

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

February 6, 2018

11:17 a.m.

**MEMBERS PRESENT**

Representative Louise Stutes, Chair  
Representative Jonathan Kreiss-Tomkins  
Representative Geran Tarr  
Representative Mike Chenault  
Representative David Eastman

**MEMBERS ABSENT**

Representative Zach Fansler  
Representative Mark Neuman

**COMMITTEE CALENDAR**

PRESENTATION ON THE ADF&G PERMITTING PROCESS

- HEARD

**PREVIOUS COMMITTEE ACTION**

No previous action to record

**WITNESS REGISTER**

RON BENKERT, Habitat Biologist  
Division of Habitat  
Alaska Department of Fish & Game (ADF&G)  
Central Region  
Anchorage, Alaska

**POSITION STATEMENT:** Presented a PowerPoint on the permitting process by ADF&G.

**ACTION NARRATIVE**

[11:17:22 AM](#)

**CHAIR LOUISE STUTES** called the House Special Committee on Fisheries meeting to order at 11:17 a.m. Representatives Stutes and Tarr were present at the call to order. Representatives Kreiss-Tomkins, Eastman, and Chenault arrived as the meeting was in progress.

Presentation on the Permitting Process by ADF&G

11:18:22 AM

CHAIR STUTES announced that the only order of business would be a presentation on the permitting process by ADF&G [Alaska Department of Fish & Game]. She reminded members that a bill is not before the committee and to refrain from asking the presenter to comment on any permitting bill.

11:20:32 AM

RON BENKERT, Habitat Biologist, Division of Habitat (Habitat), Alaska Department of Fish & Game (ADF&G), Central Region, began his presentation on slide 1, titled, "Fish Protection Laws in Alaska; ADF&G Statutory Authority." The photograph on slide 1 depicts replacing a bad culvert with one that allows for fish passage, he said.

MR. BENKERT referred to slide 2, titled "Discussion Objectives" which read as follows [original punctuation provided]:

Provide an overview of ADF&G Statutory Authority for fish and wildlife habitat protection

Identify jurisdictional boundaries of our statutes

Practical application of ADF&G Authority - Fish Habitat Permits

11:21:40 AM

MR. BENKERT referred to slide 3, titled "Permits and Authorizations" and to a table listing the permitting agencies and area of authority for any anadromous fish bodies. Besides the ADF&G's Division of Habitat [often known as the "habitat division" or "habitat"], the agency that issues fish habitat and other permits, other agencies also issue permits and authorizations on projects, including the U.S. Army Corps of Engineers, the Department of Natural Resources (DNR), local governments, the Department of Environment Conservation (DEC) and land managers, such as the federal Bureau of Land Management (BLM).

11:22:27 AM

MR. BENKERT referred to slide 4, titled, "ADF&G's Role in Resource Development" which read, as follows [original punctuation provided]:

Protect Alaska's valuable fish and wildlife resources and their habitats as Alaska's population and economy continue to expand.

MR. BENKERT said that habitat biologists strive to find the balance between resource development and resource protection for habitats. The Division of Habitat's staff negotiate with applicants to ensure that project impacts are avoided or minimized prior to the issuance of permits. For example, an applicant may initially apply for a permit to install a culvert but after consulting with the division will decide to build a bridge to protect fish habitat. Incidentally, the habitat division has so few denials because applicants sometimes withdraw their applications rather than go through the denial process, he said.

[11:24:11 AM](#)

MR. BENKERT said that the Anadromous Fish Act in Title 16 has not changed since the early 60s, but "Habitat" has not been working in a vacuum. The division's biologists use tools such as working guidelines and technical reports to guide them. For example, new blasting standards help inform the division's permitting decisions. He added that the "Habitat Division" works with DOT&PF on culvert projects to ensure the pipe allows for fish passage.

[11:24:55 AM](#)

REPRESENTATIVE TARR asked who developed the new standards. She wondered whether the division has enough flexibility in its regulatory authority to respond to a new standard that is not generated by the department.

MR. BENKERT responded that there are a couple standards. He said he was just referring to the Memorandum of Understanding (MOU) with the DOT&PF relating to culvert standards for culvert replacement in fish-bearing streams. The Habitat Division and the DOT&PF are using the newer standards, for example increasing the size of the pipe. He emphasized that the DOT&PF has been very cooperative by using the cutting-edge standards from the Pacific Northwest. He said that the Juneau staff have

physically measured blasts near creeks to determine what will protect fish and fish habitat in salmon-bearing waterbodies.

[11:26:35 AM](#)

MR. BENKERT referred to slide 5, titled, "Workload Priorities" which read as follows [original punctuation provided]:

Title 16 permitting and enforcement  
Field work - research, inspections  
AWC surveys  
Large projects of importance to the State  
Forest Resources and Practice Act  
Special Area Planning

MR. BENKERT said the Habitat Division's top workload priorities focus on Title 16 permitting and enforcement. Examples of field work include inspections of culverts prior to diverting the stream. The division also conducts planning and research that helps the division make sound permitting decisions.

[11:27:34 AM](#)

CHAIR STUTES asked for further clarification on the types of enforcement or enforcement tools the division uses.

MR. BENKERT described the enforcement process; for example, if the division discovers an egregious violation that needs to be enforced, the Habitat Division will work with the Alaska Department of Public Safety (DPS), Alaska Wildlife Troopers (AWT). He clarified that environmental crimes often are civil crimes. The Habitat Division generate a notice of violation, stating the violation, [which often falls under AS 16.05.871, the Anadromous Fish Act], and the DPS, AWT then serves the party.

[11:29:38 AM](#)

MR. BENKERT reviewed slide 6, titled, "ADF&G Statutory Authority Fish Protection" which read as follows:

THE FISHWAY ACT  
AS 16.05.841

ANADROMOUS FISH ACT  
AS 16.05.871

SPECIAL AREA PERMITTING  
5 AAC 95.970

FISH RESOURCE PERMIT

Required for handling or transporting fish during dewatering or diversion (Division of Sport Fish)

MR. BENKERT explained that the Fishway Act relates to any fish-bearing water body; however, it does not need to be an anadromous stream. He reported that "anadromous" fish are not limited to salmon, but include species such as pacific lamprey, hooligan, whitefish, and sticklebacks. He stated that the Alaska Department of Fish & Game (ADF&G) also issue permits for those conducting research.

[11:31:12 AM](#)

MR. BENKERT reviewed slide 7, titled, "Fishway Act" which read as follows [original punctuation provided]:

Fishway Act requires that any obstruction built across fish-bearing waters will provide for fish passage

Jurisdiction

Applies to all fish bearing streams (resident and anadromous) and all fish species.

Requires long-term commitment to operation & maintenance

Applies to fish passage only

Activities not covered by .841

Projects that don't have the potential to block passage

Docks, streambank protection, motorized stream crossings, etc.

[11:31:57 AM](#)

CHAIR STUTES asked if there are any exceptions to the fish passage requirements under the Fishway Act.

MR. BENKERT answered no; that fish passage is always required. He explained that if a potential blockage of fish passage occurs, the division will work with the applicant to ensure that the design will not block fish passage. For example, the Habitat Division works to ensure that culverts are properly installed, without any barriers to fish, such as a drop off. Typically, docks and stream bank protections do not hamper fish passage, he said.

CHAIR STUTES related her understanding that there are not any exemptions to the fish passage under current law.

MR. BENKERT was unsure of what was meant by exemption.

CHAIR STUTES explained that occasionally during construction that would not require an exemption for fish passage.

MR. BENKERT responded that the division occasionally may decide that short-term impacts are far outweighed by the long-term goal of a project, so some measures are allowed on a temporary basis. For example, if culvert construction was constrained by topography, the permittee may be authorized to pump water over the roadway until the culvert that allows fish passage is installed. He reiterated, in that instance, the short-term impact is far outweighed by the long-term benefit of replacing the culvert.

[11:34:36 AM](#)

REPRESENTATIVE CHENAULT asked whether projects affected by the [Fishway] act are limited to freshwater.

MR. BENKERT answered yes; the division's jurisdiction under AS 16.05.841 and AS 16.05.871 typically ends at the ordinary low-water line of saltwater.

REPRESENTATIVE CHENAULT commented that he was curious since there are significant numbers of docks in Alaska.

[11:35:40 AM](#)

MR. BENKERT referred to slide 8, titled, "Anadromous Fish Act" which read as follows [original punctuation provided]:

AS 16.05.871

ADF&G must specify those waters that are important for the spawning, rearing, or migration of anadromous fish (AWC)

(b-c) notification and plans required before conducting work in a specified waterbody (permit application)

(d) ADF&G will approve or deny the proposed work

MR. BENKERT explained that the process in AS 16.05.871(a) is accomplished through the anadromous waters catalog (AWC). The division accepts nominations in September, reviews them to ensure that they are submitted by someone with the professional qualifications to identify the species of fish. Next, the AWC regulations are promulgated by the Lieutenant Governor, typically in June, he said.

[11:36:24 AM](#)

CHAIR STUTES asked what percentage of the AWC has been completed.

MR. BENKERT answered that the AWC is about 50 percent complete. He reported that the recent international hydrologic data set has identified additional "flowing waters" beyond what the department has used. That data is currently being integrated into the AWC, he said. He reiterated that the AWC is approximately 50 percent completed, which he said is the figure posted on the Habitat Division's website.

[11:37:19 AM](#)

CHAIR STUTES asked how long it takes the Habitat Division to incorporate a water body into the AWC once the division determines a water body is anadromous water body.

MR. BENKERT explained the process, such that field information is collected during the summer season, nominations are submitted by the deadline, typically, the end of September, and the new catalog is compiled by June. He detailed that the process includes a GIS [Geographic Information System] project to adjust the lines, the life-stages, and species in the water bodies. He acknowledged that a seven to nine-month gap occurs before inclusion in the AWC; however, sometimes new elements can be inserted into the permit, but the effective date for those inclusions is the date the AWC becomes law.

[11:39:05 AM](#)

REPRESENTATIVE TARR asked for further clarification on the new data set mentioned and whether the reason for the new streams is due to new technology that allows for more information to be gathered or if data is being collected by drones.

MR. BENKERT agreed that the technology being used is rapidly advancing, for example, the Matanuska-Susitna Borough (MSB) contracted to have a LIDAR [Light Detection and Ranging] survey of the entire borough performed. He stated that LIDAR is a remote sensing method used to examine the surface of the earth. This technology provides additional details in the landscape by removing all the foliage so even small creeks are visible, he said. This technology provides much higher resolution than the topographical maps, he said.

[11:40:19 AM](#)

MR. BENKERT reviewed slide 9, titled, "Anadromous Fish Act" which read as follows [original punctuation provided]:

AS 16.05.871

(a) ADF&G must specify those waters that are important for the spawning, rearing, or migration of anadromous fish (AWC)

(b-c) notification and plans required before conducting work in a specified waterbody (permit application)

(d) ADF&G will approve or deny the proposed work

MR. BENKERT described the process for a construction project that involves a waterbody that is included in the AWC. In that instance, the party must notify the division, apply for the permit and submit specifications for the project. The division subsequently reviews the project and works with the applicant to determine if the project is permissible, as is, or if any avoidance measures need to be taken to minimize or eliminate any impact to anadromous fish habitat.

[11:41:09 AM](#)

MR. BENKERT reviewed slide 10, titled Anadromous Fish Act (.871)" which read as follows [original punctuation provided]:

Jurisdiction

Applies to any activity  
Applies to any life stage

Application of .871

Activity occurring below OHW with some exceptions  
Waterbody must be in AWC

Freshwater only down to the mean low OHW in the marine environment

MR. BENKERT explained that this is a "stronger statute" for the division and typically the division will use this [AS 16.05.871] whenever it works with anadromous waterbodies.

[11:42:00 AM](#)

MR. BENKERT reviewed slide 10, titled "Fish Habitat Permits," which read as follows:

Applicant submits plans to ADF&G  
Habitat Biologist reviews and consults area staff  
May be permitted as proposed or modified during review process  
Timeline for review...2-6 weeks  
Emergency exemptions  
AS 16.05.891  
Verbal/email approval  
Follow up with formal permit

Typical Stipulations

Timing Windows  
Diversion/Bypass Pumping  
Sediment Control  
Reveg/Stabilization  
Fish Passage  
Notification

MR. BENKERT briefly reviewed the fish habitat permit process, since he previously mentioned it. The division consults with area staff, such as the ADF&G's Division of Sport Fish or

ADF&G's Division of Subsistence to garner information and assess any concerns. He reported that the timeline for review ranges from two to six weeks, that it is difficult to determine the actual review period since the range is highly variable for individual projects. For example, some permits are over-the-counter permits issued for routine activities with little chance of impacting habitat, such as stream-crossing permits for ATVs. Those permits typically can be issued immediately, he said.

MR. BENKERT said that large projects may take years to just submit the baseline data collection. The division must consider all aspects of the project and any potential impact on anadromous waterbodies.

MR. BENKERT described some mid-range permitted projects, noting a typical DOT&PF bridge project permit may take two to six weeks to complete. These projects typically consist of multiple engineering drawings and the projects can usually be accomplished using a variety of options to coordinate and craft a project that minimizes fish habitat.

[11:45:57 AM](#)

CHAIR STUTES remarked that she finds the timeline of two to six weeks interesting because in her experience the permitting process is more like four days, based on conversations she has had with permitting agencies.

MR. BENKERT acknowledged that it is difficult to identify an average permitting process time, because it depends on the size of the project and any impact to the fish habitat.

CHAIR STUTES mentioned she did not see anything listed in the permit process for public input.

MR. BENKERT responded that the division is not required to public notice Title 16 activities.

CHAIR STUTES remarked that she found that "odd" but that could be a future discussion.

[11:47:12 AM](#)

REPRESENTATIVE TARR asked for further clarification on how ATV operators are informed so they know that they need a permit to cross streams.

MR. BENKERT answered that it basically relates to providing information to the public; however, some user groups in the Mat-Su are self-educating themselves and spread the word to others. He advised members that he often reaches out to community councils to inform them. Further, when the division finds a frequent activity occurring that has minimal impact on the waterbodies, it will offer a general permit to authorize that activity. These permits are online and can be downloaded, but must be on the person, he said.

[11:48:33 AM](#)

CHAIR STUTES directed attention back to the lack of exemptions to the Fishway Act [slide 7]. She referred to AS 16.05.851, which read, "If a fishway over a dam or obstruction is considered impracticable by the commissioner because of cost, the owner ..." The statute goes on to lay out alternatives; however, it seems that this provision sets out an exemption, she said.

MR. BENKERT answered that the division considers that to be mitigation and not an exemption. He related a scenario in which a hydroelectric project was building a dam, but it was not possible to allow for fish passage over the dam. In that case, AS 16.05.851 allows project proponents to develop a fish hatchery to offset the blockage or to pay a lump sum to the state to help manage or maintain a state fish hatchery.

CHAIR STUTES thanked him for the clarification.

[11:50:07 AM](#)

MR. BENKERT continued his discussion on slide 10, titled "Fish Habitat Permits" stating that the division can authorize an emergency exemption, but the parties must follow up with a formal permitting process.

[11:51:26 AM](#)

CHAIR STUTES asked for further clarification on mitigation, such as when the division determines mitigation is required. She asked whether there is flexibility in the law as to the mitigation site location or if the mitigation must occur on the specific site where the situation arose.

MR. BENKERT answered that at times there are no on-site options for mitigation; however, onsite is preferable. The federal

agencies have been using mitigation banking to offset unavoidable impacts in some permitting situations, he said. He reiterated that the division tries to have the mitigation occur onsite but if it is not available, the division tries to have the mitigation project occur nearby.

[11:52:36 AM](#)

MR. BENKERT, in response to Representative Tarr, said he was not well-versed with any mitigation projects that have occurred in the Eagle River area in the past few years.

[11:53:16 AM](#)

MR. BENKERT continued his discussion on slide 10, titled "Fish Habitat Permits" relating that typical stipulations associated with fish habitat permits include timing windows, in which the activities are contained in time windows when critical life-stages of anadromous fish occur, typically confining most of the work between May 15 and July 15. He mentioned the division has a storm water prevention plan to assure that unintended sediment is put into the system. He described revegetation and stabilization, for example, when DOT&PF disturbs the banks during culvert installation, it must incorporate bioengineering revegetation upstream and downstream to reestablish the riparian zone. He noted he previously discussed fish passage and notification, adding that the division requires projects to provide notice to allow the division staff to be onsite to ensure the activity is conducted appropriately.

[11:55:28 AM](#)

REPRESENTATIVE TARR asked for further clarification on the revegetation in Anchorage and whether he could describe the interface between the state laws and local ordinances in terms of riparian zone protections.

MR. BENKERT answered that the public is often confused about jurisdictional authority and people sometimes mistakenly believes that local ordinances are issued by the Habitat Division. Thus, the division is sometimes inundated by calls from the public. Although the division is aware of local ordinances, it does not incorporate any municipal or borough ordinances into the ADF&G's permitting activities, he said. The ADF&G's statutes stand alone, although the division does try to inform applicants to check with the local authorities, such as municipalities or boroughs.

[11:57:17 AM](#)

CHAIR STUTES asked for further clarification on the division's interaction with the federal agencies.

MR. BENKERT offered to cover that in a further slide.

[11:57:39 AM](#)

MR. BENKERT reviewed slide 11, titled, "ADF&G's Role in Large Project Evaluation" which read as follows [original punctuation provided]:

Large projects are often coordinated through the ADNR Office of Project Management and Permitting (OPMP)

Large projects have the potential to result in long-term or permanent change to fish and wildlife habitat.

ADF&G staff work with the applicant and other agencies to ensure the project is designed to avoid or minimize impacts to resources of the state.

This requires evaluation of all information available and identification of additional information needs to conduct a thorough analysis of the proposed project and project alternatives.

There are five phases to large projects:  
Pre-project scoping and fish and wildlife studies;  
Permitting;  
Project construction and monitoring;  
Project operation and monitoring; and  
Post-project site reclamation or restoration.

[11:57:53 AM](#)

MR. BENKERT highlighted several types of projects that require coordination between agencies, including that placer mining operations must obtain water permits through DNR's Water Section since those operations typically require significant water use. The DNR will issue a water use permit concurrent with the division's fish habitat permit. In addition, DEC authorizes mixing zones under the Clean Water Act, but the ADF&G reviews

the mixing zones and to ascertain if anadromous fish are present or spawning and determine whether the activity is permitted.

[12:00:15 PM](#)

MR. BENKERT referred to federal agencies, noting that the ADF&G comments on some federal activities, such as marine waters. He said large project evaluations which are coordinated by the DNR's Office of Project Management and Permitting (OPMP). In fact, most large project managers prefer to use the OPMP since it provides them with a single point of contact.

MR. BENKERT described the large project review, which involves review of environmental baseline data and data collection programs and forming technical working groups [comprised of state and federal agencies with subject expertise to evaluate pre-application] to review information and data required or requested from state resource agencies. The working group approves the baseline collection and works with the applicant to ensure protections are in place. He acknowledged this can be a lengthy process, recalling that the Susitna Hydroelectric Project had 27 technical working groups to address specific issues.

[12:02:23 PM](#)

MR. BENKERT said that federal agencies have permits in play as well. He stressed it can take years to get to the point at which the proponent can apply for fish habitat permits, since the project may cross multiple creeks and many issues can arise. The process is complex for data collection that can help inform the permitting decisions.

[12:03:53 PM](#)

CHAIR STUTES asked whether ADF&G can inform the federal agencies that "No, this isn't going to work here, we're sorry."

MR. BENKERT said he did not think that the division has arrived at that point yet.

[12:04:11 PM](#)

MR. BENKERT mentioned that marine waters often require federal permits including obtaining a permit from the U.S. Army Corps of Engineers to build a dock. The ADF&G can comment on federal actions to the Fish and Wildlife Coordination Act, which is not

often used; however, the division has used this process to provide input into the federal process to inform the federal decisions, as well, since the state has significant local knowledge that the federal agency may not have.

[12:05:01 PM](#)

CHAIR STUTES related her understanding that the ADF&G has an opportunity to comment in the federal process but has no control over the process.

MR. BENKERT agreed that the ADF&G does have input but not control. He pointed out that the department also participates with federal agencies on its working groups, for instance, that a technical advisory committee was established through the U.S. Corps of Engineers to revise placer mining permits. The ADF&G, DNR, and DEC helped develop the permits, which means the department could at least discuss aspects of the permit. The department also participated in an advisory committee with the Bureau of Land Management (BLM) to ascertain impacts on remediation of mining sites.

[12:06:25 PM](#)

CHAIR STUTES said she did not think the committee could sum this up today.

MR. BENKERT said he had one more slide to cover.

[12:06:40 PM](#)

MR. BENKERT reviewed slide 12, titled, "ADF&G Large Project Permitting" which read as follows [original punctuation provided]:

Activities associated with large project development that would typically require permits from the ADF&G include:

Fish Habitat Permits from the Division of Habitat addressing:

Construction of fish barriers (i.e., dams);  
Flow reduction;  
Stream crossings associated with road and pipeline construction (bridges, culverts, buried pipelines, etc.);

Water withdrawal and intake structures;  
Stream re-alignment; and  
Instream mitigation projects.

MR. BENKERT said the division works with the DNR and can require minimum instream flow, so fish will not be impacted by the project. He indicated he has pretty much covered the rest of the large project permitting.

[12:07:30 PM](#)

REPRESENTATIVE TARR, in terms of working with the DNR on flow reduction, asked whether the outcome is a water reservation on behalf of the ADF&G.

MR. BENKERT answered not necessarily. He said that a water reservation system is different. He described flow reduction, such that the permit will include that the project must maintain a minimum flow. It may be due to temporary construction use or in instances in which small hydroelectric projects are diverting flow. This is not a reservation but a requirement for the project proponent to maintain certain flows through the project site to maintain fish habitat, he said. He added that an instream flow reservation goes through a formal process with the DNR, but it can take years to adopt instream flow reservations.

[12:08:36 PM](#)

REPRESENTATIVE TARR related her understanding that once the instream flow reservation has been granted that it is more permanent than the flow reduction permit.

MR. BENKERT responded sometimes it is but sometimes it is not. For example, with respect to a hydroelectric power project, the project will obtain a flow reservation. In that instance the project will be allocated a certain amount of water to run through its turbines to produce power. However, the ADF&G could argue that too much water is being taken. Although the division does not authorize a water reservation, it might influence the amount of water under the reservation that the DNR's Water Section grants to the applicant for the project, he said.

[12:09:32 PM](#)

CHAIR STUTES thanked Mr. Benkert for his presentation.

[12:10:28 PM](#)

**ADJOURNMENT**

There being no further business before the committee, the House Special Committee on Fisheries meeting was adjourned at 12:10 p.m.