

ALASKA STATE LEGISLATURE
HOUSE SPECIAL COMMITTEE ON FISHERIES

April 3, 2018
10:03 a.m.

MEMBERS PRESENT

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

MEMBERS ABSENT

All members present

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
01/23/18	(H)	Heard & Held
01/23/18	(H)	MINUTE(FSH)

04/03/18

(H)

FSH AT 10:00 AM GRUENBERG 120

WITNESS REGISTER

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

POSITION STATEMENT: On behalf of the prime sponsor, explained the changes of the proposed committee substitute (CS) for HB 199, from Version N to I.

RON BENKERT, Fish & Game Coordinator
Anchorage Area Office
Division of Habitat
Alaska Department of Fish & Game (ADF&G)
Anchorage, Alaska

POSITION STATEMENT: Answered questions during the discussion of HB 199.

BEN WHITE, Environmental Manager
Division of Statewide Design & Engineering Services
Department of Transportation & Public Facilities (DOT&PF)
Juneau, Alaska

POSITION STATEMENT: Answered questions during the discussion of HB 199.

ACTION NARRATIVE

[10:03:49 AM](#)

CHAIR LOUISE STUTES called the House Special Committee on Fisheries meeting to order at 10:03 a.m. Representatives Stutes, Kreiss-Tomkins, Chenault, and Eastman were present at the call to order. Representatives Neuman, Edgmon and Tarr arrived as the meeting was in progress.

HB 199-FISH/WILDLIFE HABITAT PROTECTION; PERMITS

[10:04:59 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."

[10:06:51 AM](#)

REPRESENTATIVE CHENAULT moved to adopt the proposed committee substitute (CS) for HB 199, labeled 30-LS0438\I, Bullard, 3/29/18 as the working document. There being no objection, Version I was before the committee.

[10:08:20 AM](#)

MATT GRUENING, Staff, Representative Louise Stutes, Alaska State Legislature, referring to a document titled "HB 199 Explanation of Changes Version N to I," turned to the first change, which read as follows [original punctuation provided]:

Page 1, lines 2 and 3:

- The bill's title was slightly altered. It had previously read "and relating to fishways and the protection of anadromous and other fish habitat." It now reads "and relating to fishways and the protection of anadromous fish and anadromous fish habitat." The major difference being that the protection of the anadromous fish was included instead of only referencing habitat. Other fish habitat was also removed.

MR. GRUENING reviewed the first change, noting that it seemed appropriate that the commissioner should consider the effects on anadromous fish along with the anadromous fish habitat as the two work together.

[10:09:26 AM](#)

REPRESENTATIVE NEUMAN asked if staff would provide the reason for each change in Version I so members can better understand the rationale for the changes in Version I.

MR. GRUENING agreed to do so.

[10:10:06 AM](#)

MR. GRUENING directed attention to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Page 1 line 5 through Page 2, line 28:

- **Added a new Section 1** that adds legislative findings and policy language to the uncodified law of the State of Alaska:

- **Subsection (a)** on Page 1, line 7 through Page 2, line 4 contains language stating the legislature's policy to ensure sustainable fisheries by protecting anadromous fish and habitat, having standards governing activities that protect anadromous fish and habitat, providing regulatory certainty and clear criteria that allows for responsible resource development, and that the Alaska Department of Fish and Game (ADF&G) protect anadromous fishery resources in a manner consistent with Article VIII of the Constitution of the State of Alaska.

- **Subsection (b)** on Page 2, lines 5 through 28 provides additional language containing guidelines for protecting anadromous fish spawning, rearing, and migratory habitat. This language was pulled directly from (c)(1)(A)(i), (ii), (iii), (iv), (v), (1)(C), (1)(D), (1)(E), and (1)(F) of 5 AAC 39.222, Policy for the Management of Sustainable Salmon Fisheries, which is part of a regulation package passed by the Alaska Board of Fisheries that provides guidelines for the protection of salmon habitat.

MR. GRUENING pointed out that this language was non-binding language or essentially intent language in front of the bill. While the language states the findings and policies of the legislature, nothing in this Section 1 is binding, he said. Basically, subsection (a) affirmed the legislature's commitment to sustainable salmon fisheries consistent with the Constitution of the State of Alaska, he said.

MR. GRUENING turned to the next change, subsection (b), which he indicated was also part of the legislative findings. This subsection provides guidelines for the protection of salmon habitat, which was also non-binding language. He reiterated that it seemed appropriate to put these guidelines in the preface of the bill.

[10:11:44 AM](#)

MR. GRUENING directed attention to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Page 2, line 29 through Page 3, line 7:

AS 16.05.841. Fishway required.

- **Added a new Section 2** that amends the Fishway Act to require that the passage of upstream and downstream fish is provided for. Currently, AS 16.05.841 only requires fish passage for downstream migrants.

MR. GRUENING explained that the change added language "upstream" because some concern had been expressed that perhaps this created a loophole by only requiring fish passage for downstream migrants. He acknowledged that if fish cannot get upstream it would not take long before fish would not be going downstream either. It seemed appropriate to address both upstream and downstream passage, although this has not yet been an issue, he said.

[10:12:43 AM](#)

REPRESENTATIVE NEUMAN asked whether this provision would prevent a person from building a bridge across a stream since the language [AS 16.05.841] seemed to imply that doing so would create an obstruction.

MR. GRUENING answered the referenced language was existing statute that had been adopted from statehood. The only thing being changed in this statute was to add a requirement for upstream passage of fish. He offered his belief that so long as fish can move freely, it would satisfy this section.

[10:14:22 AM](#)

MR. GRUENING directed attention to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Section 4 on Page 3, lines 18 through 28, formerly Section 2 on Page 2, line 1 through Page 3, line 11

Subsection (a) on Page 3, lines 19 through 21, formerly Page 2, lines 2 through 4:

- Deleted "adjacent riparian areas" and inserted "wetland" on line 21.

MR. GRUENING stated that "formerly" refers to the previous version of HB 199, Version N, for members' reference. He reviewed the change and explained that currently the Department of Natural Resources (DNR) has the authority on riparian areas. In addition, many municipal ordinances and provisions in the Forest Resources and Practices Act also establish riparian setbacks. The goal was to avoid overlapping authority so the reference to "adjacent riparian areas" in the bill was removed. He explained the process, such that when ADF&G creates protection for a setback in a riparian area, the department must first approach DNR and request authority to do so for a project. The sponsor did not want to interrupt this process. The term "wetlands" was inserted because although ADF&G was currently cataloging wetlands in the Anadromous Waters Catalog (AWC), it did not have the explicit statutory authority to do so.

[10:16:00 AM](#)

REPRESENTATIVE NEUMAN said it seemed that this change in statute would also allow the ADF&G to catalog different uses of fisheries, which he characterized as being a fairly large change.

MR. GRUENING answered that the Anadromous Waters Catalog is already in statute. The change to add "wetlands" in statute means that the [ADF&G] is statutorily authorized and obligated to catalog them. Although the department started doing this two or three years ago, the sponsor wanted to be certain the ADF&G has the explicit authority to do so. He reiterated that the anadromous waters catalog is already in statute and this change would add a different type of waterbody that ADF&G would be authorized to catalog, he explained.

[10:17:04 AM](#)

REPRESENTATIVE NEUMAN asked whether this would be done in consultation with other departments or if the ADF&G would have full authority to make the changes. He further asked if that would be a change in statute.

MR. GRUENING agreed it would be a change in statute. He deferred to the ADF&G as to the reason the department began the process to catalog wetlands, although the wetlands in question were ones with a nexus between different anadromous water bodies necessary to support wetlands. He clarified that there was a difference between the wetlands being cataloged and the wetlands that the US Army Corps of Engineers (USACE) uses for its Section

404 permit program, which also includes forests that people would not typically think of as wetlands.

REPRESENTATIVE NEUMAN responded that he thought it would be an interesting discussion.

[10:18:02 AM](#)

REPRESENTATIVE CHENAULT asked for further clarification on whether the ADF&G had been cataloging wetlands without the authority to do so.

MR. GRUENING answered yes. He related his understanding that nothing prevented ADF&G from doing so; however, the ADF&G does not have direct statutory guidelines and authority to catalog wetlands. He deferred to the department for further explanation.

[10:18:40 AM](#)

REPRESENTATIVE EDGMON stated this was his first hearing on HB 199. He asked whether it would be fair to characterize this bill as "modernizing" some of these terms given that these statutes go back quite some time.

MR. GRUENING answered yes; he acknowledged that it was a fair characterization to consider this as modernizing these statutes. He commented that he did not wish to unfairly cast aspersions on actions the department had taken.

REPRESENTATIVE EDGMON did not think he had done so but he wanted to be sure he understood [the genesis of some of the changes.]

[10:19:38 AM](#)

MR. GRUENING directed attention to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Former subsection (b) was deleted (Page 2, lines 5 through 13). This subsection contained the process by which the department may conduct a site-specific analysis to determine anadromy.

MR. GRUENING said that since the anadromous waters presumption was deleted, the site-specific analysis determination section was no longer needed. He explained in the process of

determining if a water body was presumed anadromous, that someone could request that ADF&G conduct a site-specific analysis to determine if the water body was anadromous or not. Without the presumption, the ADF&G currently would sample water bodies prior to conducting an activity not listed in the anadromous waters catalog. He characterized this as a conforming change to reflect the repeal of subsection (c).

[10:20:41 AM](#)

MR. GRUENING directed attention to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Former subsection (c) was deleted (Page 2, lines 14 through 23). This subsection contained the anadromous waters presumption.

MR. GRUENING said this was the anadromous waters presumption, such that all naturally-occurring permanent or intermittent rivers, lakes, streams and adjacent riparian areas are considered anadromous if they are connected to a water body in the Anadromous Waters Catalog (AWC) without a physical barrier in between that prevented the upstream and downstream passage of fish.

MR. GRUENING explained that this subsection was deleted after discussions were held with several departments and through research that determined the presumption was not necessary. Although it varies from area to area in the state, approximately 50 percent of the streams, rivers, and lakes in Alaska have already been cataloged and surveyed. Of the remaining 50 percent, approximately 20-25 percent will never be cataloged due to the altitude. Although he was unsure of the specific altitude, he believed that above 5,000 feet fish were not found. Further, the department does not catalog some water bodies due to the gradient of certain streams or rivers. For example, areas such as the Denali National Park and Preserve and other protected-use areas it would be unlikely development would occur. Permitting agencies indicated that if the water body was not in the anadromous waters catalog the agencies will sample to determine the presence of anadromous fish and sampling occurs on all projects.

[10:22:53 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I, "which read as follows [original punctuation provided]:

Former subsection (d) was deleted (Page 2, lines 24 through 26). This subsection contained a clarification regarding what area of law the deleted presumption applied to.

MR. GRUENING explained that this subsection was removed because concerns were raised that the presumption might be applied to other areas and overlap with other authorities; for example, it might overlap with the Board of Fisheries' (BOF) authority to regulate fish.

[10:23:36 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Former subsection (e) was deleted (Page 2, line 27 through Page 3, line 3). This subsection contained requirements for the department to adopt regulations that are no longer necessary as the corresponding bill sections have been deleted.

[10:23:58 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Subsection (b) on Page 3, lines 22 through 28, formerly subsection (f) on Page 3, lines 4 through 11:

- Deleted "naturally occurring" in front of "permanent" on line 23. This conforming change was made throughout the bill.
- Deleted "adjacent riparian areas" and inserted "wetland" on line 24. This conforming change was made throughout the bill.
- Inserted "wetland" on line 27. This conforming change was made throughout the bill.

MR. GRUENING said concerns were raised about the definition of "naturally occurring." At times ADF&G has created spawning habitat to increase protections for anadromous fish; however,

these sections of enhanced streams are not included in the anadromous waters catalog as "naturally occurring" since they are man-made stream sections. In addition, when a river has been altered or relocated during a road project, that altered segment would not be considered "naturally occurring" and would also not be included in the Anadromous Waters Catalog. This change closed a loophole by deleting "naturally occurring" and would ensure that all rivers, lakes, and streams that have anadromous fish can be cataloged and protected, he said.

[10:25:37 AM](#)

REPRESENTATIVE NEUMAN asked for clarification whether the department has a framework it used when cataloging "naturally occurring" anadromous waters and if the department worked with other agencies or the local fishing or mining industries.

MR. GRUENING responded that it is a collaborative process and was not just the department's determination. He deferred to Mr. Benkert, ADF&G, to go into more detail.

[10:26:59 AM](#)

REPRESENTATIVE NEUMAN asked to continue the presentation, noting that he could wait for the department's explanation until later.

[10:27:12 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Subsection (a) on Page 3, line 29 through Page 4, line 8, formerly Page 3, lines 13 through 29:

- Inserted "or governmental agency" after "person" on line 3.
- An error was corrected from the previous draft. On page 3, line 17 of the previous draft, it stated that a person must obtain a permit "before constructing a hydraulic project **that uses** wheeled, tracked, excavating, or log dragging equipment..." This was supposed to read "before constructing a hydraulic project or using wheeled, tracked, excavating, or log-dragging equipment..." The error was corrected on Page 4, line 3 of the current version to align with the sponsor's intent and mirror current statute.

- Deleted references to the anadromous waters presumption.

MR. GRUENING said "governmental agency" was added to conform with the existing AS 16.05.871. Additionally, an error was corrected from the previous draft, which required that a person must obtain a permit "before constructing a hydraulic project that uses wheeled, tracked, excavating, or log dragging equipment." Version I also deleted references to the anadromous waters presumption, he said.

[10:28:56 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Subsection (a) on Page 5, line 12 through Page 6, line 2: **"Consideration of effects of activity on anadromous fish and anadromous fish habitat."** Formerly Subsection (a) on Page 5, lines 2 through 23: **"Significant adverse effects,"**

- The subsection was renamed as shown above.
- Inserted "anadromous fish" as a factor to be considered along with "anadromous fish habitat" on line 14. This resulted in a conforming change throughout the bill.
- The wording in (a) on lines 13 through 16 was altered. Instead of the more prescriptive language of "the commissioner shall find that a proposed activity has the potential to cause significant adverse effects on anadromous fish habitat under AS. 16.05.871-16.05.901 if the proposed activity...", it now reads "in determining if a proposed activity has the potential to adversely affect anadromous fish and anadromous fish habitat under AS 16.05.871-16.05.901, the commissioner shall consider whether the proposed activity..."
- Deleted the term "significant" in front of "adverse effects." This aligns the terminology in the bill with other regulatory agencies and avoids confusion regarding determining what "significant" is. This conforming change was made throughout the bill.
- Deleted "significantly", which was formerly on Page 5, line 10.

- Inserted a new (a)(7) on Page 5, lines 30 through 31. It states that the commissioner must consider if an activity will "diminish the stability of a river, lake, stream, or wetland bank or bed" in making the determination under (a).

MR. GRUENING reviewed the changes and pointed out that the rationale for the title change was to recognize the commissioner must also consider the effects on fish and not just the habitat. He stated that the wording on lines 13-16 was altered to provide a little more discretion. He explained that deleting the term "significant" in front of "adverse effects" was suggested by multiple departments. Initially, adding "significant" seemed to add a higher bar; however, the USACE and other permitting agencies use the term "adverse effects," he said. These regulatory agencies thought using the term "significant" was subjective and made it more difficult to determine what that meant. This would align the terminology, he said. Referring to (a)(7) on page 5, he stated that this provision seemed like an important sidebar.

[10:31:36 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Subsection (a)(6) on Page 8, line 30 through Page 9, line 18, formerly on Page 8, lines 18 through 22:

- **Former Subsection (a)(6)(A) and (B) were deleted.** These subsections specified that the commissioner must provide in the major anadromous permit draft assessment a determination of whether an activity's adverse effects could be prevented or minimized under (d) of this section or were likely to cause substantial damage under (e) of this section. Both (d) and (e) were deleted in the current draft.
- **New subsections (a)(6)(A)(i)(ii) and (6)(B)(i)(ii) were inserted** on Page 9, lines 1 through 18 in place of the deleted (a)(6)(A) and (B). These new subsections contain the commissioner's initial determination that a permit may or may not be issued based on whether the activity's adverse effects can be prevented or if the effects can be minimized to the extent necessary to protect anadromous fish and anadromous fish habitat, the affected habitat can be

restored to the extent necessary to protect anadromous fish and anadromous fish habitat, or the effects of the activity can be otherwise mitigated to the extent necessary to protect anadromous fish and anadromous fish habitat.

[10:33:01 AM](#)

MR. GRUENING stated that the new subsections would be part of an initial draft assessment and determination that the commissioner must put in writing, including an explanation of the rationale used to make the determination. The public noticing would allow the public an opportunity to scrutinize, comment on, and ultimately challenge the issuance of a permit, he said. He characterized this as a main provision in this bill that was very potent. He suggested the Board of Fisheries (BOF) and Alaskans want a transparent process, including notification of a permit and the ability to comment on the commissioner's determination as to whether something protects anadromous fish and fish habitat. It ultimately allows people who disagree an avenue to pursue it in court, he said.

[10:34:29 AM](#)

REPRESENTATIVE NEUMAN asked whether there was a structure or specific guidelines each commissioner uses when making these determinations since the mining industry or commercial fish industries want to know the rules.

MR. GRUENING answered no; that there is nothing specific in statute. The language states that the commissioner shall issue a permit unless the plans and specifications are insufficient for the protection of fish and game; however, in practice the departments have a very well-established structure. The department reviews the project, including the scope of activity, the duration, all the plans and specifications and then first attempt to prevent adverse effects or minimize them. If the adverse effects cannot be prevented, the department would require mitigation or restoration.

MR. GRUENING further responded that the bill provided specific criteria that the commissioner must consider and although it was not 100 percent prescriptive, the bill does codify the process for mitigation measures. Further, mitigations must be implemented in a way that prevents or minimizes disturbing fish habitat and is geared toward the protection of fish. One goal for this draft was to avoid being overly prescriptive can result

in numerous unintended consequences on industries. He acknowledged that Version I would give the commissioner more discretion but provided a transparent structure and accountability for any determination.

[10:37:51 AM](#)

REPRESENTATIVE NEUMAN offered his belief that this process would be better set in regulation since the process always evolves.

CHAIR STUTES stated that the structure would be included in further discussions.

MR. GRUENING pointed out that the bill does give the ADF&G direction to establish regulations that are consistent with the chapter.

[10:38:49 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Former Subsection (d) was deleted (Page 9, lines 5 through 11). This subsection contained the conditions under which adverse effects can be considered minimized under the bill.

MR. GRUENING said essentially this subsection was prescriptive, which said under certain conditions adverse effects may be considered minimized, but for other instances it did not. This resulted in unintended consequences on construction and resource development, he said.

[10:39:30 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Former Subsections (e)(1), (2), and (3) were deleted (Page 9, lines 12 through 16). Subsection (e) stated that adverse effects could not be prevented or minimized if they were likely to cause substantial damage. Subsections (1), (2), and (3) defined substantial damage.

MR. GRUENING offered that "substantial" damage was defined in a several ways and state agencies feared that using a strict, literal interpretation would not even allow culvert placement, which protect fish. Further, the department was concerned that even good projects could not move forward.

[10:41:08 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Former Subsections (f) (1) and (f) (2) (A) and (B) were deleted (Page 9, line 26 through Page 10, line 7). These subsections contained the factors the commissioner shall consider when determining if fish habitat will recover or be restored within a reasonable period and to a condition that will sustain the natural and historic levels of fish.

MR. GRUENING said this subsection was tied in with the substantial damage section and whether something could be minimized.

[10:41:39 AM](#)

REPRESENTATIVE NEUMAN wondered what plan would be to bring back a tributary, for example, in instances where anadromous fish were at risk of extinction from pike or pollution. He expressed concern that removing the language "commissioner shall consider when determining if fish habitat will recover or be restored within a reasonable period," that it may be removing some assurance that rules and regulations will be in place. He hoped this issue would be addressed.

[10:43:01 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Page 10, line 5:

- Inserted a requirement that the amount of the bond imposed by the department is to be included in the final assessment and written permit determination.

MR. GRUENING related this bill provides the ADF&G the authority to require a bond for restoration and mitigation. This provision would require the amount of the bond to be included in the final assessment and written permit determination, which allows for public comment and challenge. One of the main components of Version I was to enhance the public's ability to obtain information, comment, and affect that process in a way not previously available to them during the permitting process, he said. Currently, the public does not receive any notification of permits being issued, let alone to have an opportunity to comment, disagree, or challenge the commissioner's determination or decision.

[10:44:49 AM](#)

REPRESENTATIVE TARR, referring [to new subsections (e)(1)(C)(i) and (ii)], asked whether a bond would always be required or if this provision allowed the commissioner the discretion to determine if bonding is necessary. She did not see "shall" in the language, she said.

MR. GRUENING answered that it read, "if applicable." The language she referenced refers to a later section, where government entities are exempt from the bonding requirements. However, the commissioner can decide the amount of the bond, which could be zero, which would alleviate that concern. It would be public noticed and could also be challenged. In further response to Representative Tarr, he agreed that the public would have an opportunity to comment and appeal bonding. He added that the commissioner would always be required to consider whether a bond is required, based on scientific information. The ADF&G has a familiarity with mitigation measures and restoration, so the department can determine the exact cost. He recalled that this provision requires a \$5 million bond and must be justified in writing.

[10:46:53 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Subsection (e)(1)(C)(i) and (ii) on Page 10, lines 18 through 29, formerly (h)(1)(c) on Page 10, lines 25 through 27:

- **Former (h)(1)(c) was deleted.** This specified that a permit may only be issued if it will not cause substantial damage under the now deleted (e).
- In its place, **new subsections (e)(1)(C)(i) and (ii) were inserted.** These new subsections specify that the commissioner may only issue a major permit if it is determined that an activity's adverse effects can be prevented or if the effects can be minimized to the extent necessary to protect anadromous fish and anadromous fish habitat, the affected habitat can be restored to the extent necessary to protect anadromous fish and anadromous fish habitat, or the effects of the activity can be otherwise mitigated to the extent necessary to protect anadromous fish and anadromous fish habitat. This determination is subject to a request for reconsideration.

MR. GRUENING related that former (h)(1)(c) was deleted, which specified that a permit may only be issued if it will not cause substantial damage under the now deleted (e). In its place, new subsections (e)(1)(C)(i) and (ii) were inserted. He characterized this subsection as being a mirror to the initial draft assessment previously discussed where the commissioner must determine whether a permit may be issued based on its effects on anadromous fish habitat. In the final draft assessment, the commissioner could only issue a permit, which is challengeable, that when an activity's adverse effects can be prevented, if the adverse effects can be minimized to protect anadromous fish or fish habitat, or if the affected areas can be restored, or other mitigation measures can be taken.

MR. GRUENING emphasized that even if the effects can be minimized to protect anadromous fish or fish habitat, permittees are still required under the mitigation section of the bill to restore or take other mitigation measures, which is in line with the current process, he said.

[10:48:54 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Subsection (g) on Page 11, line 14 through Page 12, line 1, formerly Subsection (j) on Page 11, lines 12 through 24:

- Clarified that the bond may be initiated and held by the department or another state agency on Page 11, line 18.
- Added language on Page 11, line 26 through Page 12, line 1 to specify that the commissioner may at any time raise, lower, or eliminate the bond if they find that it is more or less than what is necessary to complete the mitigation measures. Furthermore, the department must provide public notice of such a change. These actions are subject to a request of reconsideration by an interested person or the applicant.

MR. GRUENING reviewed subsection (g) and added the rationale for this change. He explained that a process currently exists for bonding projects through DNR and the Department of Environmental Conservation (DEC), noting a mining reclamation statute also exists. The goal through the state bonding pool was to streamline the process and not necessarily require two separate bonds for a project. Instead, it gives the department authority to accept a bond that was posted through the state bond pool, for example, if the DNR was taking the lead on an overall project but required a concurrent fish habitat permit.

[10:50:02 AM](#)

MR. GRUENING, referring to language on Page 11, line 26 through Page 12, line 1, explained this would allow the commissioner to adjust or release the bond, for example, to raise the bond if the project does not go well and the bond needed to be increased. It requires public noticing and allows for challenges.

MR. GRUENING related a scenario in which a bond was required for fish habitat due to mitigation measures that were not complied with under the permit but once the permittee complied, the bond would no longer be necessary. This provision would allow the commissioner to adjust or release the bond. The commissioner would also have the authority and flexibility to raise, lower, or release the bond and it requires public noticing and allows for challenges.

[10:51:20 AM](#)

MR. GRUENING referred to and reviewed the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Subsection (h) on Page 12, lines 2 through 8:

- **Added a new subsection (h)(2)** on lines 5 through 6 specifying that the department may receive the amount of the bond from another state agency in lieu of a separate bond from the applicant.
- **Added a new subsection (h)(3)** on lines 7 through 8 specifying that a bond required in this chapter may be part of another bond held or initiated by the department or another state agency.

MR. GRUENING explained that subsection (h)(2) was conforming language, such that this could be part of a bond that is held by another state agency and it does not have to be two separate bonds for the same activity; and subsection (h)(2) was conforming language.

[10:52:07 AM](#)

MR. GRUENING stated that numerous changes were made to AS 16.05.887, the permit conditions and mitigation measures, which would be covered next.

MR. GRUENING referred to and reviewed the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Subsection (a) on Page 12, line 17 through Page 13, line 14, formerly Page 12, line 4 through Page 13, line 10.

Sec. 16.05.887 Permit conditions and mitigation measures.

- **Deleted lines 8 through 9** from the previous version of the bill, which stated that the "commissioner may not issue a permit for an activity that the commissioner determines." These two lines prefaced the deleted subsections (a)(1), (2), (3), (4), and (5).

[10:52:40 AM](#)

MR. GRUENING reviewed the changes for the deleted subsections (a)(1), (2), (3), (4), and (5) individually, beginning with subsection (a)(1), which read as follows [original punctuation provided]:

- **Former Subsection (a)(1) was deleted** (Page 12, lines 10 through 11). This subsection had stated that a permit may not be issued if it will cause substantial damage under the now deleted AS 16.05.885(e).
- **In its place, new subsection (a)(1) was inserted** on Page 12, lines 20 through 21. This language was in the in previous subsection (a) and was moved down to (a)(1) for structural purposes.

MR. GRUENING explained that subsection (a)(1) was deleted because substantial damage was very definite and did not give any leeway for the extent of the damage. For example, a culvert might not be placed because it permanently eliminated anadromous habitat. It recognized that any project would eliminate at least some small square footage of habitat. He offered another example, a dam built on what was previously anadromous fish habitat, which is now permanently altered by the dam and cannot be restored. Former subsection (a)(1) was replaced by a new subsection (a), which is existing language that was moved for structural purposes.

[10:54:10 AM](#)

MR. GRUENING reviewed the changes in subsection (a)(2), which read as follows [original punctuation provided]:

- **Former Subsection (a)(2) was deleted** (Page 12, lines 12 through 13). This subsection had stated that a permit may not be issued if it necessitates water treatment, groundwater pumping, or other means of mechanical, chemical, or human intervention in perpetuity.
- **In its place, new subsection (a)(2) was inserted** on Page 12, lines 22 through 23. This subsection specifies that the commissioner must require a permittee to implement the activity in a manner that the commissioner has determined will protect anadromous fish and anadromous fish habitat.

MR. GRUENING read former subsection (a)(2), then stated that many issues arose with this subsection since many things require human intervention in perpetuity: a bridge, dam, culvert, road, or municipal wastewater discharge plant. Numerous unintended consequences arose with the language in former subsection (a)(2), he said. It was better to give the commissioner some discretion with what shall not be permitted and to allow

citizens of Alaska to participate in the process [via the public notice and public comment process]. In its place, subsection new (a)(2) was inserted in recognition of when the current AS 16.05.871 was repealed and reenacted, that required the department to protect anadromous fish and fish habitat no matter what activity occurred. He explained that the wording was slightly different than current statute but retaining this provision was important especially given the enhanced public process.

[10:56:15 AM](#)

MR. GRUENING, referred to former subsection (a)(3), which was deleted [page 12, lines 14-15], which read as follows [original punctuation provided]:

- **Former Subsection (a)(3)** was deleted (Page 12, lines 14 through 15). This subsection specified that a permit may not be issued if it will replace or supplement a wild fish population with a hatchery dependent fish population.

MR. GRUENING characterized the issue of supplementing a wild fish population as a difficult one, since nobody wants to replace a wild fish run with a hatchery-dependent fish population. He highlighted a new process that has not been used much in Alaska, called "conservation hatcheries." This process has been used in certain places in the Lower 48 and may ultimately be of interest if Alaska experiences more run failures. He described "conservation hatcheries," which use geneticists to pair the genetics of fish being produced with the natural wild run; one that ensures genetic variation. This would enhance the wild fish population with a hatchery process but "conservation hatcheries" are not geared toward production. He characterized it as geared towards animal husbandry. He pointed out another concern raised by some hatcheries was that if a hatchery was in an anadromous waterway and strays from the hatchery were supplementing a wild run, such that the hatchery could be prohibited from obtaining a permit.

[10:58:13 AM](#)

REPRESENTATIVE EDGMON referred to the bonding on page 11, line 18, of HB 199 [Version I] which speaks to the bond being initiated and held by the department or another state agency. He asked for further clarification if there were disputes

between ADF&G's assessment or DNR how the disputes would be resolved and if ADF&G's commissioner held "the tie breaker."

MR. GRUENING responded that this pertained to a new process, so he would give his best guess. A Title 16 permit would not be issued without the [ADF&G] commissioner's authorization. He was unsure of how disputes would be resolved; however, he suggested that ADF&G and DNR would try to work together to come to an amicable resolution. He further suggested that it might be addressed in a regulations project if HB 199 were to pass. He offered to review it for the next draft.

[11:00:16 AM](#)

RON BENKERT, Fish & Game Coordinator, Anchorage Area Office, Division of Habitat, Alaska Department of Fish & Game (ADF&G), echoed Mr. Gruening's sentiment. He offered his belief that the department would develop an MOU [Memorandum of Understanding] between the state agencies to address how the agencies would address a bonding system together. He related that typically an ADF&G bonding specialist would work with applicants and the other departments. If a dispute arose, it would be elevated to the commissioner level and the commissioners could resolve the issue and meet mutual goals, he said.

[11:01:21 AM](#)

REPRESENTATIVE EDGMON said he thought this may be something he would like to see explored more as the bill evolved.

[11:01:37 AM](#)

MR. GRUENING continued the explanation of subsection (a). He referred to subsection (4), which read as follows [original punctuation provided]:

- **Former Subsection (a)(4) was deleted** (Page 12, lines 16 through 17). This subsection specified that a permit may not be issued if it will dewater anadromous fish habitat for a period likely to cause permanent or long-lasting adverse effects to that habitat.

MR. GRUENING explained that this created unintended consequences; for example, any structure placed on an anadromous fish habitat, such as a dam, that it would dewater that affected anadromous fish habitat. He reiterated attempting to be too

prescriptive "tied the hands" of projects the state needs to move forward to achieve a vibrant economy.

[11:02:48 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

- **Former Subsection (a) (5) was deleted** (Page 12, lines 18 through 19). This subsection specified that a permit may not be issued if it will permanently relocate all or portions of a river, lake, or stream if the relocation will disrupt the passage of anadromous fish.

MR. GRUENING offered an example related to road construction. During road construction, the Department of Transportation & Public Facilities (DOT&PF) must block passage of fish for a short period of time. He characterized the thorough process used, including that fingerlings and smolt would be collected and relocated to the portion of the river that was unaffected by the project.

[11:04:38 AM](#)

BEN WHITE, Environmental Manager, Division of Statewide Design & Engineering Services, Department of Transportation & Public Facilities (DOT&PF), answered that with respect to fish windows, timing, and construction, that the department's preferred alternative was to avoid road work when fish are present. In instances with short construction windows, the department will block off the stream and either staff fish biologists or ADF&G biologists will relocate the fish from one side of the project to the other.

[11:05:28 AM](#)

REPRESENTATIVE EDGMON asked whether that also pertained to fish that were not in the Anadromous Waters Catalog.

MR. WHITE acknowledged the department migrates resident fish as well as anadromous fish; for example, Arctic grayling or Dolly Varden have been moved.

REPRESENTATIVE EDGMON related his understanding that the DOT&PF's practice would be the same and all species of fish would be relocated.

MR. WHITE agreed that it was the department's typical practice.

MR. GRUENING referred to the Fishway Act, AS 16.05.841, which required fish passage.

[11:06:35 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Subsection (b) on Page 12, line 24, formerly page 12, line 2:

- **Subsection (b) on page 12, line 27.** Inserted "to protect anadromous fish and anadromous fish habitat" after "actions." This simply clarifies the purpose behind the mitigation measures.

MR. GRUENING reviewed the changes to subsection (b), noting that this subsection provides the intent for mitigation measures. He explained that the language in subsection (b)(1) [Version N], read "limit" significant adverse effects, not "prevent," however, subsection (b)(2) required that if adverse effects cannot be "prevented," they must be "minimized." He characterized this as a conforming change, which was also in line with the ADF&G's current process, not codified. The ADF&G would first attempt to "prevent" the effects of activity on anadromous fish, if that is not possible it "minimizes" the effects, and lastly, the department would "restore" or take other mitigation measures, he said.

[11:07:52 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

- **Subsection (b)(2) on Page 13, lines 1 through 3.** Inserted "or changing" after "limiting" on line 1. Inserted "or other manageable qualities" after "implementation" on lines 2 through 3. This addition adds more flexibility regarding how the department can minimize effects.

MR. GRUENING said this change was suggested by the Legislative Legal and Research Services attorney to provide more flexibility. Adding language "or other manageable qualities" provided more flexibility.

[11:10:19 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

- **Subsection (b) (3) on Page 13, line 6.** Deleted "and" and inserted "or." It made more sense to require the department to restore habitat or take other mitigation measures, rather than restore habitat and take mitigation measures. Sometimes, restoring is the mitigation measure that needs to be taken whereas in some instances, other mitigation measures may be more appropriate.
- **Subsection (b) (3) on Page 13, lines 6 through 7.** Inserted "that the commissioner determines are necessary to protect anadromous fish and anadromous fish habitat" after "measures."

MR. GRUENING explained that it made more sense to have the department restore habitat "or" take other mitigation measures rather than do both restoration and taking other mitigation measures. In fact, sometimes restoring habitat was the mitigation measure being taken; for example, one cannot restore habitat on which a dam sits; however, other mitigation measures could be taken. This would allow the [permit conditions] to do more than just restore habitat, which provides more flexibility.

MR. GRUENING referring to the change in subsection (b) (3) on Page 13, lines 6 through 7, explained that this specifically inserted the language specifically into the mitigation and restoration necessary for protecting anadromous fish and anadromous fish habitat.

[11:10:45 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Subsection (a) on Page 13, lines 15 through 23, formerly on Page 13, lines 11 through 26:

Sec. 16.05.889 Reconsideration of determinations.

- Added new subsections (a)(1), (2), and (3) that specify that requests for reconsideration are limited to whether a proposed activity should be classified as a minor or major permit, a final determination to issue or refuse to issue a permit, the amount of a required bond, the reduction of the amount of the bond, or the elimination of a bond requirement for an activity. An interested person can request reconsideration of any determination that is part of the final determination. Previously, an interested person could request a reconsideration of any determination at any point along the process, leaving room for abuse.

MR. GRUENING said that provisions were added to allow for reconsideration of determinations. This sets up the activities and the points at which activities can be appealed. For example, major permits have a public appeal process whereas minor permits do not. This provision, AS 16.05.889, would allow the public to challenge the consideration of whether the permit should be classified as a major or minor permit, he said. This subsection clarified at what point in the process challenges can occur, including the commissioner's final determination to issue or not issue a permit, and the amount of the bond.

[11:12:44 AM](#)

MR. GRUENING explained that the prior draft [Version N] set up numerous determinations and it allowed for someone to challenge for reconsideration at any point in the permitting process. This could result in reconsideration at 15-20 different points along the process, which seemed like a cumbersome way to try to permit a project. He reiterated that these changes allow for appeals, but only at certain points in the permitting process.

[11:13:17 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Subsection (b) on Page 14, line 20:

- Added language to specify that the commissioner may wave fees if the applicant or permittee is a governmental agency.

MR. GRUENING said it seemed odd the DOT&PF would be charged a fee by the ADF&G, so it was removed.

[11:13:38 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Subsection (a) on page 15, line 9:

- Changed the wording so that the grandfather clause applies to facilities, activities, operations, or projects that have in full force and effect "all authorizations required by law" instead of simply "all required state authorizations."

MR. GRUENING related that this concern was specifically raised by the Alaska Power Association. He explained that Snettisham Hydroelectric facility provides significant power to the Juneau community and it has authorizations that predate state authorizations, including a federal authorization. It was important to include all required authorizations rather than limiting it to state authorizations.

[11:14:25 AM](#)

MR. GRUENING referred to the next change in "HB 199 Explanation of Changes Version N to I," which read as follows [original punctuation provided]:

Page 15, lines 24 through 29:

Sec. 16.05.899 Enforcement Authority.

This is a new section that gives authority for departmental employees designated by the commissioner to directly issue citations for a violation of AS 16.05.871-16.05.901 or a regulation adopted under those statutes if it is not a misdemeanor and there are is probable cause to believe a violation has occurred.

MR. GRUENING stated that this bill creates an opportunity for ADF&G to pursue violations rather than a misdemeanor charge. He explained that currently the only enforcement available to ADF&G is to charge violators with misdemeanors. This made it cumbersome and difficult to prosecute violators since charging someone under an unclassified misdemeanor would require working through a prosecutor and district attorney to determine if a case will move forward. This would allow designated ADF&G employees to issue a citation to a violator.

[11:16:08 AM](#)

REPRESENTATIVE NEUMAN recalled previous discussions with ADF&G and DNR on structures built under land-use permits. The department has indicated it does not have the authority to prevent unauthorized structures from being built. He asked whether this enforcement provision "has any teeth."

MR. GRUENING said that [AS 16.05.899] does not affect DNR's authority. He characterized this provision as one "that has teeth" and was requested by those staff in the field. He related a scenario in which a biologist observed three or four people driving through an anadromous stream, tearing up the stream bed. Under this enforcement provision, the biologist could issue aailable citation, which makes it much more effective. Another example would be if ADF&G inspected a project and discovered non-compliance of permit conditions, the ADF&G's staff could issue a citation, he said.

REPRESENTATIVE NEUMAN suggested that the [committee] might consider [adding enforcement authority for] DNR also since ATVs and other vehicles could disturb anadromous fish streams that would fall under the DNR permitting process, he said.

[11:19:18 AM](#)

MR. GRUENING directed attention to the next change in "HB 199 Explanation of Changes Version N to I, which read as follows [original punctuation provided]:

Section 10 on Page 15, line 30 through Page 16, line 2:

- **Former Section 8** (Page 15, lines 13 through 17) was split into two parts at the request of the Alaska Court System so that the violation and the misdemeanor were not housed in the same subsection.

MR. GRUENING explained that the violation and misdemeanor provisions are cited separately in Version I, which he described as an accounting function.

[11:19:53 AM](#)

MR. GRUENING recapped the major provisions in HB 199, noting that he would not have time to do a section-by-section analysis. He pointed out that every provision in the bill provided additional protection for fish and fish habitat. The Fishway Act was updated to repeal a loophole. For example, the loophole would allow a permittee to establish a hatchery below the blockage or to pay money to establish or enhance an offsite hatchery instead of providing for fish passage. This bill added a two-tier permitting system, including a provision that allows "minor" permits to be issued immediately. Major permits would be afforded more scrutiny and allow the public to become completely involved in every step of the process. Further, the public can review the department's reasoning and scientific data used in on determinations, he said, as well as have an opportunity to challenge or comment on a project. The bill would also add the authority for ADF&G to bond for projects, and it expanded enforcement authority for violations and for biologists to issue violations in the field.

[11:21:48 AM](#)

MR. GRUENING continued to summarize HB 199. He stated that the bill would establish criteria the ADF&G commissioner must consider and publish when issuing a determination for considering adverse effects on anadromous fish and fish habitat. Further, the bill would establish a process by which mitigation measures must be taken.

MR. GRUENING reiterated that everything in the bill would increase protections for fish. He opined that although the bill may not contain everything that everyone wanted, it was a reasonable product that allows responsible development to move forward.

MR. GRUENING stated that the bill would place an amazing amount of scrutiny on a process that does not currently exist, he said. Most importantly, this bill would provide for public engagement of Alaskans in the process, which is very important to the sponsor, he said. He recalled that the public involvement in the process was important to the Board of Fisheries (BOF), other state agencies, and industry participants. Most parties believe

that Alaskans deserve to be informed and be involved in projects.

11:22:53 AM

CHAIR STUTES remarked that she was happy with the bill. She advised that HB 199, Version I, was still a working document. She concurred with Mr. Gruening that HB 199 [Version I] would provide additional protection for Alaska's fisheries. She acknowledged that [Version I] was not as restrictive for economic development as the previous version [Version N], which would have prevented the proposed Cordova hydroelectric dam [Power Creek hydroelectric plant] from moving forward. It would also have prevented the expansion of the Terror Lake hydroelectric project in Kodiak. She emphasized that the state needs these projects.

11:24:30 AM

REPRESENTATIVE EDGMON asked for definition of major and minor permits.

MR. GRUENING answered that it was not 100 percent prescriptive. He responded that a minor permit is one that the commissioner determined would not cause adverse effects whereas a major permit is one that the commissioner has determined has the potential to cause adverse effects. The bill further details the criteria that the commissioner must consider when making the determination and the public process.

11:25:46 AM

REPRESENTATIVE EDGMON acknowledged that he was still struggling with the thresholds under AS 16. He was unsure how the bill would handle conflicting viewpoints by agencies. He was not clear if the ADF&G would have a subservient role to other agencies in development projects. He said he did not want a discussion on AS 38; however, he did want to strike that fine balance between being overly prescriptive while still providing necessary protections the bill attempts to achieve.

MR. GRUENING acknowledged his point. He advised that currently, and in HB 199 [Version I], the commissioner [ADF&G] has the ultimate authority over whether Title 16 permits are issued for anadromous fish habitat. In instances in which a Title 16 permit would be part of a larger project, such as a National Environmental Policy Act of 1969 (NEPA) or a US Army Corps of

Engineers (USACE) project, the ADF&G commissioner would not make the final decision on whether a project will move forward.

[11:28:11 AM](#)

CHAIR STUTES explained that ADF&G has authority to withhold permits. She offered her belief that in instances in which a Title 16 permit was necessary that if the department withheld the permit, it would effectively prevent a project from moving forward.

MR. GRUENING agreed. He clarified that if the ADF&G did not issue a permit for activity on anadromous fish or fish habitat was required, that activity could not go forward. He deferred to Mr. Benkert.

MR. BENKERT responded that the ADF&G uses a collaborative effort and process when the department works with other state and federal agencies. The department coordinates with other agencies on what permits will be issued. He agreed that if the ADF&G did not issue a permit then the applicant must figure out how to move the project forward without affecting fish habitat, he said. He stated that not issuing the permit would not kill a project, but the applicant may need to restructure the project, so it did not require a permit.

[11:30:48 AM](#)

REPRESENTATIVE NEUMAN requested that staff familiar with the ADF&G and DNR permitting process be present to discuss the current process and how it changed [under the bill].

[11:31:21 AM](#)

REPRESENTATIVE TARR asked for the timeframe for the comment period and whether it was for 30 days as for many other public comment periods.

MR. GRUENING answered that the public comment period was for 30 days.

[11:31:41 AM](#)

REPRESENTATIVE TARR complimented the sponsor. She offered her belief that Version I was an improvement. She acknowledged that Title 16 has not really been updated since statehood. She said she appreciated all the time that her staff spent on the bill.

She said it was a big step forward to have the public comment component in the bill, so Alaskans can be more engaged and feel like they have an opportunity to weigh in on projects with their concerns.

[11:32:16 AM](#)

CHAIR STUTES commended the work her staff, Mr. Gruening, put into working on the issues in the bill and in explaining the changes in bill versions for the committee.

[11:32:32 AM](#)

CHAIR STUTES announced that she would be setting this bill aside.

[HB 199 was held over.]

[11:33:01 AM](#)

ADJOURNMENT

There being no further business before the committee, the House Special Committee on Fisheries meeting was adjourned at 11:33 a.m.