aware that you are in a reorganization, we do want to continue working with the biologists that move to DNR. We know that you've got a lot on your hands. We're willing to continue with the agreement, extend it, revise it right away if that's your preference." She said the federal agencies have indicated interest in maintaining relationships with biologists both at ADF&G and DNR.

CHAIR SEATON asked where research projects involved with habitat restoration would predominately be assigned.

MS. HOWARD replied that the projects are spread out, and that some will go to habitat biologists at DNR, some to the Division of Sport Fish, some to the Division of Wildlife Conservation, and others to the Division of Commercial Fisheries.

CHAIR SEATON reflected that biologists would continue to have a "mixed mission." He asked if there was anything formally in place, such as the MOU, to assist the biologists at the two agencies in sharing knowledge on an ongoing basis.

Number 2345

COMMISSIONER IRWIN responded, "We would be very remiss if we didn't allow that continued cooperation between those groups also." He said this concern would be addressed in the MOU.

COMMISSIONER DUFFY added that a number of habitat biologists with vast experience would be moved to DNR, and would continue to require access to the most up-to-date information available. Crossover between the two departments would be necessary to ensure that the best permitting decisions would be made. He stated that given the professional nature of the people involved, he believes that there will be cooperation and coordination among staff. He said that for those who are critical of this change, the MOU will amplify and identify those communication pathways.

CHAIR SEATON said the House Special Committee on Fisheries would appreciate receiving a copy of the MOU.

Number 2041

REPRESENTATIVE KELLY WOLF, Alaska State Legislature, asked if the reference to habitat biologist was a reference to a "permitter."

MS. HOWARD responded that a habitat biologist is a permitter but he/she also performs an array of other responsibilities.

REPRESENTATIVE WOLF asked if a college education was a necessary requirement for habitat biologists.

MS. HOWARD replied that there are specific requirements for a habitat biologist; it requires a degree in the biological field, but not specifically a habitat biology degree.

REPRESENTATIVE WOLF asked if an environmental science degree would be sufficient for a permitter.

MS. HOWARD replied that she didn't have the PDQ requirements memorized but that the position requires a degree in a natural resource field, and depending on the level of the biologist, it also requires a certain number of years of work experience.

REPRESENTATIVE BERKOWITZ asked if the biologists going to DNR would continue to work in restoration and research.

Number 1902

MS. HOWARD pointed out that oftentimes the research function is done to gain knowledge in a specific area and is associated with monitoring a particular development project. In looking at the

array of research activities that will remain at ADF&G or be transferred to DNR, the intent is to split the jobs according to function. For example, a lot of stream-bank restoration is being sent to the Division of Sport Fish, whereas research associated with oil and gas activities on the North Slope is more closely associated with permitting and will be going to DNR. She said that a more detailed list could be provided to identify which functions would stay and which would be transferred.

REPRESENTATIVE BERKOWITZ said his overall concern was that the overall amount of restoration and research being done by a finite number of biologists would now be divided into two camps and that the number of biologists would be reduced. He said he was also concerned with the overall impact and cost; he asked about the housing costs involved with the anticipated move.

Number 1714

KEVIN BROOKS, Director, Administrative Services, Alaska Department of Fish & Game (ADF&G), testified that leases and other administrative details had been discussed by both agencies. He said the largest amount of people needing to be moved are the 12 individuals in Anchorage. He reported that in Juneau, about 8 people need to move and that there is room in the DNR building; those people are currently split between the headquarters facility and the regional office. In Fairbanks, a change is not anticipated immediately; those people will stay. The transition will take some time, so the move won't be completed by April 15th. Many smaller offices, such as the Petersburg or Prince of Wales Island offices, will remain the same.

REPRESENTATIVE BERKOWITZ asked if the 12 staff in Anchorage would need a new home, or would be transferred into new or existing state leases.

MR. BROOKS referred to the lease on Raspberry Road, where staff are squeezed into the ADF&G offices, and also to the Atwood Building, a state-owned facility at near-full capacity, housing DNR. He said the move could possibly result in a new lease but it has not yet been determined; initially work will be done within the constraints of using existing space.

REPRESENTATIVE BERKOWITZ commented that there would eventually be additional logistical costs involved with relocating

individuals. He asked to be kept informed of the estimates of costs as they came in.

REPRESENTATIVE WOLF offered that the Kenai River Center was a successful template of various agencies working together very well, and suggested using that as an example.

MR. BROOKS responded that the need for this type of cooperation was recognized in light of there possibly being a new area office in the [Matanuska-Susitna area], consisting of DNR staff and [Division of Habitat and Restoration] staff who were being transferred.

Number 1155

REPRESENTATIVE WILSON said she found the answers to the questions reassuring, and was pleased that an MOU was going to be written.

CHAIR SEATON expressed appreciation for the detailed answers, saying the graphic framework would be helpful, as would the clarification that due deference would still be applicable.

The committee took an at-ease from 8:10 to 8:15 p.m.

CHAIR SEATON announced that representatives from the industry were next on the agenda.

Number 0800

DALE KELLY, Executive Director, Alaska Trollers Association, testified that she represents hook-and-line salmon fishermen, which is the only fleet in the state actively managed under the Endangered Species Act for stocks of concern and for the Columbia River Basin, which, she said, have been devastated due to habitat destruction in the region. The association's interest is in the protection of key habitat and watersheds. The association doesn't know a lot about habitat permitting or the subtleties of proper staffing, but is concerned that the permitting process remain a good one, she said.

MS. KELLY said the current system is good because it contains a series of checks and balances between ADF&G and DNR. She mentioned that she represents salmon fishermen in state, federal, and international arenas who are concerned about EO 107 and other similar and related bills in the legislature. She reported that the current permitting process seems efficient,

with an average turnaround time of 14 to 15 days, which isn't the case in other state agencies, including DNR. She questioned whether the move will create efficiencies or inefficiencies because fewer staff will be available to do more work.

Number 0459

MS. KELLY testified that the association supports streamlining bureaucratic process and reducing governmental costs, but isn't sure this is the way to go. She noted that the two commissioners are doing very well with the direction given to them, and that an overwhelming concern is not whether ADF&G and DNR can establish a permit structure that makes sense; rather, she said the crux of the issue is this: "There is no commissioner authority that we can see for commissioner of [ADF&G] and, in fact, there is actually no direct authority. All of the Title 16 authority is being delegated to people below the commissioner of DNR."

MS. KELLY continued that establishing a system in which the commissioners aren't in control of the process hasn't been done in the state before, and she wondered whether it's been implemented in other states. She said that within the appeals process, DNR appeals would be elevated to the commissioner, but that would be a pretty extreme case. She said that within the existing system there are cases when commissioners have had to go "toe-to-toe and negotiate solutions," delegating authority to the lowest level that's practical - and that's good business, she added. She said that there's nothing within the structure that allows those commissioners to conduct meaningful dialogue while actually having the authority to make decisions. She pointed out that there is a never-ending appeals process in the ACMP and possibly there is a need to "get a grip on that and revamp that program." She said if the commissioner doesn't have the authority, there will be some difficult times.

MS. KELLY concluded by relating that the association would like to see the authority of the commissioner of ADF&G be re-engaged. She highlighted that because the agencies have different missions, the tension between the agencies is healthy and has brought about exceptional habitat values. Ms. Kelly said the association suggests that the governor take a step back, listen to people's concerns on all sides, and identify problems and solutions in order to come up with a well-formed, articulated plan. Otherwise, she said, the goals of an efficient and better-run government won't be achieved.

TAPE 03-20, SIDE A

Number 0001

REPRESENTATIVE GUTTENBERG asked what would happen if agencies couldn't negotiate among themselves.

MS. KELLY responded that if agencies couldn't negotiate, there would be a lot of litigation and unhappy people; either an administrative or judicial appeals process would be the end result.

CHAIR SEATON asked if the MOU between DNR and ADF&G would potentially re-engage authority to the commissioners.

MS. KELLY said she has learned that one doesn't really know what is contained in an MOU until it's been written; she questioned whether an MOU could "top a statute."

Number 0201

CHAIR SEATON commented that the idea is that the MOU would re-engage not only the habitat biologists, but also the commissioners; he said this concern would be passed on to Commissioner Irwin.

Number 0256

EARL CHAMPION, Silver Bay Logging, testified that he's lived in Alaska for almost 30 years and that most of his professional career has involved private industry projects and the development of natural resources. He relayed an experience he had in obtaining a permit and explained that in the current permitting process, after one completes an application and delivers it to the [Division of Governmental Coordination (DGC)], it gets distributed to other agencies needing to review it, with the general rule being that a response will come within 50 days. In this particular example, when it was nearly 50 days, the [Division of Habitat and Restoration] advised DGC that there hadn't been sufficient time to review the application and more time was needed. After being informed, "that the clock stopped," notification was received two and one-half weeks later, specifying the conditions that were needed for this permit. He reported that instead of 50 days, it took 4 months to get this permit.

MR. CHAMPION further explained that this was the 6th or 7th time that the barge had been permitted to do the same thing. He said

that he had to become his own advocate to make the permit move, and told the committee that "government is here to serve the applicant" and that he's interested in streamlining the permitting process. He suggested that by bringing this "under one house," the delays would be minimized. The permitting laws would still need to be followed, but streamlining the process would get it closer to "one-stop shopping."

CHAIR SEATON said the legislature would probably be developing missions and measures for the department and looking at the success of the department regarding timelines and delays.

REPRESENTATIVE WILSON said that Mr. Champion's testimony was "something real to hang our hat on," and could be used to measure whether the proposed changes would make a difference.

REPRESENTATIVE GUTTENBERG asked if Mr. Champion noticed anything specific in the proposed changes that would make it easier to obtain his permit.

MR. CHAMPION replied that [he wouldn't know] that answer until he experienced the changes.

Number 0854

PAUL SHADURA, President and Acting Executive Director, Kenai Peninsula Fishermen's Association, said the association is not opposed to the change within the divisions, but wants to be assured of accountability and of there being adequate protections to spawning streams, and to anadromous and non-anadromous resident species. He reported that the Board of Fisheries recently adopted a statewide wild trout policy in conjunction with a sustainable fisheries policy, and that habitat is a main concern. He said he was unsure of how DNR would relate to the Board of Fisheries' recommendations.

Number 1145

MR. SHADURA referred to AS 16.05.870, and read: "The commissioner shall, in accordance with AS 44.62 (Administrative Procedure Act), specify the various rivers, lakes, and streams or parts of them that are important for the spawning, rearing, or migration of anadromous fish." He said he understands that this duty will go directly to the new deputy director, and he questioned whether the person in this new position would have the necessary qualifications and expertise to discern biological, developmental, and conservation issues. He said

that there must be a way for ADF&G to have some say in the permitting process. He referred to [Article III, Section 26], noting that the governor did appoint a commission to do this job. He suggested the establishment of a commission to approve of permitting; the commission could be confirmed by the legislature and would include a qualifications review. Deputy commissioners and subordinates are not reviewed by the legislature, he added.

MR. SHADURA continued that another issue pertained to the anadromous fish catalogue, saying that those functions will go to DNR, yet fish streams surveys and databases will be compiled by the Division of Sport Fish. He expressed concern that evaluations will be made by people who do not have habitat expertise. He said it seems like the Division of Sport Fish will be designating the anadromous streams and resident areas for resident populations, and he's not sure how this dual system will function. He concluded by saying that he hoped his concerns would be alleviated by further testimony.

CHAIR SEATON noted that DNR was writing down the questions that were being generated during the meeting and that hopefully DNR would provide a response to Mr. Shadura's question about how the Board of Fisheries would relate to the DNR.

Number 1758

FRANK RUE told the committee that he served as the Commissioner of ADF&G for the past eight years and before that he was the ADF&G habitat director for seven years; for nine years prior to that he was a resource manager for DNR. He referred to his written testimony and testified as follows:

I do not support EO 107 and urge you to disapprove it and instead work with the administration and the public to address any real or perceived problems with the ADF&G administration of the Anadromous Fish Act, the Fishways Act, and the FPA.

I am submitting, for the record, two letters, one signed by the last five commissioners of [ADF&G] to Governor Murkowski and one from me to Representative Gara. I believe they are both relevant to your deliberations.

Tonight I will limit my remarks to the two reasons the administration has given to justify this move. I

believe these two issues are related to the success or failure of this structure.

First, that this restructuring will lead to a more efficient and streamlined permitting process; and second, that DNR will maintain the same level of protection as ADF&G.

If this move is about efficiency, or removing layers of the bureaucracy, I don't see it. You could reduce three regional supervisors to one operations manager in the name of efficiency and leave the function in ADF&G. You can cut deputy directors and biologists in the name of efficiency and leave the function in ADF&G.

The fact is that the vast majority of projects that require an anadromous fish habitat permit or a fishway permit are single-permit projects and require no other authorization. Those permits are issued in an average of just 14 days, so what layers of bureaucracy are being removed and what timelines are being sped up by moving the function to DNR? I don't believe any.

Number 2126

MR. RUE continued:

Projects that do require more than an ADF&G permit seldom require a DNR permit too. The Corps of Engineers and ADF&G are far more likely to issue permits for the same project, so what duplication is being removed? None, in my opinion.

Forest practices-related culverts do not require a permit from DNR. The timber industry was very adamant that there be no FPA permits. The only permit needed by a timber company for a culvert is an ADF&G permit. Here again, no duplication is removed by putting DNR in charge of fish habitat as opposed to having ADF&G.

The second issue is that if the level of protection is to be the same under DNR as it is under ADF&G, then why make the move? In fact, this move is about weakening the standard of protection for Alaska's salmon, trout and other fish.

There are several reasons I believe the level of protection will be lower under DNR than it has been under ADF&G.

Start with the different missions of the two departments. DNR is focused primarily on developing renewable and non-renewable resources on state lands - oil and gas; minerals; timber; agriculture and parks. It is expressly not responsible for management of Alaska's wildlife or development of its fisheries.

Fish and Game is responsible for managing fish and wildlife for the sustainable use and enjoyment of Alaskans.

What this means in reality is the commissioner of DNR gets out the cut and the commissioner of fish and game gets out the catch.

Number 2302

MR. RUE continued:

The ADF&G commissioner goes to work every day, responsible for Alaska's commercial, sport, and subsistence and personal use fisheries. These are fisheries people who need to feed themselves and their families and they generate close to a billion dollars in income each year. They employ more Alaskans than any other sector of the economy.

When faced with a development project that could impact important fish habitat, who do you think will have greater concern and determination to make sure that habitat is protected?

The commissioner of ADF&G, who is responsible for all the fisheries in the state; who knows that habitat protection is one of the foundations of sustainable fish and wildlife management; who knows that he or she will fail the fishermen of Alaska if habitat is lost?

Or, under the scheme of EO 107, a deputy commissioner in DNR, who has no responsibility to the fishermen of Alaska?

The level of protection will also be lower because a deputy commissioner in DNR, not the commissioner of ADF&G who is confirmed by the legislature, is the last administrative stop for anadromous and resident fish habitat decisions, outside of an appeal, apparently. Although, before, we heard something different.

Number 2356

MR. RUE testified:

A deputy commissioner in DNR, and not the commissioner of ADF&G, will decide what is "important habitat," what is "proper protection" and when fish passage is "necessary."

Instream habitat of king salmon, steelhead, and rainbow trout will have less stature in DNR than a potato. A potato at least has a cabinet-level DNR commissioner responsible for its well-being.

A deputy commissioner at DNR does not have equal standing with the commissioner of DOT or his own boss or the regional forester of the United States Forest Service (USFS) to bring issues to their attention and effectively argue for fish habitat protection. Fish habitat will lose out.

I have 23 years of experience at DNR and ADF&G negotiating the FPA; negotiating with DOT, as transportation projects are built to protect fish habitat; negotiating oil and gas stipulations on state and federal leases; working to keep trees important to stream habitat in buffers; and working to protect critical wildlife and fish habitat in state and federal forest plans.

I can guarantee you from my experience, that ADF&G commissioners will care more and have a higher standard of protection for fish than will a deputy commissioner at DNR.

Number 2541

Mr. Rue continued:

The level of protection will be lower because 22 people have been cut from the [Division of Habitat and Restoration]. The workload has not gone down; time in the field will.

Will the remaining positions that go to DNR be biologists now and in the future? They don't have to be under the order; they could be resource managers, foresters, or hydrologists rather than trained fish habitat biologists.

The level of protection will be lower because the biologists who are left at DNR will be isolated from their peers at ADF&G's [Division of Commercial Fisheries and Division of Sport Fish]. One operations manager, instead of three knowledgeable regional supervisors, will be responsible for the biologists and issues from Barrow to Ketchikan.

It is curious that the governor wants less and not more supervision and support for these same biologists he accused of having personal agendas.

None of this makes sense unless you want less protection for Alaska's fish and easier, cheaper development of timber, roads, and mines that will impact salmon and trout.

Number 2634

MR. RUE testified:

There is an alternative.

If you want the same standard of protection, leave the function of fish habitat protection in ADF&G. If the legislature agrees that positions should be cut from the [Division of Habitat and Restoration], you can do that and keep the function ADF&G.

If the legislature feels that the policies ADF&G uses to implement the Anadromous Fish Act and the Fishways Act need to be changed, that can be done by working with the administration and the public to implement regulations. Commissioner Irwin probably wasn't aware of this, not many people are, but ADF&G has tried, twice, to adopt detailed regulations on 870 and 840

and both times the DNR prevented them from going public. That way, Alaskans will have more say about how much or how little protection they want for Alaska's salmon and trout habitat than they will if EO 107 is allowed to go into effect.

I do not think there is a way for the legislature to make a silk purse out of a sow's ear. EO 107 is a sow's ear for Alaska's fish despite the best intentions of the current commissioner of DNR. Please work to reject EO 107.

Number 2803

REPRESENTATIVE WILSON said that the committee would be awaiting responses to some good questions that had been brought up in Mr. Rue's testimony.

REPRESENTATIVE BERKOWITZ stated that the development of Alaska's resources will play a critical role in the state's economy in the foreseeable future and that the development of those resources is dependent upon federal cooperation. He asked Mr. Rue about the importance of having a strong, viable habitat division in order to maintain positive relations with the federal government, that is, to develop resources, and to "keep at bay those lawyers who would otherwise seek to prevent development of the resources."

MR. RUE replied that this was an issue when he was commissioner. He said that regarding involvement by federal agencies, ADF&G's attempts to maintain the existing fisheries has enhanced the state's credibility in the permitting process. Similarly, [many] private citizens or groups concerned about fish have agreed with ADF&G's approach and have not pushed for appeals.

MR. RUE cited the Fort Knox [gold] mine and the North Slope as examples of good projects. He referred to the desire by federal agencies, to turn huge gravel pits in the North Slope back into moist tundra. Because the [Division of Habitat and Restoration] made it clear that this wasn't a reasonable request, the federal agencies backed off and those pits are now lakes - fish habitat. Trust has been established because of ADF&G's reliability in "looking out for the interests of fish," and under the new structure, he said he didn't know if, in the long run, this would continue to be the case.

Number 3230

CATHERINE POHL said she was speaking on behalf of herself and told the committee that she was a habitat biologist with ADF&G and could offer a view from the field. She provided the following testimony:

EO 107 will not result in streamlined permitting. It will gut habitat protection and degrade habitat. It will also discredit the state, create chaos, inefficiency, and delays. And it may endanger economically important negotiations. To meet your mandate of sustaining the state's productive and valuable fisheries resources, I believe you will need to reject EO 107.

I believe the public does not want the consequences of EO 107. Unfortunately, few may understand those consequences. To understand, you need to look closely at how habitat protection happens, and how that will be affected by organizational structure and by staff levels.

Number 3401

MS. POHL continued:

There will be a loss of accountability since EO 107 strips ADF&G of its authority for habitat protection, but not its responsibility. We all know that when authority and responsibility don't line up, things go wrong. It's a classic management tenant. The deputy commissioner from DNR would not be subject to legislative approval and DNR would not be responsible or answerable in the same way to fisheries stakeholders. Not answerable in the same way that you are or that [ADF&G] is. This sounds like philosophy but it is really important, given the flexibility of the statutes. A commissioner charged with protection and management of fish and wildlife, and their habitat, and subject to legislative approval, is needed for accountability. And that accountability is essential for effective habitat protection.

So how would that work on the ground? Title 16 fish habitat protection statutes are narrow in scope, but open and discretionary tools for providing protection more than requirements. There are no Title 16

permitting regulations, just policy and statute, so commissioner-level commitment, expertise, and accountability are essential. There could be dramatic losses to fish passage and spawning habitat, and still strictly meet the minimum "requirements of the statute" - if the power to protect, itself, is not effectively invoked.

Number 3496

MS. POHL continued:

It appears that this is exactly what the administration has in mind, given the staff cuts and recently drafted legislation. This legislation proposes changing general concurrence projects, such as Title 16 permits, into general permits. The majority of Title 16 permits would then have no review, and no site-specific conditions. That is a recipe for disaster. Older USFS road crossings would be an example of where that kind of approach leads. Seventy percent of surveyed national forest culverts fail to meet fish passage standards.

What does the change in authority mean to other habitat protection outside the stream bank? There's been talk about that this evening which was confusing to me, and perhaps to some of you as well. ACMP standards and review provide our only real protection for riparian buffers outside of the FPA. It allows us to avoid, minimize, or mitigate effects on key habitat through project review. That's a big part of my job now, but a part that will go away on May 1st. I say that because we've had to prioritize our workload due to extreme staff cuts. The ACMP part of it, and that includes buffers, protection for eelgrass, tideland fills, estuaries, near-shore habitat: No review. Other than fish passage, nothing is more important to the future of Alaska's fisheries.

Number 3658

MS. POHL continued:

If there's no statutory or regulatory requirement to review such projects at all, let alone to review them in a way that protects important habitat, concurrence

is assumed if there's no objection in the ACMP review process. So the bottom line is that commissioner-level commitment and accountability are just essential for habitat protection, beyond the stream bank as well as within the stream bank.

There's no indication that habitat protection outside of ordinary high water will happen at DNR. Proposed legislation makes clear that the intention, despite statements otherwise, such as "no change in substantive environmental requirements," is to eliminate even the basic, modest, habitat protection the state can now provide for stream buffers, productive tidelands, and nearshore waters, crippling state review projects on federal land as well as urban areas. If habitat protection remains a goal of the state, the legislature will need to assure, through its own authority, that habitat protection is placed in the hands of an agency and a commissioner that can protect the use and enjoyment of fish and wildlife through its implementation of statute and regulation.

Number 3809

MS. POHL continued:

Ironically, other agencies will continue to look to ADF&G for habitat guidance. ADF&G consultation is hard-wired into their permits. Yet there is no provision for this role in the proposed reorganization plan. It is as if the proponents of EO 107 are blind to the current scope of review that supports the mutual habitat protection goals of municipalities, federal agencies, and the state. Mr. Rue mentioned some of those examples. He mentioned our role in the core permit process. You could also add in all kinds of municipal permit reviews, setback variances, restoration plans, wetland fill, and subdivisions. There is also the FERC (Federal Energy Review Commission) process, smoothing the way for federal permitting. Loss of ADF&G's role in the FERC hydropower process may lead to roadblocks with the federal agencies.

Number 3905

MS. POHL continued:

We've also talked about the inefficiencies that will result from the loss of the close communication we now have with ADF&G biologists. Perhaps most important, with the demise of area offices, the efficiency that comes with knowing the ground and the players will be lost. It will be impossible to schedule frequent site visits to distant locales, and since we don't know these distant places, it will be impossible to issue good permits with minimal review. Delays will result. With the staff cuts, we will no longer be able to offer significant scoping early in project development, though early involvement is known to save time and money for the applicant. Unnecessary delays due to last-minute project modification are inevitable.

There are already considerable losses of funding for habitat protection, assessment, and restoration because many of the funding sources available for habitat work at ADF&G cannot be transferred to DNR. This unnecessarily impoverishes state habitat protection, and will lead to habitat degradation as well as permitting delays.

Number 4005

MS. POHL continued:

Approximately one-third of the state's permitting/project review staff received layoff notices. Southeast was hit the hardest. Five of the nine project review biologists were laid off. This represents over 50 years "on the ground" from Icy Bay to southern Southeast. If anyone could streamline, it would be these "master" permitters. They streamline. They know the country and the operators, and that's what it takes. What will be left will be a skeletal crew will remain to cover the entire Archipelago and outer coast to Cape Yagataga. What will this look like?

There is no way we can cover for even one of the permitters lost to layoff. Delays are inevitable with half or one-third of the permitting staff.

Compliance monitoring and post-project inspections will be a luxury we can't afford. And without monitoring and inspections, there is no accountability. Enforcement is time consuming. It requires a consistent field presence, as well as supervisory and legal support - not likely at DNR. And wide-ranging ADF&G management and research biologists, who do get in the field and are trained, will lose the ability to enforce for habitat. Most habitat protection occurs voluntarily, as it should, but that is due to our field presence, our current field presence, which provides education and continuing enforcement.

Number 4110

MS. POHL continued:

In addition to that loss of that field presence, and delays, you'll see a much-reduced scope of review - fewer projects reviewed, fewer issues addressed. You will see degradation of urban and forested landscapes. There is no sign that DNR will pick up ADF&G's review roles in municipal and federal projects. Perhaps the saddest part is that there are no real gains in this for industry, only losses.

Among the losses will be a loss of state credibility, handicapping long-term fisheries, subsistence, and development negotiations. Without hydro review, it may be hard for ADF&G to pass the "red face" test in treaty negotiations with our salmon-challenged neighbors to the south.

We are losing a generation of habitat biologists' expertise as well, crippling the state's ability to train new biologists and setting the state's habitat program capability back at least 10 or 15 years, even if the EO decision is reversed within weeks or months.

One thing I've learned from working as a habitat biologist is that most Alaskans care about fish and wildlife. They care a lot. Some say EO 107 is a runaway train. But I don't believe that. I have to believe that all of you and your colleagues need to do the right thing, that you want to do the right thing.

There is no tweaking, no Band-Aid to make EO 107 work.
Please support the resolution to overturn EO 107.

Number 4258

REPRESENTATIVE BERKOWITZ asked both commissioners for their assurances that biologists and others from the department who chose to testify would not be subject to any retaliatory action.

COMMISSIONER IRWIN replied, "That question was totally out of line. ... Of course we care about people." He said he knew Ms. Pohl had strong opinions against EO 107 and he complimented her for sharing her views.

[Commissioner Duffy indicated his concurrence with Commissioner Irwin's remarks.]

REPRESENTATIVE BERKOWITZ said he intended no offense, but wanted to encourage good dialogue on the subject matter. He asked Ms. Pohl about the impact of the removal of the biologists on the North Pacific Salmon Treaty.

MS. POHL replied that without hydro biologists' review of hydro projects, if hydro-related problems were to create loss of runs in British Columbia and the Pacific Northwest, the loss of credibility would become an issue. She said the state's habitat protection program has been a "strong suit" in negotiations on these issues.

Number 4530

REPRESENTATIVE GUTTENBERG asked about the loss of funding sources for ADF&G biologists.

MS. POHL replied that funds would no longer be applied to project review and habitat protection because those funds would need to remain at ADF&G even though the function of project review was being moved to DNR.

REPRESENTATIVE GUTTENBERG asked, "Why would that be?"

MR. RUE offered that the reason involved federal aid dollars such as the Dingle-Johnson and Wallop-Breaux funds; these funds couldn't be used for permitting because they go directly to the fish and wildlife agency [ADF&G]. He said he thought some money could go to DNR via RSA [reimbursable services agreement], through a rehire position to do instream flow.

TAPE 03-20, SIDE B

Number 4625

MR. RUE continued that those funds were used by the [Division of Habitat and Restoration] for project reviews. He said he didn't believe the federal aid office would allow those funds to be directed to DNR.

MS. POHL added that the issue was one of credibility with federal agencies because the agency with expertise in fish and wildlife is ADF&G. She said, "You'd be swimming upstream trying to convince them otherwise."

REPRESENTATIVE GUTTENBERG asked about the projected amount of federal dollars that would be lost.

MS. POHL deferred to management to answer that question.

Number 4536

CHAIR SEATON asked about developing missions and measures, in order to look at the loss of habitat protections such as eelgrass, for example. He said the committee would appreciate some way of measuring loss, and that this information would also give DNR the opportunity to make sure that "the loss isn't creeping."

MS. POHL responded that DNR's emphasis on Title 16 issues will probably continue but that with a reduced staff, the scope of projects would have to be reduced. She said that biologists have prioritized projects "from today forward, given the transition" and that the ACMP-type issues which don't involve Title 16 permits have fallen below the "can do" line. Regarding the question on performance measures, she repeated there is no "tweaking or Band-Aid that could make this thing work in an acceptable way." However, she said one could track incoming core permits, categorize, and enter those to a database, and note which involve productive tidelands, estuaries, [or] eelgrass. She pointed out this was problematic unless it was reviewed; it's the habitat biologists who review the information and determine which resources are affected. She said that at least by looking at the incoming notices and counting those that don't get looked at, one could guess at the amount involved with the most sensitive resources but "you will never even know what resources you're missing if these projects aren't reviewed."

Number 4205

STEVE ALBERT, Habitat Biologist, Division of Habitat and Restoration, Alaska Department of Fish & Game (ADF&G), testified that he has worked for the state for over 21 years, mostly as a habitat biologist, and wanted the committee to know that having "financial axes to grind" was not the motivation for his testimony. He referred to his written testimony and told the committee:

Today in Alaska we are facing the fiscal realities of a budget deficit. We stand at a crossroad - a major fork in the road. One road leads to rapid development of non-renewable extractive resource industries at any cost. Proposed administrative and legislative actions will completely dismantle environmental regulation, remove almost all opportunities for public notice and input, and place the final decision-making approval for development projects in the hands of a few.

The other road also has development of extractive resources but with measured growth, recognition of the economic values of renewable resource development such as tourism, sport fishing, and hunting, and the recreational values attached to our vast fish and wildlife resources. The economic value and number of jobs associated with this component of the economy far exceeds all other industries. Fish have returned to Alaska since the eons of time. Why would you want to risk these resources?

Number 4000

MR. ALBERT continued:

In the next 10-50 years, what will Alaskans do when the mines play out, the trees have been harvested, the waters dammed to provide power for industry, the oil and gas is depleted, and when all of our lands are (indisc.) disposed? In April 2002, [U.S.] Senator Ted Stevens said, "The day will come when oil and gas revenues will not be available. When that occurs, we will have our permanent fund, but we should also have in the meantime dedicated funds for preserving and protecting the revenue base of this state forever, and that is the fisheries resource. It is the resource that will sustain our state far into the future."

MR. ALBERT testified:

The proposed reorganization's tangible and intangible costs will be great but will likely be shifted to municipal governments, the general public, industries, developers, large and small, and private landowners. But where are the efficiencies and benefits? Presently habitat permits are free and fast. How will development project proponents, small and large, respond to DNR's \$200 to \$500 per permit fees in the future? How will developers respond to absorbing the costs of having to wait even longer for their permits? A little guy putting in a driveway culvert will be paying the same as a large timber company for their log stringer bridge permit. [Commissioner] Irwin has often referred to his business approach to managing state government. Any reasonable corporate manager would request completion of a detailed, long-term cost/benefit analysis before this reorganization is implemented. Any reasonable manager would identify the standards by which you, the legislature, and the public will be able to measure increased efficiency. Any reasonable manager would compare rates of regulatory enforcement at DNR and ADF&G. The legislature and the public need these elements to make an informed management decision.

Throughout this whole reorganization discussion, for months now, DNR Commissioner Tom Irwin, has heaped tons of praise on how the permitting process for his previous company was handled in the ADF&G Fairbanks office where the [Division of Habitat and Restoration] was a separate entity. As an example, he mentioned a water reservoir project for which his company needed an ADF&G permit. He stated that he received his permit in a very timely manner and the environment was protected and even enhanced. As a reminder to this Committee, the [Division of Habitat and Restoration] was a separate entity and the system worked. The system as it is right now works! It works for the public, to whom we are all responsible, for the fish and wildlife resources that they expect to be available for their use and enjoyment, and for all development projects, except for literally a handful

of ill-conceived or incomplete projects, proposed annually.

Number 3720

MR. ALBERT concluded:

I am not against development, I live in a house made of wood, I drive a car that requires gasoline, and I heat my house with natural gas. But I appeal to you to recognize that development at any cost over other societal values, without recognizing the concepts of sustainability and multiple use resource management is wrong, is poor public policy, and against the vision of the writers of the Alaska Constitution. I truly believe we can have reasonable development and maintain fish, wildlife, and water quality values. Balancing the budget while placing public resource values at risk is unacceptable.

Number 3645

BOB CHURCHILL, Member, Anchorage Fish and Game Advisory Committee, and Member, Executive Board, Alaska Fly Fishers, told the committee that for the past 2 years he was on the Southcentral Regional Advisory Council, the federal companion to the state advisory committee, and he also sat for 3 years on the Board of Game. He said he was familiar with public process and its importance in contributing to making good decisions; he suggested that EO 107 be debated in the House and Senate. He said that although salmon currently appear to be plentiful, due to their two-to-eight year cycle, damaging consequences can take a long time to show up. He asked that, in addition to salmon runs, issues involving resident species and other dependent wildlife be looked at and considered. He said that the "total dollar budget" needs to be examined to ensure that critical arenas such as salaries, work hours, trainings, transportation to sites, supplies, and equipment are included.

MR. CHURCHILL asked, "What kind of accountability have we established for these upper level, key managers who are going to make these decisions?" He mentioned that fly-fishermen travel to Alaska from all over the world and spend a lot of money because of the environment and [the resource]. He asked, "How is enforcement going to work?" He also expressed concern that a high level of accountability be built into the system for the

managers who will be accepting responsibilities regarding habitat.

CHAIR SEATON noted that accountability is difficult to measure and asked Mr. Churchill to send any specific suggestions for measuring accountability to the committee.

Number 3052

CLEM TILLION, Consultant, Aleut Enterprise Corporation, mentioned that he was a former legislator, a former chairman of the North Pacific Fisheries Management Council, and a former chairman of INPFC [International North Pacific Fisheries Commission]. He began by telling the committee his views on a variety of issues. He stated that he was supportive of EO 107, noting that he didn't believe that one had to be anti-conservation to be supportive of EO 107. He said that many of the witnesses were thinking of their "rice bowls" rather than of the actual need to "protect this or that." He mentioned that taxes had been raised in the fishing industry so that commercial fisheries would have the necessary budget, whereas the sport fishery received money through funds such as Dingle-Johnson and Wallop-Breaux. Mr. Tillion continued that he liked the idea of cutting the budget because we've "gotten too fat," and said he viewed this cut as a way of getting enough money to keep "the regular ADF&G going." He said he believes that the legislation requiring protection exists, and said, "Don't worry about who loses their job, worry about the job and the resource itself."

REPRESENTATIVE BERKOWITZ said opposition to EO 107 had more to do with the reality that the protections afforded to the habitat and the jobs of Alaskans who depend on the habitat would be adversely affected rather than there being a concern with protecting the "rice bowls" of 30 biologists.

CHAIR SEATON announced that the panel of public interest groups would be the next group to testify.

The committee took an at-ease from 9:30 to 9:32.

Number 2448

PAULA TERRELL, Alaska Marine Conservation Council, an organization of about 1,000 members, said its guiding principle is to promote, urge, encourage, and work towards sustainable fisheries. She began by saying there's a misunderstanding between Title 16 permitting and single permitting. She referred

to Mr. Champion's earlier testimony, explaining that his difficulty was with DGC, not with ADF&G. She said with EO 107, the governor indicated that the problem was not with single permitting but with multiple permitting. She said that the permitting horror stories do not always reflect instream permitting, Title 16. Ms. Terrell mentioned that the transition report indicated "they wished to see any decision about moving habitat to DNR deferred until a new commissioner could come in and a habitat director would come in that would then review the whole process." She questioned why the transition report wasn't being listened to.

Number 2037

MS. TERRELL referred to question 3, addressed earlier in the meeting, and said Commissioner Irwin's response didn't answer whether the site-specific visits, currently being done by habitat biologists, would be continued in the future. Ms. Terrell referred to the question, "What about a mission statement?" She suggested that a separate mission statement be made for the [DHMP]. She stated that DNR's goal is "to contribute to Alaska's economic health and quality of life by protecting and maintaining the state's resources and encouraging wise development of these resources by making them available for public use." Under [Sec. 16.05.020], the ADF&G commissioner is required to "manage, protect, maintain, improve, and extend the fish, game, and aquatic plant resources of the state in the interest of the economy and the general well-being of the state." Ms. Terrell said the aforementioned would be accomplished through rehabilitation enhancement and development programs; ADF&G must do all things necessary to ensure perpetual and increasing production. She pointed out that these two mandates [between DNR & ADF&G] are different.

Number 1755

MS. TERRELL continued that there was a difference of opinion regarding whether the Dingle-Johnson funds could be used outside of ADF&G and she asked for clarification on this. She questioned how the monitoring, enforcement, and compliance involved with the habitat biologists being moved to DNR would be managed; she asked how jobs could be done adequately when the number of available workers will be diminished. She inquired as to how the department will answer these questions before making a decision about EO 107. She suggested that a broader view be taken, with consideration given to ACMP and DGC, as well.

MS. TERRELL cautioned that fishermen currently function successfully with the Marine Stewardship Council's certification of Alaska's wild salmon. According to Bob Tkacz's "Laws for the SEA," certifiers will consider "what's happening with habitat" and, she said, without certification, "we are in dire straits."

Number 1328

SETH LITTLE, Alaska Center for the Environment, testified that this public-interest conservation organization has over 8,000 dues-paying members from around the state. He provided the following testimony:

We recognize the need to develop our state's resources but also to identify the responsibility to conserve and protect the state's fish and wildlife resources. In order to fully comprehend and assess the impacts of the governor's Executive Order 107, the missions of ADF&G and DNR need to be fully understood. They are very different. The [ADF&G's] mission is to protect and develop Alaska's fish and wildlife resources while DNR's mission is to promote development of the state's resources. These two missions balance each other, providing a system of checks and balances and an opportunity for fish and wildlife biologists to work with developers through the permitting process.

By moving the permitting authority, one agency is given primacy in the process of checks and balances that has been in place since statehood to manage Alaska's fish and wildlife resources and resource development. This is far more than a process change as it is a major substantive and statutory change. (Indisc.) requires applying knowledge of fish to individual conditions, which can cost far less to do the job right the first time, rather than to restore the habitat after it has been diminished.

Experience has shown that the direct involvement of biologists knowledgeable about fish and fish habitat in the review of culvert designs and installation plans is the single most effective means of preventing fish passage problems. This gives biologists the ability and authority to respond to both individual environmental conditions and the needs of operators.

Number 1156

MR. LITTLE continued that he had heard vague responses to the submitted questions, specifically to questions three and five, noting that the response to question five was "increased communication and teamwork." He referenced the MOU and questioned the long-term measures that would be in place at DNR and DHMP to ensure that fish and wildlife habitat would continue to receive the current level of scrutiny that is in place. He also asked about long-term measures to ensure that a high level of recruitment would remain in place, while taking into consideration lay-offs, retirement, and staff turnover. He wondered whether, similar to the [Department of Community & Economic Development], DNR could contract with private consultants to do the work of habitat biologists. He concluded:

Please do not let this executive order go through the legislature without a vote on the issue. Recent hearings and testimony have brought up far too many unanswered questions and concerns from members of the public for there not to be a legislative process and a vote.

Number 0758

BRUCE BAKER, President, Board of Directors, Southeast Alaska Conservation Council (SEACC), said that SEACC is a coalition of 18 volunteer conservation groups in 14 communities across Southeast Alaska from Yakutat to Ketchikan. He said that SEACC is dedicated to safeguarding the integrity of the region's unsurpassed natural environment while providing for balanced, sustainable use of the region's resources. He testified that SEACC agrees with much of the previous legislative testimony against EO 107. He told the committee that he served for 11 years as deputy director of ADF&G's [Division of Habitat and Restoration]. He provided the following testimony:

My primary question tonight is why the legislature would acquiesce to the relinquishment of the authority you've retained over fish and game habitat protection since statehood. We urge you to carefully consider the following points.

Number one. EO 107 reduces the authority and right of the legislature to influence executive management of the state's fish and wildlife by shifting the core statutory responsibilities of the ADF&G commissioner, an executive officer appointed by the governor and

subject to legislative confirmation, to a deputy commissioner of DNR appointed by the DNR commissioner and not subject to legislature confirmation.

The first Alaska legislature specifically assigned accountability for core [ADF&G] functions to the commissioner of fish and game. However, EO 107 assigns these core fish and game responsibilities to a deputy commissioner, a position not directly accountable to the legislature. Executive Order [107] is, therefore, constitutionally impermissible because it does not simply reorganize the functions of the executive branch but significantly alters those functions by assigning them to an executive official who is not the head of the department.

Secondly, EO 107 fails to specify any minimum qualifications for the DNR deputy commissioner. Section 23 of the order directs the state forester to "recognize the expertise of the deputy commissioner with regard to fish and wildlife habitat." However, Section 40 does not require the DNR commissioner to appoint a person with any expertise related to protection of fish and wildlife habitat as a deputy commissioner. In comparison, the [ADF&G] commissioner must be a "qualified executive with knowledge of the requirements for the protection, management, conservation, and restoration of the fish and game resources of the state." The executive order has transferred responsibility to a person with unspecified qualifications and unknown abilities.

Number 0525

MR. BAKER concluded:

In conclusion, unless a majority of the legislature in joint session disapproves of this executive order, it will: 1) reduce this and future legislatures' control over the state's fish and game resources by placing the core responsibilities for fish passage and habitat protection into the hands of a state official not directly accountable to the legislature. 2) It will also transfer responsibility for the protection of the state's fish and game resources from a qualified executive to, as I mentioned, a person with unspecified qualifications and unknown abilities.

We urge the legislature to put the long-term health of Alaska's fish and game, and the welfare of all the Alaskans who depend upon these renewable resources, ahead of any short-term political objectives.

Number 0324

GEOFFREY PARKER, Vice President, State Council of Trout Unlimited and Counsel to Alaska Sportfishing Association, testified in opposition to EO 107. He told the committee that he was on the Anchorage Fish and Game Advisory Committee for 20 years, had served on various planning teams for ADF&G and DNR, and was special counsel to the Senate State Affairs Committee under former Senator Mitch Abood. He explained that his testimony was divided into the following sections: general perspectives, what to do immediately, and eleven specific suggestions. He provided the following testimony:

For general perspectives on this, I'd like to offer [the following] eight.

First, we've heard from a number of legislators that they have received more public opposition on this topic than any other they can remember.

Second, every biologist who has appeared before any of these committees has spoken out against this transfer.

Third, as a matter of perspective, the governor has lost the factual arguments. He had two, (indisc.) relying on examples, but (indisc.) has been disproved by [ADF&G's] very efficient record. What you saw in the morning's paper was, chiefly, some new argument arising. But it makes sense to combine professionals in the resource arena. The problem with that argument is the budget cuts to DNR have eliminated many of the professionals there

Fourthly, take a look at the budget. We're going from ... \$12.4 million for ADF&G down to \$3.5 million for this habitat permitting function in DNR to perform (indisc.) [FPA] function, 870 and 840 functions, and the Coastal Zone Management functions that are currently in DGC. That will pay salaries, but won't do anything else. It won't pay for equipment, leasing, and so forth.

Fifth, look at the costs. DNR will basically be able to cover salaries but they will not be able to travel, and we will lose many of our federal funds.

Sixth, look at what's going to happen from a matter of perspective, with staff. Many biologists at ADF&G who are going to be transferred are already, apparently looking for other work. [Tape ends.]

TAPE 03-21, SIDE A

MR. PARKER continued:

DNR won't meet its staff needs, or is highly unlikely to do so. And ask yourself whether bright, young, professional biologists coming out of school are going to want to work for a management agency or be a permit (indisc.) They are going to want to work in an arena where they can publish and ascend in their careers. That would be ADF&G. You'll get biologists in DNR that are a lot like biologists in the Corps of Engineers [or] the Federal Highway Administration.

Seventh, take a look at where the effects of this change will most be felt. It will be here in Southcentral because that's where the permit load is greatest.

Finally, eighth, most importantly, we're talking about a billion dollar (indisc.) in direct ex-vessel value in the combined ex-vessel value of salmon plus sport fishing for (indisc.). Sport fishing, I want to emphasize, is now [worth] \$600-and-some million of first round of expenditure in the state. And rainbow trout, in just three drainages - the Naknek, Kvichak, and Nushagak - have surpassed in their dollar value, by direct expenditure, all the value of commercial salmon costs in Bristol Bay.

Number 0208

MR. PARKER continued:

Now I'd like to go to the next part of my testimony which is "What we should do now." ... Most of you don't want to embarrass the governor by rejecting this

proposal, which we urge you to reject. What you can do, short of that, is ask the governor step back, take time. There's nothing wrong with hearing more from the public and doing this later.

Now, the third part, and the final suggestions. First of all, if EO 107 goes into effect then ... I would suggest eleven possible amendments to the statutes.

First, I would put into statute a requirement that DNR adopt very strict regulations to implement 870 and 840. To remove the (indisc.) and make it clear that the statutes must fully protect fishery resources and that they will be strictly construed.

Secondly, I would address this in statute - qualifications of the deputy commissioner - and I would parrot AS 16.05.010 which requires that he be a professional with experience in the management of fish and game. I would (indisc.) qualify that 1959 statute to require that the person also have biological training as a fisheries biologist.

Thirdly, I would address the overall need for a mission statement for this deputy commissioner or this staff in DNR and that mission statement should be very straight, very specific, that there should be a no-degradation standard for our fisheries.

Fourthly, I would enact a requirement for a task force to report on how well this transfer is occurring. And I would put on that task force, by statute, what (indisc.) non-governmental agencies such as the American Fisheries Society, as well as ADF&G.

Fifth, I would modify the defense that exists in civil suits that a permittee who has obtained a permit is not liable in a civil suit for legal errors that have developed from the permit. I would modify that defense so that it would only exist if ADF&G concurs with the permit. That would create an incentive for a permittee to bring order to both (indisc.) himself from civil suits, for example, for public nuisance which exists in both the 840 and 870, to bullet-proof himself from damages claims if he has a permit that is signed-off on by ADF&G also.

Sixth, I would address penalty and damages provisions in both of these statutes, 840 and 870; (indisc.) and I would make clear that both are [public nuisance statutes]. And then I would make clear that both have an (indisc.) so that if DNR does not do this ... the public can. The great irony in 870, 840, and ... DNR statutes, (indisc.) a public nuisance to block a fisherman from having access to navigable waters, and yet, it's not a public nuisance to block the fish from having access to those waters? We need to fix that. You guys need to fix that.

Seventh, I would maintain the public interest exception to attorney's fees, liability, for suits that seek to protect fish in this context, of 840 and 870. You should not repeal those if you want to have an effective program at DNR because it is the public that helps these programs to be effective.

Eighth, I would model portions of these statutes after hazardous waste laws, in one specific sense. For a permittee, I would make a (indisc.) of interest in land that is subject to a permit while any of the events could go wrong on account of that permit. And you should do that if you are really serious about protecting this state's largest, most lucrative, renewable industry, which is fishing - commercial and sport.

Ninth, I would implement notice provisions in the statute that require [ADF&G] and responsible entities, specifically like the American Fisheries Society, to be (indisc.) no permit application.

Tenth, I would advise 870 and 840 to mimic the [FPA] in one respect. And that is to presume, just as the [FPA] presumes that a water body is an anadromous water body if it is connected to an anadromous water body ... you should know that 870 and 840 presume that a body, so attached, and having had characteristics of (indisc.), like the [FPA] says ... is also anadromous and presumably important. The reason that I emphasize "presumably important" is that 870 and 840 were drafted in 1959 and actually pre-date the territorial law, and by presuming that they are important, reflect modern fisheries (indisc.) genetic diversity being important.

Last, number eleven, I would move and (indisc.) in ADF&G, certain specific, limited, land-use planning and designation functions that are currently in DNR, so that ADF&G can administratively act and designate river corridors that are important for commercial, sport, and subsistence purposes and conserve them, so they will not be (indisc.).

Number 0926

COMMISSIONER IRWIN suggested, rather than continuing the meeting, that on behalf of himself and Commissioner Duffy, staff work together to combine notes and to compile a list of questions. He said those questions would be answered in a timely manner.

CHAIR SEATON concurred that this was an excellent idea, noting that addressing questions or common themes that had been brought up during the meeting would benefit the process.

ADJOURNMENT

There being no further business before the committee, the House Special Committee on Fisheries meeting was adjourned at approximately 10:15 p.m.