

ALASKA STATE LEGISLATURE
HOUSE SPECIAL COMMITTEE ON FISHERIES

January 23, 2018
10:01 a.m.

MEMBERS PRESENT

Representative Louise Stutes, Chair
Representative Jonathan Kreiss-Tomkins
Representative Geran Tarr
Representative Mike Chenault
Representative David Eastman
Representative Mark Neuman
Representative Zach Fansler

MEMBERS ABSENT

All members present

OTHER LEGISLATORS PRESENT

Representative Bryce Edgmon
Representative Dan Ortiz

COMMITTEE CALENDAR

HOUSE BILL NO. 199

"An Act establishing general fish and wildlife permits and major and minor anadromous fish habitat permits for certain activities; establishing related penalties; and relating to the protection of fish and game and fish and game habitat."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 199

SHORT TITLE: FISH/WILDLIFE HABITAT PROTECTION; PERMITS
SPONSOR(S): REPRESENTATIVE(S) STUTES

03/27/17	(H)	READ THE FIRST TIME - REFERRALS
03/27/17	(H)	FSH, RES
04/11/17	(H)	FSH AT 10:00 AM GRUENBERG 120
04/11/17	(H)	-- Delayed to 4/12/17 at 6:00 PM --
04/12/17	(H)	FSH AT 6:00 PM GRUENBERG 120
04/12/17	(H)	-- Delayed from 4/11/17 --
01/18/18	(H)	FSH AT 10:00 AM GRUENBERG 120

01/18/18 (H) -- MEETING CANCELED --
01/23/18 (H) FSH AT 10:00 AM GRUENBERG 120

WITNESS REGISTER

MATT GRUENING, Staff
Representative Louise Stutes
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Provided a proposed committee substitute ("Version N") and answered questions during the hearing on HB 199, on behalf of Representative Stutes, prime sponsor.

ACTION NARRATIVE

[10:01:42 AM](#)

CHAIR LOUISE STUTES called the House Special Committee on Fisheries meeting to order at 10:01 a.m. Representatives Tarr, Eastman, Neuman, Kreiss-Tomkins, Chenault, and Stutes were present at the call to order. Representative Fansler arrived as the meeting was in progress.

HB 199-FISH/WILDLIFE HABITAT PROTECTION; PERMITS

[10:02:53 AM](#)

CHAIR STUTES announced that the only order of business would be HOUSE BILL NO. 199 "An Act establishing general fish and wildlife permits and major and minor anadromous fish habitat permits for certain activities; establishing related penalties; and relating to the protection of fish and game and fish and game habitat."

CHAIR STUTES stated that as the first order of business for the year, the committee will be introducing a committee substitute (CS) for HB 199. She said that she is aware that the bill has generated a lot of discussion and interest, and she is excited to continue the discussion. She pointed out that the committee worked quite a bit on the bill over the interim, engaging the administration, industry, municipalities, and other interested stake holders to address concerns and suggestions. She said that as a result [of those efforts] many changes have been incorporated into the new CS. She said that she thinks the committee will find the bill has been significantly narrowed in scope compared to the version in committee last year. She admitted that there will likely be many more changes to the bill

and that her intent is to hold multiple hearings and hear testimony from industries, the administration, salmon advocates, and other interested entities so that the public process shapes this legislation. She encouraged all stake holders to engage in this process so there can be a true balance between responsible development and protecting the salmon resource that Alaskan's hold dear. She said she would entertain a motion to bring this CS before the committee.

[10:04:17 AM](#)

REPRESENTATIVE FANSLER moved to adopt the proposed committee substitute (CS) for HB 199, Version 30-LS0438\N, Bullard, 1/19/18, as a working document. There being no objection, Version N was before the committee.

[10:05:49 AM](#)

MATT GRUENING, Staff, Representative Louise Stutes, Alaska State Legislature, presented the changes made to HB 199 on behalf of Representative Stutes, prime sponsor. He began his presentation by stating that the old fiscal notes had been removed from the bill because of significant changes. He said the prime sponsor's staff are awaiting new fiscal notes and expects them to show less of an impact. He then introduced the document titled "Summary of Changes HB 199 Version J to N" [included in the committee packet]. He explained that this document was organized differently than others because there had been five drafts of the bill since the committee had last seen it. Wording in the new version is now different and many sections were completely reordered. He said his approach to the document was to identify a change and then state when "conforming changes were made throughout the bill."

MR. GRUENING stated that the bill creates a rebuttable presumption that certain areas are anadromous fish habitat and that this presumption triggers the Alaska Department of Fish and Game's (ADF&G) authority to issue fish habitat permits for those areas. He said the bill also creates a two-tiered permitting system containing minor and major anadromous habitat permits. He also pointed out that there has been a tendency for people to focus on major anadromous habitat permits, but approximately 70-80 percent of all permits will be in the minor category. He said that a minor permit can be issued on the same day and that this efficiency will not be impacted by the proposed bill. He also said that there is an opportunity for people to request reconsideration of a determination on their permit applications.

However, reconsiderations may be denied because the commissioner typically relies on the same information that he used when making the initial determination.

10:08:26 AM

MR. GRUENING continued his synopsis of the bill by restating that most permits will be in the minor permit category, and he added that the category determination depends on the presence or absence of "significant adverse effects." He said that he would go over that issue where it is specifically defined in the bill. He summarized by saying that HB 199 creates enforceable standards and an increase in public process - two specific issues in the letter from the Board of Fisheries to the legislature. He pointed out that current Title 16 statutes state that the commissioner shall not issue a permit if it does not ensure proper protection of fish and game; however, proper protection of fish and game is not currently defined in statute. He also said the parts of the proposed bill dealing with "significant adverse effects" and "permits and mitigation" were the "meat" of the enforceable standards language.

MR. GRUENING pointed out that for minor permits, a determination by the commissioner must be posted online and include the reason for the determination. He said this requirement was a product of the desire to create better public process in habitat permitting.

MR. GRUENING stated that major permits will include a 30-day public comment period, and that although this requirement worried some individuals, it pertains to an issue the Board of Fisheries requested in its letter to the legislature. As such, he said it was appropriate to include better public process; a process that would allow opportunity to address local or regional concerns, as well as concerns from individuals acting on their own.

10:10:24 AM

REPRESENTATIVE NEUMAN asked if there was a way for the committee to look at the current regulations, to better understand the differences created by the proposed bill.

MR. GRUENING responded by saying that he can provide a brief synopsis of the types of permits, types of activities, and waterbodies, but for detailed explanations he would defer to the people available online. Nonetheless, he said ADF&G basically

uses an "841 permit," which falls under the Fishway Act, AS 16.05.841.

[10:11:34 AM](#)

REPRESENTATIVE NEUMAN suggested to Chair Stutes that he go over this information with staff at a different time to avoid interrupting the day's schedule.

[10:14:09 AM](#)

MR. GRUENING began his presentation of the Summary of Changes document with the changes in the bill title, on page 1, lines 1-3, in Version N. He said lines 1-2 in the previous version of the bill included the language, "An act establishing general fish and wildlife permits and major and minor anadromous permits for certain activities"; however, in Version N the phrase "general fish and wildlife permits" was deleted. He said that this change occurred because the former "general fish and wildlife permit" has been relocated as a subset of the new "minor andadromous permit". He also said the terms "other fish" and "wildlife" were removed throughout the bill because it was Chair Stutes intent that HB 199 be an anadromous fish Act. He stated that comments from industry and stakeholders indicated that the term "wildlife" was vague. He said that while most of these changes have been made to Version N, there are two locations where these terms have not yet been removed. The term "other fish" is on page 14, line 21, and "wildlife" is still present on page 14, lines 23 and 24.

[10:16:06 AM](#)

MR. GRUENING said that he identified all other instances where "other fish" and "wildlife" were removed from the bill, so committee members could form their own opinions based on the context in which they are used.

MR. GRUENING said that the phrase "relating to fishways" was added to the title as a housekeeping measure to reflect the proposed repeal of AS 16.05.851. As an existing statute, AS 16.05.851 provides an exception to a Fishway Act requirement that the commissioner be notified when a dam or obstruction is placed in a fish bearing stream [and a fish pass is deemed impractical]. The exception allows a lump sum payment to the state's Fish and Game Fund and establishment or increase of onsite or offsite hatchery production. He said there is no intent for HB 199 to allow a situation where people could pay

money or start a hatchery if they blocked fish passage. [The proposed repeal of the AS 16.05.851 is both the previous version of the bill and the current Version N. The language "relating to fishways" was added only to Version N. In both versions of the bill, AS 16.05.861 has been amended to remove the references to AS 16.05.851 found on page 1, lines 8-9 and lines 13-14.]

[10:17:55 AM](#)

MR. GRUENING said the final change to the title was removal of the phrase "relating to the protection of fish and game habitat" and replacing it with **"relating to the protection of anadromous fish and other fish habitat."** This change occurs on page 1, lines 2-3 of Version N. He said this remaining reference to "other fish" and "wildlife" will be removed from the title if it is the committee's intent to do so.

REPRESENTATIVE NEUMAN suggested that there be further discussion at a later date on the removal of the language dealing with "other fish" and "wildlife", because of impacts to other aspects of the ecosystem, including plants.

[10:18:52 AM](#)

MR GRUENING moved on to the next set of changes identified in the Summary of Changes document, at 16.051.871 Determination of anadromous fish habitat. He first identified the changes in 16.05.871(a) located on page 2, lines 2-4, of Version N. He began by saying that the previous version of the bill required the commissioner to specify in regulation the "water bodies or portions of them" that are important anadromous fish habitat, including the waters that are covered under the presumption in 16.05.871(c) of Version N. 16.05.871(a) now designates "rivers, lakes, and streams", instead of "water bodies or portions of them", as the types of waters the commissioner must identify. He said that this was existing language from AS 16.05.871(a) and was consistent with waters already cataloged. He reminded the committee that conforming changes were made throughout the bill to reflect this.

[10:20:43 AM](#)

MR. GRUENING said that the term "important" was removed from 16.05.871(a) in the previous version of the bill because its use in describing "anadromous fish habitat" created a potential loophole that could allow individuals to avoid the permit requirement. Removal of the word "important" recognized that an

area would either be specified as anadromous fish habitat or it would not. He noted that this change was the will of prime sponsor and that conforming changes were made throughout the bill.

[10:21:25 AM](#)

REPRESENTATIVE TARR asked if there would be a conflict with the Anadromous Fish Catalog if this new language is adopted.

MR. GRUENING said that he is not 100 percent sure about this, but said he believed that this process will include changing language in the Catalog. Mr. Gruening said that the drafters also asked if the waters in the catalog were to be revisited, to determine what is and is not important. However, he said that there was no intent to revisit waters currently listed in the catalog.

[10:22:28 AM](#)

MR. GRUENING continued to the next set of changes identified in the Summary of Changes document, located at 16.05.871(b) on page 2, lines 5-13, of Version N. He said that the previous subsection (b) was deleted and a new subsection was inserted to clarify when the department should conduct a site-specific determination to determine if a river, lake, or stream is anadromous. In addition, it was not clear in the previous draft who would make the request for a determination, the type of information required to support the department's determination, or how the site-specific determination relates to the anadromous waters presumption.

[10:23:12 AM](#)

MR. GRUENING said that this change was for the point of clarity and to spell out the process in greater detail. He also said that the new wording requires that the department's determination be posted on the state's online public notice system.

[10:23:30 AM](#)

REPRESENTATIVE NEUMAN pointed out that a determination by the commissioner should be based on specific standards. He said that without standards "you have nothing to identify by" and a determination could change with different commissioners.

[10:23:55 AM](#)

MR. GRUENING responded by saying that the bill spells out standards for the commissioner to base a determination and that he could explain this when he presents the sectional analysis to the committee.

MR. GRUENING moved on to the next set of changes identified in the Summary of Changes document at 16.05.871(c), found on page 2, lines 14-23 of Version N. He pointed out that he had already mentioned one element of this modification, that waters presumed to be anadromous were narrowed from "permanent or seasonal surface water bodies" in the previous version of the bill to "rivers, lakes, and streams" in Version N. Rivers, lakes and streams presumed to be anadromous were further narrowed by the requirement that they be connected to waters already in the Anadromous Waters Catalog. He said it is a common-sense approach to presume an area is anadromous if it is connected to an area that has already been designated as being anadromous. He said the exception to this would occur when there is a barrier, such as a waterfall, that prevents fish from entering the area in question. In such cases, waters upstream of the barrier would be excluded from the presumption and waters below the barrier would be included. He then provided additional detail on this change, stating that the new presumption language mirrors that which currently exists in the Forest Resources and Practices Act (FRPA), with the exception that the FRPA uses a stream gradient to define a barrier to upstream fish passage. He added that under the FRPA, a stream gradient must be eight percent or greater to be considered a barrier to fish passage.

[10:26:04 AM](#)

MR. GRUENING said that use of the FRPA gradient of eight percent was rejected because recent scientific data shows fish can swim upstream in gradients that exceed eight percent; coho and chinook have been observed swimming upstream in gradients of 10 to 12 percent.

REPRESENTATIVE TARR asked if the permanent barrier could be a natural or a man-made barrier.

MR. GRUENING said a barrier could be man-made, but it would require a "major" permit. He concluded by saying the answer to Representative Tarr's question would be "yes and no."

REPRESENTATIVE KREISS-TOMKINS stated his understanding that downstream of a permanent barrier there is a rebuttable presumption [that the area is anadromous], and above a barrier it is assumed that the waters are not anadromous. He then asked if there was a mechanism to catalog an area as anadromous if fish are found above what was initially thought to be a barrier to fish passage.

MR. GRUENING said that mechanism is not currently in the bill; however, it does exist in the current permitting process. He said that ADF&G can make an anadromous determination if fish are discovered during any permitting project. He said that he has given this issue some thought and thinks it is "a little bit of a gray area" in the bill.

[10:28:11 AM](#)

REPRESENTATIVE KREISS-TOMKINS asked for confirmation on his understanding that this change "in a certain sense goes backward from the status quo just above these permanent barriers."

MR. GRUENING said that this is correct, although the FRPA currently has that presumption, and that it applies only above the barrier. He said that one difference between HB 199 and the FRPA, regarding barriers, is that the language in HB 199 refers to a "permanent physical barrier." He also said the issue of what constitutes a physical barrier is not clear, as it may, for example, be a beaver dam that may not completely block fish passage and may not exist from year to year. He said that "Other than what applies to the FRPA, that presumption does exist, but not for these types of permits right now."

REPRESENTATIVE NEUMAN asked how the issue of barriers would affect dams that are used by communities for water and electricity.

MR. GRUENING responded by saying that this question relates to Representative Tarr's question regarding natural versus man-made barriers. He said that he thinks the type of physical barrier needs to be fine-tuned in the bill. He added that although a permit would be required for a dam, it is not the intent of the proposed legislation to permit a dam project and then establish the waters above the dam as no longer being anadromous. He said that the Representative Neuman's point was well taken. He acknowledged there needs to be a distinction for this in the bill and suggested the committee could consider the issue "in the next round."

[10:30:22 AM](#)

MR. GRUENING pointed out that 16.05.871(c), on page 2, lines 14-23, in Version N states that the presumption includes "lands beneath" anadromous rivers, lakes, and streams, and this language was not included in the previous draft. He stated that it should be clear that the bed of a river is part of the anadromous fish habitat given that it is the site of egg deposition.

MR. GRUENING continued to the next set of changes identified in the Summary of Changes document, found in 16.05.871(d) on page 2, lines 24-26, in Version N. He said this new subsection states that the presumption established under 16.05.871(c) - that certain rivers, lakes, streams, the lands beneath them, and adjacent riparian areas are anadromous fish habitat - is applicable only to AS 16.05.871-901. He said this was added to clarify that the presumption applies only to fish habitat permitting law. He said there was a concern among the fishing community that the bill would affect the regulatory authority of the Board of Fisheries regarding fishery openings and closures near salmon streams. However, an opinion from the Department of Law eliminates this concern. He reiterated that HB 199 does not affect commercial, subsistence, or any other type of fishing. He said that the Department of Law's opinion is specific to fishery openings and closures, but there is another "fix" in the bill that addresses the concern that someone might need a permit to fish recreationally in a river. He said that these were technical aspects of the bill but they close loopholes and ensure that the bill does not pertain to fishing as an impact to fish.

[10:32:31 AM](#)

MR. GRUENING continued to the next set of changes identified in the Summary of Changes document, found in Sec. 16.05.871(e) paragraphs (1)-(3), in Version N. These changes are located on page 2, line 28 through page 3, line 3. He described these as structural changes intended to provide greater clarity.

MR. GRUENING stated that 16.05.871(e)(1) maintains the requirement that all waters identified under 16.05.871(a) will continue to be listed in the Anadromous Waters Catalogue.

MR. GRUENING stated that 16.05.871(e)(2) requires the department to develop regulations for conducting the site-specific reviews

and determinations under 16.05.871(b). He added that anyone can request a site-specific determination from ADF&G on an area presumed to be anadromous. He said this means that a presumption of an area being anadromous habitat "is not the final word."

MR. GRUENING stated that 16.05.871(e)(3) allows ADF&G to define in regulation the scope of the adjacent riparian areas that are considered anadromous fish habitat. He said that it seemed unusual that ADF&G cannot currently specify in regulation, or define, riparian areas important to streams already catalogued as anadromous waters. That authority currently resides with the Department of Natural Resources (DNR); therefore, there would be overlapping authority between the two departments on this issue if the proposed language is adopted. He said biologists should probably be the ones making this determination. In addition, he said that for purposes of expediency, the applicant would not have to go to DNR and initiate an additional process to request a riparian area be reserved for the protection of fish. He said that giving ADF&G the authority to designate riparian areas as anadromous habitat would create a direct connection between the biologists and their ability to accomplish their task of protecting fish.

[10:34:50 AM](#)

REPRESENTATIVE TARR recognized that they did not currently have fiscal notes before them but said she would like to see information in the fiscal notes regarding the number of site-specific evaluations that might occur given the proposed language in 16.05.871(e)(2) of Version N.

MR. GRUENING said that he would get back to Representative Tarr on that matter and make sure it is considered when drafting the fiscal note.

REPRESENTATIVE FANSLER brought attention to Mr. Gruening's statement that overlapping authority would exist between ADF&G and DNR under 16.05.871(e)(3) of the proposed bill, and he asked if Mr. Gruening could provide other examples where overlapping authority exists.

MR. GRUENING said that based on his discussions with biologists and staff at DNR and the Department of Transportation & Public Facilities (DOTPF), there are hardly any projects that don't have overlapping authority. He added that because DOT, DNR, and ADFG consider different types of lands and water in large

projects, they work together to complete segments of different permits. He said that this already occurs, but he would provide a specific list of permits and activities that require the interaction of these three departments.

REPRESENTATIVE NEUMAN noted that the Alaska soil and water conservation districts conducted a lot of research and monitored the quality of waterways. He wondered if "those folks" could be included in discussions on the bill.

[10:37:28 AM](#)

MR. GRUENING moved on to the next set of changes identified in the Summary of Changes document, found at Sec. 16.05.871(f), paragraphs (1) and (2), on page 3, lines 4-11, of Version N.

MR. GRUENING said Sec. 16.05.871(f)(1) narrows the definition of anadromous fish habitat and that this reflects the change in Sec. 16.05.871(a). He said that this is repetition of a change he identified earlier and that it defines the waters that fall under the presumption of anadromous habitat.

MR. GRUENING said that the change at 16.05.871(f)(2) was a point of much debate. It is new language, which states that a river or stream includes the foreshore, or intertidal, portion of that river or stream. This was included because it could otherwise be unclear where anadromous habitat terminates in the downstream portion of a stream or river. He said it answers the question of whether the habitat would include, for example, estuarine areas. He said the proposed language might deserve further consideration, but it seemed to meet the definition of what was intended.

[10:39:11 AM](#)

MR. GRUENING moved on to the next set of changes identified in the Summary of Changes document, at Sec. 16.05.875 Anadromous Fish Habitat Permit. These changes are found in Version N on page 3, line 12 through page 5, line 1.

MR. GRUENING said Sec. 16.05.875(a), on page 3, lines 13-16, refers to a new "general" minor permit that can provide an exemption to the requirements stated in 16.05.875(a), paragraphs (1) and (2). He said that the new general minor permit is a blanket permit for certain types of activities. He said that it is essentially for rural areas where there may be, for example, an all-terrain vehicle (ATV) stream crossing. This authority

allows the commissioner, without an existing permit or application, to permit certain types of activities under certain conditions on a regional or geographical basis. He can stipulate the conditions under which the activity may occur and the mitigation measures that must be taken. The commissioner may issue such a permit only if it does not adversely affect salmon habitat. He also said that the general minor permit differs from the regular minor permit in that there are a different set of standards regarding the types of activities and conditions that can be permitted.

[10:41:03 AM](#)

REPRESENTATIVE TARR said she wanted a clarification on the difference between the "general" minor permit and the "regular" minor permit. She stated her understanding that the regular minor permit is also at the discretion of the commissioner and that this new general permit is a "carve out" of a minor permit.

MR. GRUENING responded by saying yes and added that the general permit was not in the previous version of the bill. He said it existed as the general fish and wildlife permit, but the intent now is for a minor general anadromous permit, which is different in its standards in that it does not require anyone to apply for a permit. He reiterated his example of the commissioner issuing a regional or geographic permit for ATV crossings in a rural area. Regarding the differences in standards between the general minor and regular minor permits, he said that a general minor permit is more stringent, requires less of an impact to habitat, and could require someone to have written authorization from the department prior to engaging in the permitted activity. He said it would not apply in a situation where someone wanted a "blanket permit to drill 20 wells" in an area.

[10:42:55 AM](#)

REPRESENTATIVE CHENAULT pointed out that Mr. Gruening had mentioned "rural" several times regarding the use of a general permit, and he asked if the general permit could be used in municipalities such as the Kenai Peninsula, Matanuska-Susitna, or Fairbanks North Star Boroughs.

MR. GRUENING answered yes and said that he used rural areas as an example because that is where the typical concerns were present. He said that use of the general minor permit is not regional or population specific and it can be applied anywhere.

REPRESENTATIVE CHENAULT reminded the committee of Mr. Gruening's point that the Forest Practices Act has a different standard for defining a permanent barrier to fish passage. He asked if it would be possible to have the different statutes regarding this issue agree with one another.

MR. GRUENING said that would be up to the prime sponsor and that this was more a question of intent. However, he stated that the eight percent gradient in the Forest Practices Act was viewed as insufficient by the sponsor. He stated that he would be reluctant to speak to the Chair's intent on that matter without first discussing the matter with her.

[10:44:37 AM](#)

MR GRUENING moved on to the next changes identified in the Summary of Changes document, at 16.05.875(a) paragraphs (1) and (2). These changes are found on page 3, line 12, through page 5, line 1, of Version N. Mr. Gruening stated that Sec. 16.05.875(a) was a significant change from the previous version of the bill. He said that language in the previous version of the bill required a person to obtain an anadromous fish habitat permit before conducting an activity that "may use, divert, obstruct, pollute, or otherwise affect" a "water body or portion" that was specified as "important" anadromous fish habitat. The new version of this section mirrors wording in current statute AS 16.05.871(b) regarding what types of activities would require a permit. The bill now requires a person to obtain an anadromous fish habitat permit before "constructing a hydraulic project that uses wheeled, tracked, excavating, or log-dragging equipment in the bed of a river, lake, or stream" or "conducting an activity that has the potential to use, divert, obstruct, pollute, or change the natural flow or bed of a river, lake, or stream" if the area is identified or presumed to be anadromous fish habitat. He reiterated that this language stemmed from an effort to not "reinvent the wheel" on the types of activities that require a permit. He said that this change from the previous bill was not related to a specific request but was more related to the issues of enforceable standards and public process.

MR. GRUENING went on to say that this addresses another concern he had previously mentioned, that of unintended activities such as commercial or recreational fishing requiring a permit because they may be loosely interpreted as activities that may "otherwise affect a water body". He said that over the last 60 years, the term "use" has not been interpreted such that it

would include commercial fishing; therefore, it is unlikely it would be in the future. This was the reasoning that went into the decision to use existing statutory language in Version N when describing the activities requiring a fish habitat permit, rather than the language drafted in the previous version of the bill. He said that he wanted to make it clear to everyone that a lot of effort went into addressing this concern.

MR. GRUENING moved on to the next set of changes identified in the Summary of Changes document, found at 16.05.875(b), on page 3, line 30 through page 4, line 7 of Version N.

MR. GRUENING referenced the language in the previous version of the bill, Version J, on page 4, lines 6-14, regarding the requirement for an application. He said Version J referenced 16.05.883 regarding the requirements for an application. However, 16.05.875(b) under Version N references 16.05.883(a), to differentiate between a regular minor permit and the new general minor anadromous permit, established under 16.05.883(b) of Version N, which does not require an application or a permit and has separate conditions for issuance. He said that conforming changes, consisting of inserting 16.05.883(a) throughout Version N, make it clear that a reference was being made to the regular minor permit and not the general minor permit.

[10:48:20 AM](#)

MR. GRUENING moved on to the next set of changes identified in the Summary of Changes document, found at 16.05.875(f) on page 4, lines 25-30, of Version N. He stated that this change equates to the removal of the 30-day public comment period associated with the department's determination that an activity requires a major anadromous fish habitat permit. [The 30-day comment period associated with the issuance of a major anadromous habitat permit remains in Version N of the bill.] The comment period for the determination was removed because it seemed cumbersome and unnecessary given that it pertained only to the determination and because there would be a comment period for the issuance of the permit itself. He added that the comment period was removed in recognition of expediency regarding development.

[10:49:14 AM](#)

REPRESENTATIVE TARR pointed out that the 30-day comment period would occur earlier in the process than any other comment

period. She said that this would provide an earlier opportunity to identify concerns, and she asked if this was considered.

MR. GRUENING responded by saying that even without a 30-day comment period there would still be an opportunity to ask for a reconsideration of a determination. He added that the commissioner can respond to a reconsideration with a denial and that further reconsideration would have to occur at the [Alaska] Supreme Court. He said there is no opportunity to continually "stall out" a project.

[10:50:55 AM](#)

MR. GRUENING moved on to the next set of changes identified in the Summary of Changes document at 16.05.877 "Significant adverse effects." These changes are implemented in Version N on page 5, lines 2-23.

MR. GRUENING stated that the language in the previous version of the bill, Version J, at 16.05.877(a)(1), consisting of "impair the quality, quantity, or flow, of water necessary for a waterbody to support anadromous fish habitat", was deleted. He said that similar and more refined language now appears in Sec. 16.05.877(a)(3)(A) and (a)(3)(B) of Version N, on page 5, lines 11-14.

MR. GRUENING stated that 16.05.877(a)(3) of Version J was also deleted. He said that language had defined a "significant adverse effect" as impairing "the quality or flow of a water body that is not anadromous fish habitat but is necessary to preserve the quality or flow of a water body that is anadromous fish habitat". He said that the word "indirectly" had already been removed from the definition and this seemed to be consistent with that change.

MR. GRUENING said that 16.05.877(a)(5) under the previous version of the bill, Version J, was also deleted. He said that this section had defined a significant adverse effect as "adversely affecting other fish and wildlife that depend on the health and productivity of that anadromous fish habitat". He said that this was consistent with the removal of the terms "other fish" and "wildlife" throughout the bill. He reiterated that while "other fish" and "wildlife" are not unimportant, it was the intent of the prime sponsor that this be an anadromous fish Act.

[10:52:45 AM](#)

MR. GRUENING moved on to the next set of changes identified in the Summary of Changes document at 16.05.877(a)(1), found in Version N on page 5, lines 6 and 7. He stated that this was a new paragraph that defines a "significant adverse effect" as one that could interfere with the spawning, rearing, or migration of anadromous fish at any life stage." He said that this language comes from an old draft regulation, and that it speaks more to the biology of the fish than their habitat. He said there was a desire to balance habitat with biology.

MR. GRUENING moved on to the next set of changes identified in the Summary of Changes document at 16.05.877(a)(2), found on page 5, lines 8 and 9 of Version N. He said that in the previous version of the bill, the definition of a "significant adverse effect" included one that will "impede or prevent the safe, timely, and efficient upstream and downstream passage of fish to areas of anadromous fish habitat." He said this has been narrowed in the current version to: "impede the safe and efficient upstream and downstream passage of anadromous fish". He added that this was a common-sense modification, as the term impede means to prevent.

[10:54:12 AM](#)

MR. GRUENING moved on to the next set of changes identified in the Summary of Changes document, at 16.05.877(a)(3), found on page 5, line 10, of Version N. He indicated that the word "significantly" was structurally added so that it applies to subparagraphs (A), (B), and (C). The purpose of this was to create a higher threshold that would avoid interpretation of something very minor as having a negative effect.

MR. GRUENING moved on to the next set of changes identified in the Summary of Changes document at Sec. 16.05.877(a)(3)(A), found in Version N, on page 5, lines 11 and 12. He said that this is a new subparagraph that defines a significant adverse effect as "significantly impairing water quality or water temperature necessary to support anadromous fish." It is a reduction in the language used in the previous bill regarding significant adverse effects as it removes language pertaining to waters that are not anadromous habitat.

[10:55:24 AM](#)

MR. GRUENING moved on to the next set of changes identified in the Summary of Changes document at Sec. 16.05.877(a)(3)(B),

located in Version N on page 5, lines 13 and 14. He said that this is a new subsection that defines a significant adverse effect as "significantly reducing instream flows or altering the natural flow regimes necessary to support anadromous fish and anadromous fish habitat."

MR. GRUENING moved on to the next set of changes identified in the Summary of Changes document at 16.05.877(a)(3)(C), present in Version N, on page 5, lines 15-17. He said that the previous version of the bill was altered from "reduce aquatic diversity, productivity, stability, or function" to "significantly diminish the overall aquatic diversity, productivity, stability, or function of all or portions of a river, lake, or stream that is anadromous fish habitat." He said that use of the words "overall" and "significantly" raises the threshold at which an effect becomes adverse. He added that the language, significant adverse effects, does not infer that a permit will not be issued; it means that the project calls for a major permit rather than a minor permit.

[10:56:45 AM](#)

MR. GRUENING moved on to the next set of changes identified in the Summary of Changes document at 16.05.877(a)(4), found on page 5, lines 18 and 19, of Version N. This is a new subsection that defines a significant adverse effect as "creating conditions known to have adverse effects on, or cause increased mortality of, anadromous fish at any life stage." He said that this was another effort to not focus only on impacts to habitat but to consider impacts to the actual fish and their biology as well. He said that there may be instances where fish are being affected while there are no impacts to their habitat.

[10:57:29 AM](#)

MR. GRUENING moved on to the next set of changes identified in the Summary of Changes document at 16.05.883, found on page 6, line 18, through page 8, line 2, of Version N. This portion of the bill pertains to the minor anadromous fish habitat permit.

[10:57:34 AM](#)

REPRESENTATIVE FANSLER asked Mr. Gruening to revisit the statement Mr. Gruening had just made regarding new language in the current version of the bill originating from previously used definitions. He asked if the language Mr. Gruening was about to

explain to the committee had a similar origin or if it was new language.

MR. GRUENING said that he didn't know if the wording is the same as what had been used in a previous draft, as he did not have the draft document with him. However, he confirmed that it was language that had not been adopted in regulation.

[10:58:36 AM](#)

REPRESENTATIVE FANSLER said he appreciated hearing when new language is based on a prior draft or document. He said he would also appreciate a follow-up, in some manner, to show the committee the origin of previously used language.

MR. GRUENING said that there were many revisions to the bill and that is why he did not have this type of information on hand.

[10:59:07 AM](#)

REPRESENTATIVE CHENAULT pointed out that Mr. Gruening had indicated that some language had come from prior draft regulations, and he said he would be interested to learn where they originated and why they were not put forth in previous legislation or regulations.

MR. GRUENING stated that he would provide this information.

[10:59:41 AM](#)

MR. GRUENING returned to his explanation of the changes at 16.05.883 regarding minor anadromous fish habitat permits, found on page 6, line 18-page 8, line 2, of Version N. He said subsections (b)-(g) give the commissioner the authority to issue a general minor anadromous fish habitat permit for minor activities under certain conditions. Most of the language existed in the previous version of the bill but that it was under the general "fish and wildlife" permit section. It has now been renamed as the "general minor anadromous fish habitat permit." He said that, as referenced in the title change, the terms "other fish" and "wildlife" were removed, leaving only references to "anadromous fish" throughout this section. He said there were also several changes to the conditions under which the commissioner may issue a general minor anadromous fish habitat permit and he went on to explain these to the committee.

MR. GRUENING began his explanation of 16.05.883, at subsection (b), paragraph (1), found on page 6, lines 23 and 24, of Version N. He said that in the previous version of the bill, 16.05.873(b)(1) contained the language, "the activity, singly or in combination with other factors, poses little potential to significantly affect fish and wildlife habitat." He said that in Version N, 16.05.883(b)(1) states that "the activity will not cause significant adverse effects to anadromous fish habitat." He said that the reference to "other factors" in the previous version implied that there might be something other than the primary activity involved in the impact, and it seemed appropriate to "dial that down." He also said that it did not seem necessary to distinguish between activities singly and in combination, because it is understood that there may be more than one activity involved under a general permit. He said that this was a simplification and an attempt to avoid identifying "other factors" that don't have anything to do with the primary activity under consideration.

[11:01:54 AM](#)

MR. GRUENING identified the next change in the Summary of Changes document as a deletion from the previous version of the bill, on page 2, line 28. It consisted of language specifying that a general permit could only be issued if "the activity does not relate to industrial development". He said that this was deleted because industrial development was difficult to define and because there may be instances where the commissioner would want to issue a permit that was related to industrial development yet still not significantly or adversely affect fish habitat. He said there did not appear to be an opportunity for any loopholes with this change, as activities that adversely affect anadromous habitat could not be allowed under this permit. He said that this was a "clean-up" that allows the commissioner some discretion in how blanket permits are issued, and it lends toward not overly hampering development.

[11:02:52 AM](#)

MR. GRUENING continued with his explanation of the Summary of Changes document, moving on to 16.05.881(d) on page 7, lines 8-15, of Version N. He said the language on lines 8 and 9 was added to allow the commissioner to "issue a regional or geographical authorization for an activity subject to a general minor permit." The commissioner may also require a person to "obtain written authorization from the department." This language provides discretion for the commissioner to say whether

the permit will be a regional/geographical permit or if there will be a requirement to obtain written authorization from the department.

MR. GRUENING continued with the Summary of Changes document, moving on to 16.05.883(g) of Version N, on page 8, lines 1 and 2. He said that this subsection is new; it is seen "throughout the bill"; and was added to clarify that the definition of "anadromous fish habitat" is consistent with the rest of the bill.

[11:03:50 AM](#)

MR. GRUENING continued with his explanation of the Summary of Changes document, at 16.05.885 "Major anadromous fish habitat permit", found on page 8 of Version N. He said the first change under this section was at subsection (b), on page 8, lines 23-28 of Version N. He said that the previous subsection was deleted, and a new subsection was inserted. He said that the new language requires the commissioner or an applicant to collect the needed information for the commissioner to determine whether a proposed activity should be permitted as a minor or major anadromous permit. He said that it also provides the commissioner, at his/her discretion, with the ability to recover fees equal to the cost incurred by the department in collecting the necessary information to make the determination under subsection (a) of this section. Previously, this subsection had required the applicant to collect the information. The new language under Version N states that ADF&G will collect the necessary information and may, as opposed to shall, recover the cost of doing so. He said the new language was less prescriptive and provided more flexibility with the permitting process.

[11:04:54 AM](#)

REPRESENTATIVE NEUMAN said that the bill seemed to be giving the commissioner more discretionary authority over issuance of the permits. He said he sees a need for a structure because decisions can change politically or for other reasons. He said he would like to see "something in there that defines that, so that, whether it's asking other groups or getting other information, to me that just seems like a whole lot of authority for the commissioner (*indisc.*) without a structure of why and how the decisions were made."

MR. GRUENING asked for clarification on Representative Neuman's comment, asking if it pertained to the commissioner's discretion to require fees.

REPRESENTATIVE NEUMAN said yes, and that the legislative discovery process will allow the committee to "work through that."

[11:05:55 AM](#)

MR. GRUENING continued his explanation of the Summary of Changes document, moving on to 16.05.885(f)(2) subparagraphs (A) and (B), of Version N, on page 9, line 31 through page 10, line 7. He said that these are new subparagraphs that clarify how ADF&G will measure whether a project will cause substantial damage. Specifically, the language clarifies how the department will assess whether anadromous fish will recover to natural or historic levels after the project is completed. He added that this was another layer of definitions to aid in providing greater detail. He said that feedback from industry and others indicated that there was a lack of definitions in the bill.

[11:06:43 AM](#)

MR. GRUENING continued with the Summary of Changes document, addressing 16.05.887 "Permit conditions and mitigation measures." He said changes to this section were found in subsections (a) through (e), on page 12, line 4-page 13, line 10 of Version N.

MR. GRUENING said that in the previous version of the bill, the language of 16.05.887, subsection (a), paragraph (3) was deleted. It had stated that the commissioner may not permit an activity if it cannot be carried out in a manner that will ensure the proper protection of other fish and wildlife habitat. He said this was consistent with the intent to remove the terms "other fish" and "wildlife" from the bill.

[11:07:27 AM](#)

MR. GRUENING continued his explanation of the changes to 16.05.887(a), on page 12, lines 14 and 15, of Version N. He said that the language in the previous bill stated an activity cannot be permitted if it would "convert a wild fish population to a hatchery-dependent fish population". He said that language has been altered in the current version to: "will replace or supplement a wild fish population with a hatchery dependent fish

population". He said this change reflects the difference between the term "convert" and the phrase "replace or supplement". He said that the word "convert" basically means "replace"; however, the word supplement takes into consideration avoidance of introducing a hatchery stock into an existing wild population.

[11:08:19 AM](#)

MR. GRUENING moved on to 16.05.887(a)(4) on page 12, lines 16 and 17, of Version N.

[11:08:22 AM](#)

REPRESENTATIVE NEUMAN pointed out that there is discussion in the legislature to allow different organizations to work on projects that supplement fish habitat and to hatch eggs. He asked how that these projects would be affected if they "are not hatchery" and whether they would have to be regulated by ADF&G.

MR. GRUENING answered that this would not affect those efforts because the stipulations and mitigation measures would be in relation to an anadromous fish habitat permit being issued. It would only apply if the mitigation measures proposed to the commissioner include restoring or enhancing the affected stream with hatchery produced fish.

[11:10:27 AM](#)

The committee took a brief at-ease from 11:10 a.m. to 11:10 a.m.

[11:10:50 AM](#)

MR. GRUENING returned to the Summary of Changes document, at 16.05.887(a)(4) of Version N. He said that the previous version of the bill read that an activity cannot be permitted if it would "dewater or relocate a water body or a portion of a water body, for 5 or more years, that the commissioner has specified as important, or as presumed to be important, to anadromous fish habitat under AS 16.05.871(a)." He said that under Version N, 16.05.887(a)(4) now reads, "will dewater anadromous fish habitat for a period likely to cause permanent or long-lasting adverse effects to that habitat". He said that the phrase "5 or more years" was replaced with "a period likely to cause permanent or long-lasting adverse effects" to allow ADF&G more flexibility in determining the appropriate period. Feedback from the

department indicated that in some cases a period of 5 years may be too little and in others it may be too much.

11:12:08 AM

MR. GRUENING moved on to 16.05.887(a)(5), on page 12, lines 18 and 19, of Version N. This is a new subparagraph specifying that a permit may not be issued for an activity if it "will permanently relocate all or portions of a river, lake, or stream if the relocation will disrupt the migration or passage of anadromous fish."

MR. GRUENING interjected that under Version N, 16.05.887 "Permit conditions and mitigation measures." provides the "side bars" for the conditions when the commissioner may not issue a permit. He said that the conditions specified under this section must be met for a permit to be issued. He noted that while this section specifies when a permit may not be issued, 16.05.877 "Significant adverse effects." identifies whether the project requires a major or a minor permit.

MR. GRUENING resumed his explanation of 16.05.887(a)(5). He said this section was added because there were comments from multiple sources indicating that there will be instances where a river will need to be permanently relocated. Therefore, the phrase, "if the relocation will disrupt the migration or passage of anadromous fish", was added as a condition for those instances when it is necessary to permanently relocate an anadromous river.

11:13:31 AM

REPRESENTATIVE NEUMAN described a hypothetical situation where a river runs through an area selected for a proposed mine, and he asked Mr. Gruening if such a river could be relocated permanently if fish passage was not interrupted for a long period.

MR. GRUENING responded that the scenario described by Representative Neuman was conceivable. He stated that anyone or any industry including the mining industry could work with ADF&G and other agencies to relocate the river responsibly. He added that in the previous version of the bill, the concerns relating to the terms "dewater" and "relocate" were contained in one individual paragraph at Sec. 16.05.887(a)(5); however, in Version N, they are split into paragraphs (4) and (5) so that there could be a different standard or condition for each of the

two terms. He also added that he had met with the mining association and, while they had not mentioned an example like Representative Neuman's, the bill was crafted so that it would apply to mining operations as well.

[11:15:27 AM](#)

MR. GRUENING continued his explanation of the Summary of Changes document at 16.05.889 "Reconsideration of determinations." The first change he identified was at 16.05.889(a) of Version N, on page 13, line 13. He said that the phrase "person adversely affected" was changed to "interested person" for consistency purpose, as interested person was already utilized in the section dealing with the commissioner's initial determination. He added that the drafters of the bill had indicated to him that the two terms were not significantly different, as nearly anyone could say that they were adversely affected.

[11:16:48 AM](#)

MR. GRUENING continued with his explanation of the Summary of Changes document at 16.05.891 "Exemption for emergency situations.", found in Version N, on page 13, line 30. This section pertains to emergency situations where an oral permit may be issued for necessary instream work. The one change in this section was the addition of a "state agency" as an entity that may receive an oral permit for emergency situations. This change provided flexibility to the previous version of the bill, Version J, which identified only "a riparian owner" as the recipient of an oral permit.

[11:17:35 AM](#)

MR. GRUENING continued with his explanation of the Summary of Changes document, moving on to 16.05.899 "Applicability of permitting requirements.", found in Version N, on page 14, line 25 through page 15, line 11. He said that this new section is very significant because it contains the existing "facility, activity, operation, or project" exemption. He said that there was an intent in this language to be very broad and not exclude anyone. He quoted portions of the language from 16.08.889 which read in its entirety as follows:

Sec. 16.05.899. Applicability of permitting requirements. (a) Notwithstanding AS 16.05.875(a), and except as provided in (b) of this section, a facility, activity, operation, or project that has in

full force and effect, on the day before the effective date of sec. 3 of this Act, all required state authorizations relating to the protection of anadromous fish and anadromous fish habitat

(1) shall continue to be authorized under AS 16.05.871 - 16.05.901 and the regulations adopted under 16.05.871 - 16.05.901, as those sections and regulations read on the day before the effective date of sec. 3 of this Act, and may continue to renew those authorizations and obtain minor authorization modifications under AS 16.05.871 - 16.05.901 and the regulations adopted under AS 16.05.871 - 16.05.901, as those sections and regulations read on the day before the effective date of sec. 3 of this Act; and

(2) is not required to obtain an anadromous fish habitat permit under AS 16.05.883 or 16.05.885.

(b) The exemption provided by (a) of this section does not apply to a facility, activity, operation, or project that significantly expands or increases in scope, area, or frequency, or otherwise takes action outside, those actions for which it is authorized on the day before the effective date of sec. 3 of this Act.

MR. GRUENING said that in laymen's terms, the intent is for those permitted under the current law to stay under the current law, including for renewals, in perpetuity, unless they significantly expanded the scope of their permit. He gave an example of an expanded permit as a situation where a permittee might want to change a discharge point. In general, it would be a change that exceeds the scope of the original permit. He said that this section addressed concerns by municipalities and industry as well as others. He said that a specific concern from municipalities and DOTPF was the potential loss of the ability to permit mixing zones if the previous version of the bill was adopted as written. Mr. Gruening said there was intent to not overly burden municipalities at a time when they cannot afford it. In addition, he mentioned concern for oil and gas exploration companies with existing projects that have already been permitted. He summarized by saying that new activities would fall under the new proposed laws, and that the exemption for existing facilities seemed reasonable, as it had the least amount of impact for ongoing operations.

[11:20:00 AM](#)

MR. GRUENING stated that this concluded his explanation of the Summary of Changes HB 199 Version J to N document.

[11:20:20 AM](#)

REPRESENTATIVE EASTMAN asked if the term "interested person" is different in any way from any person, legally speaking.

MR. GRUENING answered by saying no, it is any person. He added that anyone can say they have an interest, legally speaking.

MR. GRUENING, in response to a question from Representative Neuman, offered his understanding that the term "person" will include corporations. However, he said that he needs to be 100 percent clear on this and will "triple check" it to be sure that his answer is correct. He also said that there is no intent under HB 199 for permit applications to be submitted solely by a person.

[11:21:35 AM](#)

CHAIR STUTES thanked Mr. Gruening for his presentation. She also reminded everyone of her previous statement indicating that there would be additional meaningful changes to HB 199 as the committee works through it. She encouraged committee members and stakeholders to reach out to her office if they have any ideas, concerns, or issues. She said a collaborative effort is needed to update Title 16; the intent of the legislation is not to diminish the value of any one resource in the state. She stated that the intent of the legislation is to maintain a sustainable, healthy, renewable resource in our fisheries; that is the crux of the proposed legislation.

CHAIR STUTES said she believes that by working with all the stake holders, the committee can develop a good document. She recounted, "you know what they say when you're in the legislature: "If you have a bill that everybody likes a little bit and doesn't like a little bit, you've got a winner.'" She said that HB 199 would be on the front burner and the committee will hear it plenty of times until everyone is comfortable with it and has had an opportunity to provide input and ask their questions.

[11:24:15 AM](#)

REPRESENTATIVE CHENAULT reiterated Chair Stutes' statement that there would be numerous opportunities for future hearings on HB

199, and he said that a number of people have questions for the administration and the departments that are involved in the bill.

[HB 199 was held over.]

[11:25:07 AM](#)

ADJOURNMENT

There being no further business before the committee, the House Special Fisheries Committee meeting was adjourned at 11:25 AM.