

ALASKA STATE LEGISLATURE
SENATE STATE AFFAIRS STANDING COMMITTEE
ANCHORAGE LEGISLATIVE INFORMATION OFFICE
ANCHORAGE, ALASKA

July 20, 2018

1:31 p.m.

MEMBERS PRESENT

Senator Kevin Meyer, Chair
Senator David Wilson
Senator Cathy Giessel
Senator John Coghill
Senator Dennis Egan (online)

MEMBERS ABSENT

All members present

OTHER LEGISLATORS PRESENT

Representative Chris Birch
Senator Shelly Hughes (online)

COMMITTEE CALENDAR

OVERVIEW: How Will Ballot Measure 1 (Initiative Petition 17FSH2)
Impact the State of Alaska

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

JOANNE GRACE, Director
Civil Division
Alaska Department of Law
Anchorage, Alaska

POSITION STATEMENT: Addressed the state's position on Ballot
Measure 1.

SAM COTTEN, Commissioner

Alaska Department of Fish and Game
Juneau, Alaska

POSITION STATEMENT: Addressed the impact of Ballot Measure 1 on the department.

RON BENKERT, Fish & Game Coordinator
Division of Habitat
Alaska Department of Fish and Game
Anchorage, Alaska

POSITION STATEMENT: Addressed the impact of Ballot Measure 1 on the department.

MARC LUIKEN, Commissioner
Alaska Department of Transportation and Public Facilities
Juneau, Alaska

POSITION STATEMENT: Addressed the impact of Ballot Measure 1 on the department.

BEN WHITE, Environmental Program Manager
Division of Statewide Design and Engineering Services
Alaska Department of Transportation and Public Facilities
Juneau, Alaska

POSITION STATEMENT: Addressed the impact of Ballot Measure 1 on the department.

ANDREW T. MACK, Commissioner
Alaska Department of Natural Resources
Anchorage, Alaska

POSITION STATEMENT: Addressed the impact of Ballot Measure 1 on the department.

KYLE MOSELLE, Associate Director
Office of Project Management and Permitting
Alaska Department of Natural Resources
Anchorage, Alaska

POSITION STATEMENT: Addressed the impact of Ballot Measure 1 on the department.

LARRY HARTIG, Commissioner
Alaska Department of Environmental Conservation
Juneau, Alaska

POSITION STATEMENT: Addressed the impact of Ballot Measure 1 on the department.

ANDREW SAYERS-FAY, Director
Division of Water
Alaska Department of Environmental Conservation

Juneau, Alaska

POSITION STATEMENT: Addressed the impact of Ballot Measure 1 on the department.

ACTION NARRATIVE

[1:31:10 PM](#)

CHAIR KEVIN MEYER called the Senate State Affairs Standing Committee meeting to order at 1:31 p.m. Present at the call to order were Senators Coghill, Wilson, Giessel, Senator Egan (online), and Chair Meyer.

OVERVIEW: How Will Ballot Measure 1 (Initiative Petition 17FSH2) Impact the State of Alaska

[1:32:04 PM](#)

CHAIR MEYER announced the committee's agenda is an overview of Ballot Measure 1, Initiative Petition 17FSH2. He explained that the committee meeting would address the initiative's impact on the state's day-to-day operations and budgets. He noted that four commissioners would address the impact to the state should the initiative pass. He emphasized that the committee was on a fact-finding mission and would not take a position on the initiative. He noted that the initiative was under litigation and conceded that there was not a lot of time to educate people on what the initiative's impact would be on the state.

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JOANNE GRACE, Director, Civil Division, Alaska Department of Law, Juneau, Alaska, disclosed that she has held her current position for several months and was previously the head of the Civil Appeals Section. She revealed that during her time in the Civil Appeals Section she handled the Alaska Supreme Court case in Mallot v. Stand for Salmon which is litigation that arose out of the initiative that is now known as Ballot Measure 1.

She said she would explain the state's position on the previously noted litigation to provide context for the discussion of the other agencies that would address the committee. She noted that prior to her explanation, she would address the committee's forthcoming departmental testimonies as follows:

In testifying today, the agencies will be mindful of Alaska's statute AS 15.13.145 which prohibits state agencies from spending money to influence the outcome

of a ballot measure unless the Legislature has specifically appropriated money for that purpose. The Alaska Public Offices Commission (APOC) has determined that a public official's statements about a ballot proposition do not violate the statute if they are made in the usual and customary duties of the official such as responding to a constituent's inquiry or answering questions at a press conference.

The public officials who are appearing at this hearing to explain the impacts of Ballot Measure 1 will be engaging in conduct very similar to the activities that APOC has determined to be permissible, so the statute also permits their testimony today, but the Department of Law has advised them to refrain from taking a position on the initiative and just simply provide an objective view of its impact on each agency; that said, the sponsors of Ballot Measure 1 disagree with the state's interpretation of the bill and the state agencies do not propret to explain the sponsors' interpretation.

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MS. GRACE addressed the pending litigation for Ballot Measure 1 as follows:

My main purpose here is to explain the pending litigation on Ballot Measure 1. The lawsuit arose from the decision of the lieutenant governor which was based on the advice of the Department of Law to deny certification of the proposed initiative. Under Alaska statutes, the lieutenant governor has 60 days to either certify or notify an initiative committee that he is going to deny certification and the reasons for denial.

The potential reasons for denial are very limited. One reason is that the initiative deals with the subject that is prohibited by the Alaska Constitution. One prohibited subject is appropriation. An initiative that makes an appropriation cannot appear on the ballot. The Alaska Supreme Court has said that an initiative makes an appropriation when it deprives the Legislature of its exclusive authority to allocate state assets among competing needs.

The court has also held that the prohibition on allocating state assets by initiative is not limited to money, but also applies to natural resources. The reason that the convention delegates included a prohibition on appropriation via initiative is that they saw in other states taking control of finances away from the Legislature had impeded the Legislature's ability to do its job, that is to facilitate governmental functions and to plan for the state's future.

In Alaska it makes sense to include natural resources in this prohibition because we are a resource state, because Congress gave Alaska an enormous grant of land and mineral rights to allow the state to generate revenues to fund state government. So, if an initiative can take that authority away from the Legislature, that would be just as harmful as restricting the Legislature's ability to allocate financial resources. So, a law like Ballot Measure 1 can be enacted by the Legislature, just cannot be enacted by initiative so that the authority to decide how to use the state's assets remain exclusively with the Legislature.

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MS. GRACE continued as follows:

The Department of Law advised the lieutenant governor that Ballot Measure 1 makes an appropriation by eliminating the Legislature's exclusive authority to allocate anadromous fish habitat to certain uses, it does this in part by eliminating any discretion to allocate the habitat to uses that do not permanently preserve it; for example, some large development project.

The initiative requires a permit for any use of anadromous fish habitat that will have an impact other than a de minimis effect, and it defines anadromous fish habitat very, very broadly to include all lands and waters that could affect anadromous fish, even indirectly; it creates standards and it prohibits granting a permit for activities that cannot meet the standards.

Several of the initiative's provisions create the appropriation of fish habitat, among these are the bill's prohibition on granting a permit for activities that cause substantial damage to habitat; this is found in section 7 of the proposed bill. Under the bill substantial damage will occur if despite mitigation measures any anadromous fish habitat will be adversely effected such that it will not likely recover or be restored within a reasonable period to a level that sustains the fish and wildlife that depends on it, so this prohibits a permit for any activity that will permanently displace any fish habitat, but large acreage development projects will generally permanently displace at least some small amount of anadromous fish habitat as that is very broadly defined in the bill; for example, according to the evidence presented in the case, large hard-rock mines cannot be built without tailings and waste-rock-disposal areas and those sites often permanently impact at least some amount of anadromous fish habitat. Under currently law, the loss of this habitat is mitigated off site by creating new habitat, but Ballot Measure 1 prohibits off-site mitigation; this provision will also prohibit other types of projects including, for example, a highway or a pipeline that will permanently displace wetlands or a seasonal flood plane that contributes indirectly to anadromous fish.

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MS. GRACE continue as follows:

Another section proposed, AS 16.05.887(a)(5), would prohibit a permit for activities that will withdraw water from an anadromous fish habitat in an amount that will adversely affect the habitat, fish or wildlife; and AS 16.05.887(a)(6) would prohibit a permit for activities that will dewater and relocate a stream or river if the relocation doesn't provide for fish passage or will adversely affect anadromous fish habitat, fish or wildlife, both of those provisions will prevent a permit for many activities. Mining projects, for example, routinely dewater stream segments according to the evidence in our case and divert streams, and because of the great prevalence of streams in Alaska, some amount of stream location is typically necessary in order to build roads, buildings and other facilities that large-scale development

projects require, and in Alaska highway projects often parallel streams and rivers that sometimes require relocation to make sure that the highway will remain intact as a road. Relocating a stream will always adversely affect the fish habitat where the stream was once located and where a building or a road is located instead.

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MS. GRACE continued as follows:

Another provision that creates an appropriation by prohibiting the use of anadromous fish habitat is proposed AS 16.05.867(b), which is found in section 2; this section states that when issuing a permit, Alaska Department of Fish and Game (ADF&G) shall ensure the proper protection of anadromous fish habitat by maintaining seven-habitat-protection standards, these include maintaining instream flows, passage of fish, and bank stability. The bill requires that the commissioner must ensure that these standards are maintained when issuing a permit and it requires that all duties carried out under the chapter must be consistent with those standards, and the commissioner's failure to follow these standards is a Class A misdemeanor under this bill; for example, permits cannot be granted for large hydro projects because AS 16.05.867(b)(2) requires that an activity maintain instream flow, the duration of flow, and natural and seasonal flow regimes.

In short, certification of Ballot Measure 1 was denied because the initiative would preclude certain uses of anadromous-fish habits and thus would deprive the Legislature of its authority to decide how to allocate fish habitat among competing uses. This is not a policy decision, it does not matter to the Division of Elections whether anyone thinks this initiative is a good idea or bad idea, the only question for purposes of certification and the only issue in the ongoing litigation is whether the initiative makes an appropriation and based on Alaska Supreme Court case law we think that it does.

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She continued as follows:

As a result of the denial of certification, the sponsors filed suit in September of 2017, three weeks later the Superior Court ruled in the sponsor's favor and ordered the lieutenant governor to prepare the booklets to allow the sponsors to gather signatures. The sponsors then got the signatures needed to get the initiative on the general election ballot in November. Meanwhile, the Division of Elections appealed the Superior Court decision to the Alaska Supreme Court which held oral argument in April. The argument in the Supreme Court was not only about whether Ballot Measure 1 makes an appropriation, parties also argued about severability.

The Alaska Supreme Court will allow an initiative that makes an appropriation to appear on the ballot if the court can sever unconstitutional provisions and the remaining bill meets a three-part test. The test is: first, standing alone the remainder of the proposed bill can be given legal effect; second, deleting the impermissible part of the bill would not substantially change the spirit of the measure; third, it's evident from the content of the measure and the circumstances surrounding its proposal that the sponsors and the petition subscribers would prefer the measure to stand as altered rather than to be invalidated in its entirety.

The state argued that eliminating the unconstitutional provisions of Ballot Measure 1 would delete all the substantive standards in the bill and all that would be left would be the procedural requirements and that this would substantially change the spirit of the bill and thus it would not sufficiently reflect what the petition signers had approved and thus it was not evident that they would prefer that the bill go ahead as altered. The sponsors argued that no severance was necessary because their position is that there are no unconstitutional provisions but that if the bill were severed it would still meet that three-part test.

The possibility that the court might sever parts of Ballot Measure 1 means that there's a whole range of possible outcomes of the litigation so that it's difficult to say with any certainty what the bill might look like if it goes on the ballot. The court could uphold the initiative in its entirety, the court

could strike the initiative in its entirety, or by severing certain provisions it could order one of a number of variations between those two extremes. For this reason, the state asked the court if it's going to sever any provisions to issue a decision at least a few days before the ballot printing deadline for the general election to September 5, so the Division of Elections can review the new draft and write a summary to appear on the ballot. The court could issue a decision sooner than September, but we don't expect that it's going to wait until after September 5.

CHAIR MEYER thanked Ms. Grace for explaining the initiative to the best of her abilities based upon the circumstances. He noted that Ms. Grace answered one of his questions regarding the prospect of a ruling to occur.

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CHAIR MEYER recognized Representative Birch for attending the committee meeting.

SENATOR COGHILL asked Ms. Grace to summarize the three-part test.

MS. GRACE reviewed the three-part test as follows:

The first part is that standing alone after the court deletes unconstitutional provisions, standing alone the remainder of the proposed bill can be given legal effect. Secondly, deleting the impermissible part of the bill would not substantially change the spirit of the measure. Three, it's evident from the content of the measure and the circumstances surrounding its proposal that the subscribers, the sponsors and the petition subscribers prefer that it stand as altered rather than being struck entirely.

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SENATOR GIESSEL referenced section 8 and noted that the term in the section appears in AS 16.05.889(a) as follows:

Within 30 days after the date of a determination of the commissioner under AS 16.05.871(e), AS 16.05.875(d) or (d), AS 16.05.883, AS 16.05.884(d) or (f), or AS 16.05.885(d), any interested person may request that the commissioner reconsider the

determination. A request for reconsideration must be in writing.

SENATOR GIESSEL asked what the definition is of "any interested person." She inquired if "any interested person" could be a Canadian or an individual that resides in Iowa who just feels like asking for a reconsideration.

MS. GRACE answered that "any interested person" was not defined in the bill. She said she thought other statutes have similar language and perhaps one of the other agencies in attendance could address previous case law. She opined that the Alaska Supreme Court tends to be broad minded and Ballot Measure 1 is a bill that is intended to preserve fish habitat. She continued as follows:

I think that citizen who felt that granting a permit was improper under the law would be allowed to appeal, but that would be open to interpretation by the court.

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SENATOR GIESSEL asked if the initiative was not prioritizing one resource over multitudes of others. She inquired if the Alaska Supreme Court was wrestling over the same question.

MS. GRACE replied as follows:

That's essentially the core of it, in other words, the bill takes away the discretion of the Legislature as delegated to the Department of Fish and Game to choose to use anadromous fish habitat for some purposes which generally is going to be large development projects because if the habitat is not permanently preserved the bill prohibits it; for example, if a road or a pipeline or a tailings facility is going to permanently displace that habitat then that's taking away, then that's not permitted, it cannot get a permit and that takes away the discretion of the agency and therefore the Legislature to decide to use the habitat for that purpose, that's in fact what makes it an appropriation and what therefore makes it an improper subject for an initiative.

CHAIR MEYER asked Ms. Grace to address the ballot measure's impact on hydro projects as follows:

You had mentioned that this could have a big impact on hydro projects and certainly we have a lot of hydro already in the State of Alaska. Are those projects grandfathered or would they have to fall under this initiative if it passed?

MS. GRACE answered as follows:

It grandfathers permits, authorizations, license approvals for activities adversely effected on or before the effective date of the act until expiration or termination of the user's permit authorization license or approval. I don't actually know what the permitting requirements are for hydro projects, I know that a new hydro project would be unlikely to get a permit under the standards in this bill. I don't know if for an existing permit if the permits ever expire or whether it might be required to get a new permit for some kind of additional building.

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CHAIR MEYER asked to verify that a hydro project like in Kodiak or even Bradley Lake would be almost impossible to get permitted under the initiative.

MS. GRACE answered as follows:

The affidavits in our case said that larger hydro projects would not be able to meet the standard, I'm not entirely sure how large those are and exactly where that line is drawn.

CHAIR MEYER asked how the initiative pertains to other developments. He inquired if Prudhoe Bay and Kuparuk oilfields would be able to come online if Ballot Measure 1 had been passed when the oilfields came online. He asked if the previously mentioned oilfields would be grandfathered as well.

MS. GRACE answered as follows:

The affidavits that the state got from our agency officials said that Prudhoe Bay would not have been built with this initiative. Again, whether they are grandfathered depends on what permits would expire and when they would need new permits; for example, one of our affidavits said that the Red Dog Mine is going to need a new tailings facility and so even though it is

an existing project a new tailings facility would require a new permit to the extent that it would displace anadromous fish habitat and would not be grandfathered under this bill.

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CHAIR MEYER noted that Prudhoe Bay and Kuparuk are private developments that provides the state with most of its revenue. He asked to address state projects like the new Seward Highway. He inquired if Ballot Measure 1 would allow major roads to be built.

MS. GRACE answered that she could not speak to Chair Meyer's inquiry because she did not know what would be entailed; however, she opined that it was possible.

CHAIR MEYER noted that the commissioner of the Alaska Department of Transportation and Public Facilities (DOT&PF) could address his question.

SENATOR COGHILL addressed section 5, AS 16.05.877, "Significant adverse effects," subsection (a):

The commissioner shall find the potential for significant adverse effects where the activity may, singly or in combination with other factors: (1) impair or degrade any habitat characteristic protected under AS 16.05.867.

He asked if any habitat characteristic protected under AS 16.05.867 would be a source of litigation.

MS. GRACE answered that it may well be. She noted that the section Senator Coghill referenced lists habitat protection standards that the commissioner is required to respect when he or she issues a permit and that could also subject the commissioner to criminal penalties if he or she fails to do so.

SENATOR COGHILL noted that the section he previously referenced talks about the aquatic habitat diversity. He asked to confirm that diversity could be a primary topic of discussion if any impact occurred on that characteristic.

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MS. GRACE confirmed that the scenario Senator Coghill noted could be a topic of litigation.

SENATOR COGHILL replied as follows:

That would stand true for all three characteristics and the eight qualifications under (b). What I'm looking for is the fact that it looks to me like the initiative is written in such a way that the courts would be forced to have to decide many, many of these questions. So, any habitat characteristic would be the source of discussion under those at least nine criteria?

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MS. GRACE answered that Senator Coghill's question was certainly possible.

SENATOR COGHILL addressed section 5 as follows:

If you look in section 5, once again it's in the additional criteria, so additional criteria beyond on those would then be something that would have to be decided.

MS. GRACE answered as follows:

To the extent that Fish and Game drafts regulations and those could also be subject to challenge.

SENATOR COGHILL replied as follows:

I think one of the reasons I'm asking these things is because if we had a bill like this in front of the Legislature, those are the kinds of things you would try to get some understanding of, "What did you mean when you said that?" way before you signed off on it. I find those very, very broad in such a way that my expectation is that it could grind to a halt anything, notwithstanding the constitutional issue, just the procedural issue itself would then in my view cause a constitutional tension on, "Could the state actually move forward?" So, those are at least the two points that I wanted to bring up immediately.

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CHAIR MEYER concurred with Senator Coghill. He noted that Senator Coghill serves as chairman on the Senate Judiciary Committee.

SENATOR WILSON addressed section 3 regarding possible impact and asked Ms. Grace what the definition was for "anadromous waters" and how far does "anadromous waters" go out. He inquired if "anadromous waters" would cover all of Resurrection Bay or Prince William Sound.

MS. GRACE replied that the definition was very broad and essentially included lands or waters that could impact anadromous fish, even indirectly. She conceded that the answer was potentially "yes."

SENATOR WILSON asked to confirm that there is no mile designation for the "anadromous fish" definition. He voiced his concern that the initiative could impact docks, cruise ships, harbor repair, new liquid natural gas (LNG) docks in Nikiski and extending pilings in the Mat-Su Borough.

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MS. GRACE answered that Senator Wilson's statement was certainly a possibility. She specified that the definition applies to the following:

Lands or waters that contribute directly or indirectly to the spawning, rearing, migration or over-wintering of anadromous fish.

SENATOR WILSON asked to confirm that offshore drilling would also be impacted as well.

MS. GRACE answered that it was possible someone could make that claim.

SENATOR COGHILL noted that two military bases were in the Fairbanks area. He pointed out that the entire Fairbanks area is considered a floodplain. He continued as follows:

If it was intermittent which is the case in Fairbanks, I have lived through several floods in the Interior and they certainly impact the whole community in a variety of ways, but that water body in that town would then probably be considered under this chapter as an anadromous fish habitat, if I understand this definition. Would you see it the same way?

MS. GRACE replied as follows:

My reading of this definition is that it was written to be as broad as it possibly could be.

SENATOR COGHILL opined that Fairbanks, whether building a toolshed or building for an F-35 aircraft, would be hugely impacted.

CHAIR MEYER noted that Senator Giessel had sent a letter of inquiry to a mayor in her district on a similar subject.

SENATOR GIESSEL answered that she did and detailed that she addressed the impact of fire service in the Hillside area where large tankers access water bodies and streams to fight fires. She remarked that getting a permit to withdraw water as she described could be complicated or possibly be denied.

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MS. GRACE answered as follows:

The bill prohibits a permit for an activity that will withdraw water from anadromous fish habitat in an amount that will adversely affect the habitat of the fish or the wildlife, so I guess it would depend on how much was being withdrawn.

SENATOR GIESSEL asked Ms. Grace to address her statement that the commissioner could be liable for criminal penalties under Ballot Measure 1.

MS. GRACE replied as follows:

The bill makes failing to follow any of the provisions in this bill a Class A Misdemeanor, and some of the provisions including these habitat protection standards and the standards for granting or denying a permit can only be done by the commissioner.

[2:05:24 PM](#)

SAM COTTEN, Commissioner, Alaska Department of Fish and Game, Juneau, Alaska, addressed the impact of Ballot Measure 1 on the department as follows:

The Alaska Department of Fish and Game (ADF&G) is responsible for issuing Title 16 permits; specifically, our Division of Habitat takes care of that. Our primary purpose is to protect fish and game resources from any adverse impacts as a result of

development. Ron [Benkert] will be able to describe some of the examples of permits like stream crossings, pipelines and anything that might impact habitat. We've been doing this for a lot of years and they've had a lot of big projects to benefit from the experience.

If the initiative were to pass it would certainly change the way we approach these permits, obviously a lot of rules would change and so we are able to discuss some of that and hopefully respond to some of your questions on those kinds of changes. In order to comply with the new statutes, obviously we would have to do a new regulatory exercise, put in new regulations, that would take some time, it's uncertain now and it would cost some money. I think our cost estimate that we submitted to the Legislature earlier was I think about \$1.3 million a year for at least 5 years, an additional expense that we would have to undergo.

Ron Benkert, you may already know, he's our regional supervisor for the habitat divisions for the Southcentral region, he has a lot of experience with the Pebble prospect, the Chulitna coal project, the Susitna project, Port MacKenzie rail extension, he also represents the department with what's known as the LMPT, Large Mine Permitting Team, so in that regard he works with other departments in a joint effort. Internally, Ron also works with our other divisional folks with the Division of Wildlife, Division of Commercial Fish, Division of Sportfishing, Division of Subsistence, so we take a very comprehensive approach to it internally and then within state government.

2:08:07 PM

RON BENKERT, Fish & Game Coordinator, Division of Habitat, Alaska Department of Fish and Game, Anchorage, Alaska, stated that his intent was to provide a brief background on how the division was currently operating and then to address initiative concerns. He said his presentation addresses the division's perception in how it currently operates and potential changes. He said he would also address projects that probably would have impact associated with Ballot Measure 1.

MR. BENKERT commenced his presentation and addressed the division's mission statement as follows:

Habitat's mission is to protect Alaska's valuable fish and wildlife resources and their habitats as Alaska's population and economy continue to expand.

He said the Habitat Division does a balancing act. He asserted that the division understands that there are acceptable impacts to fish habitat because the state must build roads, cross streams and extract resources.

He explained that the division has a mitigation sequence by working with project applicants to minimize any kind of impacts that could potentially impact fish habitat. He noted that the division is working with the Alaska Department of Transportation and Public Facilities (DOT&PF) on replacing fish-habitat culverts. He added that the division works with DOT&PF and local entities to provide good designs for fish pipes that provide passage for fish.

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He addressed "Workload Priorities" as follows:

- Title 16 permitting and enforcement;
- Field work: research, inspections, fish surveys;
- Large projects of importance to the state;
- Forest Resources and Practices Act;
- Special Area permitting and planning;
- Summation:
 - Habitat's top workload priorities are focused on the anadromous waters catalog and our Title 16 permitting authority. We also participate in large project reviews and reviews of forest practices on state and private land. We also conduct Special Area planning and research that helps us make sound permitting decisions.

CHAIR MEYER asked that Mr. Benkert address how Ballot Measure 1, if passed, would impact the division.

MR. BENKERT addressed "ADF&G Statutory Authority Fish Protection" as follows:

- The Fishway Act:

- AS 16.05.841.
- Anadromous Fish Act:
 - AS 16.05.871.
- Special Area Planning & Permitting:
 - 5 AAC 95.700.
- Summation:
 - Alaska's early fish protection laws have helped us avoid many of the major issues related to fish passage and habitat loss or degradation seen in many areas of the Lower 48. As early as 1919, the territorial government could require fishways prior to construction of dams or other obstructions. By 1959, the Legislature enacted a Fish and Game Code included statutory protections for fish passage and later fish habitat.

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MR. BENKERT addressed the "Fishway Act (.841)" as follows:

- 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 and maintenance.
 - Applies to fish passage only.
- Activities not covered by .841:
 - Projects that do not have the potential to block passage:
 - Docks, streambank protection, motorized stream crossings, etc.
- Summation:
 - The primary strength of the Fishway Act is that it requires passage for all species of fish and, if an obstruction such as a culvert is authorized, the structure has to be maintained in the long-term, rather than just built and left alone.

He addressed "Anadromous Fish Act (.871)" as follows:

- Jurisdiction:
 - Applies to any activity.
 - Applies to any life stage.

- o Restricted to ordinary high-water mark.
- Application of (.871):
 - o Activity occurring below OHW with some exceptions.
 - o Waterbody must be in AWC.
 - o Freshwater only down to low tide in the marine environment.
- Summation:
 - o Broad in scope and applies to nearly any in-water activity, protection to all life stages of anadromous fish. For fish passage projects, this statute allows us to review designs and make decisions based on more than just fish passage. We can consider impacts to habitat or stream function and include requirements for streambank restoration and revegetation, and of a new culvert.

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SENATOR WILSON asked to confirm that Mr. Benkert's presentation focuses on current practices and not on changes from the initiative.

MR. BENKERT answered yes. He noted that the first portion of his presentation addressed current operations and the remainder would focus on changes from the initiative.

He addressed "Activities That Typically Require Fish Habitat Permits" as follows:

- Culvert, bridge and ford installation, maintenance, and restoration;
- Stream crossings: vehicles, pipelines, power lines;
- Streambank repair and construction;
- Stream diversions or removals;
- Water withdrawals: road work, drilling, mining, ice roads;
- Material extraction sites;
- Dam construction and maintenance;
- Run of the river hydro projects (no dam);
- Research projects: fish weir installation and operation;
- Dock and boat ramp construction;
- Blasting.

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MR. BENKERT addressed "New Duties and Functions the Initiative Would Require Habitat to Implement" as follows:

- Presume that naturally occurring connected water bodies and adjacent riparian areas are anadromous, currently jurisdiction ends at the ordinary high-water mark of documented anadromy.
- Require site-specific determinations to determine a water body is not anadromous fish.

He referenced a map which showed locations where the division has done sampling. He noted that the proposed Arctic National Wildlife Refuge (ANWR) project would require the division to do sampling during the current season.

SENATOR EGAN asked how an anadromous stream is added to the division's catalog.

MR. BENKERT explained that the division has a process where a team in the Sport Fish Division receives nominations. He detailed that a nomination form is submitted by a biologist or whoever has identified additional fish habitat that could be put into the division's catalog. He explained that nominations are reviewed several times including an area biologist who must signoff. He summarized that new segments go to the lieutenant governor to sign into law every spring. He noted that the process has a lot of steps to ensure what is being looked at should be included in the catalog.

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SENATOR EGAN asked if fieldwork is done for every request for catalog inclusion.

MR. BENKERT answered that the division has a team that goes out annually on what is called the Alaska Freshwater Fish Inventory Team.

SENATOR EGAN asked if Mr. Benkert knew what the average cost was for each request to add to the anadromous catalog.

MR. BENKERT answered that he did not know.

CHAIR MEYER asked that the information that Senator Egan requested be provided to all committee members at a later date.

[2:25:35 PM](#)

MR. BENKERT addressed the division's additional responsibilities as follows:

- Develop bonding structure and requirements;
- Develop regulations associated with the initiative;
- Develop a bail schedule for bailable citations as noted in the initiative;
- Implement civil penalties in addition to criminal penalties as noted in the initiative;
- Extend jurisdiction into the riparian areas adjacent to anadromous streams as noted in the initiative for cross-jurisdictional issues;
- Respond to appeals on permit decisions;
- Restrict project mitigation to on-site only.

He addressed public notices development for the following:

- Permits, applications and amendments;
- General permits;
- Rescinding a permit;
- Any draft major anadromous fish habitat permit assessment, and major fish habitat applications;
- May require written authorization for an individual to operate under a general permit.

[2:28:40 PM](#)

He addressed additional responsibilities in response to the initiative as follows:

- Determine whether a fish habitat permit is a major or minor permit.
- Respond to and address public input on major fish habitat permits.
- Collect fees equal to the cost of service for major permits.
- Determine if the proposed activity is likely to cause substantial damage to anadromous fish habitat.
- Determine if anadromous fish habitat will recover or be restored within a reasonable period of time.
- Specify in regulation all de minimus activities that do not require a permit and require a permit for all activities not specified.

CHAIR MEYER asserted that his focus was on the impact to the state. He opined that the additional duties and services noted by Mr. Benkert would be very costly.

MR. BENKERT concurred with Chair Meyer. He noted that the division's cost estimate includes additional personnel needed to develop regulations and citations, a program analyst, regulatory specialists, and added personnel to deal with the workload from all the other requirements that would be the result of the initiative's passage. He agreed with Commissioner Cotten that a significant impact for a cost perspective would occur, an estimated \$1.3 million per year for at least 5 years.

[2:31:24 PM](#)

He addressed "Initiative Impacts on Stakeholders" as follows:

- Increased time and cost because of public notice requirements and determining whether anadromous fish are present.
- Public input into permitting process could slow down the process.
- Prohibitions contained in the initiative that would modify or preclude the issuance of permits for certain activities.
- Determine if bonding is required on major permits.
- Expense of conducting site specific determinations and extensive data needs to prove anadromous fish are not present, an expense borne by the applicants.

He addressed "Specific Examples of Initiative Implementation" as follows:

- New AS 16.05.867(a) states that an anadromous fish habitat permit may not be granted for an activity that will cause "substantial damage" to anadromous fish habitat.
- "Substantial damage" is defined as an activity inconsistent with restoring the habitat within a reasonable time to support anadromous fish.
- Under this provision, larger hydro projects/dams such as the Susitna Hydro Project which, by definition, change flows and alter natural and seasonal flow regimes, may not be permissible.

He noted that defining what "substantial damage" is will be required to codify regulation.

[2:33:35 PM](#)

MR. BENKERT addressed "Additional Examples" as follows:

- New AS 16.05.887(a)(1) may prevent us from issuing permits for the proposed Donlin Prospect mine because two anadromous streams would be eliminated permanently, causing substantial permanent damage to anadromous fish habitat.
- New AS 16.05.877(a)(6) states that an anadromous fish habitat permit may not be granted for an activity that will dewater and relocate a stream or river if the relocation does not provide for fish passage or will "adversely affect" anadromous habitat, fish, or wildlife.
- Major highway projects often parallel streams and rivers and often require extensive erosion control and/or relocation to keep the highway intact and passable.
- These types of projects have an adverse effect on anadromous fish habitat and could potentially not be permitted.

He addressed "Conclusion" in his presentation as follows:

- Passage of the initiative would require, but is not limited to:
 - Hiring additional staff including habitat biologists, an analyst programmer, and program technicians to implement initiative components and handle additional workloads.
 - A public education component may need to be developed to inform the public of our new and expanded jurisdictional authority.
 - The division anticipates that development of regulations could take a significant effort.
 - Implementation of any new regulations and criteria would also take significant time and effort.

[2:36:23 PM](#)

SENATOR GIESSEL asked if Mr. Benkert had a definition for "any interested person."

MR. BENKERT answered no. He explained that the department would have to defer to the Alaska Department of Law for determining the definition.

SENATOR GIESSEL referenced subsistence and addressed the Fish Resource Monitor Map regarding "New Duties and Functions the Initiative Would Require Habitat to Implement." She noted various subsistence communities that will drive their four-

wheelers through creeks. She pointed out that Mr. Benkert mentioned that pedestrian fording in creeks was considered di minimus. She asked what consideration was given to the impact of four-wheelers on an established hunting trail and would a permit be required.

MR. BENKERT answered as follows:

If you are fording an anadromous stream now you need a permit for it. A lot of the thrust of our general permits we issue to the public is just specifically for that activity when we have a well-established trail that the public has been using for decades, we try to identify those areas and develop a general permit to authorize that activity with some sideboards. We have stipulations in there that basically requires them to ford the creek in an appropriate manner to minimize any impacts to the stream bed or banks. We are continually identifying those, we are always adding new general permits as we identify new areas that could use that, but currently you still are required to come and get a permit from us if you are planning on crossing with a four-wheeler or pickup truck fording on an anadromous stream.

2:38:08 PM

SENATOR GIESSEL addressed the Red Dog and Fort Knox mines as follows:

A question now about two large projects that exist now and the impact that they had on fish resources. I'm referring to the Red Dog Mine, this is a zinc mine that had a natural leeching of minerals into Red Dog Creek creating a sterile creek actually because of all of the minerals and actually the riparian edges of that creek were also devoid of vegetation. Then we have Fort Knox, Fish Creek right below Fort Knox; again, the area had been damaged by historic mining, it was restored by the mine and fish are back, same thing happened at Red Dog. When the mine began operation, the water was purified, and the fish actually came back. Is that allowed to take into consideration under this initiative, the potential for actually cleaning up a waterway and restoring fish resource?

MR. BENKERT replied that Senator Giessel's points were very legitimate. He asserted that the Fort Knox project has done a great job of providing on-site mitigation by transforming old plaster mining operations into a very productive wetland complex for aquatic vegetation, fish and wildlife. He said Fort Knox is an example of how to have compensatory mitigation offset impacts. He noted that Fort Knox is in a resident fish-stream area that is not an anadromous fish habitat but is a good example of offsetting impacts to a fish habitat. He concurred with Senator Giessel that Red Dog Creek was a sterile creek during the construction of the Red Dog Mine. He confirmed that Red Dog Creek currently supports a strong run of fish due to the mine's perpetual water treatment. He noted that the mine had issues with some of their discharges but pointed out that the water can support fish populations. He disclosed that Red Dog Creek could not support fish populations prior to the Red Dog Mine.

He addressed Senator Giessel's question regarding anadromous stream mitigation as follows:

The way we read the initiative, even if you could provide onsite compensatory mitigation, just because of the statement that if you actually had to remove a piece of anadromous stream that would probably trigger denial of the permit because it says you can't permanently remove or alter an anadromous fish stream; I don't see the connection between that statement and providing appropriate on-site compensatory mitigation, I think the compensatory mitigation part could be trumped by some of those statements in the other parts of the initiative.

[2:41:14 PM](#)

SENATOR GIESSEL asked what industry, company or agency, applies for most of the fish-habitat permits that the division grants.

MR. BENKERT answered that the division's largest client is DOT&PF. He added that the division works closely with the North Slope producers who have a lot of permits in play.

SENATOR GIESSEL asked if the division has ever issued a fish-habitat permit that it regretted. She inquired what the division would do in a situation that she previously described.

MR. BENKERT answered that the division has conducted enforcement actions with a cease-and-desist due to noncompliance of permit

provisions and stipulations. He noted that noncompliance in egregious situations may result in a Class A Misdemeanor.

SENATOR WILSON asked if there are gaps in the current law where the initiative would make the division's day-to-day operations easier or better. He noted that Mr. Benkert previously addressed penalties and asked if he felt that current laws were good as is or does the initiative bolster current laws.

[2:43:55 PM](#)

COMMISSIONER COTTEN commented as follows:

As the chairman noted before the meeting started, we're really not supposed to voice our opinion as to the nature or the preference, pro or con, on the initiative, it's an advocacy position.

SENATOR WILSON asked if Commissioner Cotten believed that there were gaps in the current law that needed to be repaired.

COMMISSIONER COTTEN replied that "statutory section 871" was addressed in the last legislative session where rewrite efforts were made regarding adequacy. He said the department was dealing with the rewrite and noted that there has been success but conceded that critics have suggested that it could have been more restrictive.

SENATOR COGHILL said there were two things that he noticed in the initiative: description of "anadromous fish habitat" and "significant adverse effects." He continued as follows:

In section 3 under the "anadromous fish habitat," the adjacent riparian areas which you said would be kind of a new authority, it says that it may contribute indirectly to the spawning, rearing, migration. How would you see that in kind of the intermittent seasonal-water runoff? Would that be just a spawning area only or would that be a vegetation runoff that might hinder egg spawning or have a biomass that would be beneficial to the fish? How would you see that as an adjacent to the spawning area? That's in section 3 and it's under subsection (f) in this chapter, "anadromous fish habitat means," and then they talk about "naturally occurring permanently intermittent seasonal water body," but they also talk about indirectly affecting spawning, migration, overwintering of this anadromous fish, I was just

wondering; would it be runoff? Would it be the fact of egg hatching? Would it be movement of mud that might hinder that? How would you see that in an indirect impact on those fishes from an adjacent water body?

2:46:30 PM

MR. BENKERT answered as follows:

I think that's correct. If you had some kind of an operation that was discharging large amounts of sediment from an upland location into the creek, that would probably also now fall into our jurisdiction. There's other jurisdictions that are already dealing with that, DEC has programs that prevents inputted sediments, there's [inaudible] water prevention program, also requires them to try to ensure that the inputted sediment doesn't come from uplands into anadromous water bodies; again, that would be something that we would have to further define if this was to move forward in regulation or some kind of guidelines that would basically further define what exactly we would need to do to implement that particular section.

SENATOR COGHILL addressed significant adverse effects as follows:

I asked the Department of Law this, it goes to the "significant adverse effects." The first thing they say is that the potential for significant adverse effects that in combination with other factors may impair or degrade any habitat characteristic, and then it goes back to the habitat protection standards and it seems to me like you would have to write a whole book on what any habitat characteristic would be under the definitions given under section 2.

MR. BENKERT answered as follows:

That's what it says, I think that the language in the initiative kind of speaks for itself. We don't have an opinion on which way that would go, but obviously it would take an awful lot of thought and effort for us to grapple with that if the initiative was to move forward.

2:48:38 PM

SENATOR WILSON asked Mr. Benkert to address the division's permitting process. He inquired how long do the permits have and how often are permits renewed.

MR. BENKERT answered that the division typically does not issue permits longer than five years and that two years was typical.

SENATOR WILSON asked what the percentage was for permit renewal.

MR. BENKERT replied that he would get back to the committee with information. He noted that the division does a lot of amendments with DOT&PF to extend expiration dates due to delays to avoid having to start projects over.

SENATOR WILSON noted that new projects would have to go back if the initiative passed. He asked if a current permit was amended if the permit would come under the initiative.

MR. BENKERT explained that the initiative indicates that an amended permit would have to public notice as well.

[2:51:03 PM](#)

CHAIR MEYER noted his discussion earlier in the hearing with the Alaska Department of Law regarding grandfathered permits. He asked to verify that Mr. Benkert was saying that if the permits were to come up for renewal or amended that the permits would fall under the initiative.

MR. BENKERT answered as follows:

As the Department of Law indicated, Red Dog is a good example, they are currently planning an expansion of that facility, they have their current permits, so they wouldn't be affected by that if they wanted to do nothing else, but under the initiative if they wanted to conduct an expansion of the facility they would need new permits to expand that facility which if this would pass it would be evaluated under a new permitting regime under what was required by the initiative.

CHAIR MEYER thanked ADF&G for enlightening the committee on the major impact that he said appears would occur to the department if the initiative passed.

[2:52:36 PM](#)

MARC LUIKEN, Commissioner, Alaska Department of Transportation & Public Facilities (DOT&PF), Juneau, Alaska, commenced the department's presentation with an overview as follows:

- DOT&PF Mission and Policy:
 - Our mission at DOT&PF is to "Keep Alaska moving through service and infrastructure".
 - DOT&PF employs 3,000 Alaskans who collectively strive to serve all Alaskans and provide them with efficient and reliable access to goods and services.
 - DOT&PF is committed to environmental stewardship, we work towards maintaining healthy salmon populations and maintaining fish habitat as we accomplish our mission. We want to ensure healthy populations of salmon for future generations.

- DOT&PF Core Values:
 - Integrity: Doing the right thing even when no one is watching. Doing what you say you are going to do.
 - DOT&PF implements commitments made to the public and agencies with regard to projects that require work in fish habitat.
 - Excellence: Commitment to continually improve.
 - DOT&PF conducts research, collects monitoring data, and works with others to improve our processes to ensure that our impacts to fish habitat are minimized and that mitigation efforts are successful.
 - Respect: Positive regard for customers, stakeholders, investors and colleagues.
 - DOT&PF works with the public, resource agencies, as well as local governments and watershed councils during project development to ensure that impacts to fish habitat are minimized while still allowing Alaska's much needed infrastructure to be developed.

[2:53:56 PM](#)

BEN WHITE, Statewide Environmental Program Manager, Alaska Department of Transportation & Public Facilities, Juneau, Alaska, addressed his presentation, "Ballot Measure 1-Potential Impacts to DOT&PF" as follows:

The proposed Ballot Measure 1 - Stand for Salmon Initiative - introduces changes to the way that ADF&G regulates development within fish habitat and modifies Title 16. This proposal will have a direct impact in the time and cost it takes a project to be developed and put into construction.

It is anticipated that this proposal will require an additional 8 positions within the Department at a total annual increase of \$953,900; this figure does not consider the services and commodities costs of each position; e.g., office furniture, phone service, IT service, computers and other office supplies.

MR. WHITE referenced "DOT&PF Activities in Fish Streams" as follows:

- There are several ways that DOT&PF projects involve work within and near fish habitat:
 - Culverts (New);
 - Culverts (Improvements);
 - Culverts (Maintenance);
 - Bridges (New);
 - Bridges (Replacements);
 - Bridges (Maintenance);
 - Roadway Embankment Protection (Riprap Armoring);
 - Stream Realignment Temporary and Permanent (Airports, Roadways);
 - Mitigation, Restoration, Enhancement (Habitat creation).

[2:56:15 PM](#)

He addressed "The proposed language could restrict or prohibit" as follows:

- Culverts with inverts;
- Riprap for erosion protection and scour counter-measures;
- Channel maintenance (alluvial systems);
- Temporary construction activities, diversions, and water use.

He addressed "The presumption that a naturally occurring 'permanent or seasonal water body' is anadromous" as follows:

- Most critical aspect of the proposed changes to current fish-habitat regulations - the assumption of anadromous

fish would lead to extra resource demands for DOT&PF (staff time, funding, etc.), and project delivery time would increase.

- Delay in project delivery: The proposed language requires applicants to prove fish do not exist for all work in Alaska waters.
- Design for fish passage everywhere: This will require more technical design time and generally larger hydraulic structures.
- Example: new scour risk.

MR. WHITE summarized that the initiative will increase the delivery time of the division's projects. He said one of the options the department has is to design everything for fish passage, an option that will require more technical design and effort. He said the department will have to design large hydrological structures for passing fish rather than just passing water. He summarized that larger structures will require more maintenance and monitoring on a regular schedule.

[2:58:38 PM](#)

He addressed the "Use of the term 'significant adverse effect' and vague terms like 'reasonable period' and 'habitat-dependent connections'" as follows:

- Under NEPA a "significant adverse effect" would require either an Environmental Assessment (EA) or Environmental Impact Statement (EIP). Currently most of our minor maintenance projects fall under a Categorical Exclusion (CEs):
 - CE development time: 6-12 months;
 - EA development time: 1-3 years;
 - EIS development time: up to 5 or more years.

He summarized that the ballot measure has the potential to increase the amount of time it takes for the department to build up its environmental document.

SENATOR COGHILL asked if his significant adverse effect overview was a "term of art" for triggering an environmental assessment.

MR. WHITE answered as follows:

Significant adverse effect as defined in NEPA the act, we are not allowed to do categorical exclusions on anything that has a significant impact.

SENATOR COGHILL commented as follows:

So just us putting this in statute would drive you to an environmental impact study on most anything that had that kind of an impact?

MR. WHITE answered that there was a potential for it to cause that.

SENATOR COGHILL replied that he did not know that.

[3:00:22 PM](#)

MR. WHITE addressed the "Two-step public notice process" and the "No timelines established for 'major' fish habitat permits" as follows:

- Two-step public notice process:
 - The proposed language indicates that there are two public notice steps in the process: the application and initial determination as well as a draft permit.
- No timelines established for "major" fish-habitat permits:
 - Most of the work accomplished by DOT&PF would be processed under a "major" permit.
 - Without established timelines there is uncertainty in project delivery, and delay causes increased costs or potential loss of funding.

He addressed "Potential conflict between engineering/safety requirements and habitat requirements" as follows:

- DOT&PF Engineers are responsible for safeguarding the traveling public.
- Risks related to scour vulnerability, reduced flood resiliency, and adverse impacts to adjacent properties could increase.

[3:03:01 PM](#)

He addressed "Reconsideration determinations, automatic denial if the commissioner fails to make a determination" as follows:

- There is no mention of "good standing" for someone that has participated in the permit process (public notice).
- Reconsideration determinations will require additional work from both the applicant and permitting agency.

- Reconsideration determinations result in automatic denial if there is failure to address.

MR. WHITE summarized that reconsideration determinations creates uncertainty for the department in project development and is difficult to build into their construction projects.

He addressed "Mitigation required for all 'significant adverse effects'" as follows:

- The proposed language now makes mitigation required for all significant adverse effects.
- The proposed language states that a fish-habitat permit "may not be granted for an activity that will cause substantial damage to anadromous fish habitat."

He asserted that the department has done a fairly good job in creating a lot of fish habitat where there was not fish habitat before. He disclosed that the department has actively worked with ADF&G to remove fish-passage-problem culverts.

He addressed "Limitation on mitigation options" as follows:

- The proposed language indicates that permit conditions or mitigation measures "may not offset the activity's adverse effects" in another water body or portions of the same water body. This proposed language requires mitigation to occur on-site.
- On-site mitigation for airports causes other wildlife hazards.

He explained that the proposed mitigation language will not allow for upstream or offsite mitigation, a proposal that will pose a problem with airport projects regarding runway safety areas.

[3:06:53 PM](#)

He addressed "DOT&PF Public Process" as follows:

- DOT&PF has a robust public process for the development of our infrastructure projects:
 - During initial planning:
 - Highways: Statewide Transportation Implementation Plan (STIP).
 - Aviation: Airport Improvement Plans.
 - During project development:

- Public Involvement Plans/NEPA.
- Public comment periods, meetings, workshops.
- During the permit process:
 - Public review and comment on permit process.
 - Section 404/10 - Wetlands and Waters of the U.S.

3:08:01 PM

CHAIR MEYER remarked that Mr. White had done a good job of pointing out that the initiative would create delays, duplication, and increased cost to the department's projects. He asked if there were road projects that may not be able to get a permit under the initiative.

MR. WHITE answered that there may be projects or activities that are difficult to get a permit for. He continued as follows:

I think at the end of the day we have to get the roads constructed, we have to get the airports built, and we will work diligently with our other agencies to do the mitigation and to make these things happen. I hesitate to say that the project itself would stop, but I think there are aspects of the project that we will be forced to redesign and restructure, so we will have to use our engineers and get creative and come up with another alternative.

CHAIR MEYER opined that projects on the Seward, Glenn, and Sterling highways would be impacted by the initiative.

SENATOR WILSON asked what percentage of the 242 airports that DOT&PF operates may be affected by the initiative.

MR. WHITE answered that he would have to get back to the committee with the information.

SENATOR WILSON replied that he just wanted to remind folks that DOT&PF does more than just roads. He noted that the new definition in the initiative does not really have boundaries of where the waterways go and asked what the impact might be on the Alaska Marine Highway System.

MR. WHITE answered as follows:

We currently have a few projects specifically in Ketchikan where we are looking at ferry terminal improvements and there are going to be some situations where we've got anadromous fish streams and fish

habitat nearby at some of marine terminals, so we would have to evaluate that to see exactly what the impact will be.

3:10:42 PM

SENATOR WILSON asked if Mr. White could provide the committee members in the future with a "ballpark number" of construction projects.

SENATOR COGHILL noted that he appreciated the department addressing "significant impacts" and how that might affect the NEPA implementation, something that is important. He continued as follows:

It's also true that in Alaska almost everything we do outside of our existing roads is a green-field operation. I'm thinking in the Fairbanks area we have actually used some of the roads as flood mitigation and this would stop any of that I would take it because if it's going to impact the floodplain, building a road across it that would probably not work. So, would that be your take in this particular situation, this initiative?

MR. WHITE answered that he believed so.

SENATOR COGHILL commented as follows:

My guess is most of the work you do has places where public comment would generate attention and bring it to a litigation, so whenever there is tension like that the clarity of definitions is probably a little better for you. So, the ambiguity you brought up I think is going to be important for us to understand because I think what you've just highlighted was places where litigation certainly will happen because of the ambiguity, so I appreciate that.

3:12:28 PM

SENATOR GIESSEL addressed the potential for DOT&PF delays as follows:

On page 9 you talked about the potential delays in the projects, extending from 6 months to more than 5 years, but then I look back on page 4 and I don't know that you actually called out what you estimate the total annual cost being of approximately \$1 million,

you only counted in that the 8 positions it looks like and what you really outlined here is delays could not only add cost but possible compromise even grant funding from the federal government, things like that, it sounds like \$1 million might be a rather conservative estimate.

MR. WHITE confirmed that the \$953,000 was an estimate on just the amount of positions required to do the work. He said he is not aware of the department doing a cost analysis from the impact of project delays.

SENATOR GIESSEL accepted that the cost could be greater, but the cost has not been quantified. She addressed DOT&PF maintenance as follows:

You talked about possibly being prohibited from using ripraps around bridge abutments to protect the bridge, the road, etcetera. What about road sanding and road plowing? You go over bridges and over culverts and snow of course is diverted into those waterways the culvert passes through, there will be sand in that snow, certainly some chemicals to decrease icing, it sounds like those will be implicated as well. Are you going to have to protect somehow preventing the snow from falling into that stream? You could have chemical implications.

[3:14:23 PM](#)

MR. WHITE answered that DOT&PF works diligently with ADF&G to capture sediment that is coming off structures. He said the final regulation from ADF&G will dictate the total impact to the department's maintenance and operations crew.

SENATOR GIESSEL addressed riverbank erosion in the Mat-Su Valley and continued as follows:

I know DOT&PF has to do considerable work to protect the roads that are there and even homes from flooding, sounds like this initiative could affect your work in that realm, certainly if you had to apply for a permit that could delay it and it may be a moot point by the time the river erodes. Is that a possible ramification?

MR. WHITE answered that Senator Giessel's question is a possibility. He reiterated that the department works diligently

with ADF&G to find a way to streamline the permit process, but the initiative would have an impact on the way DOT&PF can work in fish habitat.

SENATOR WILSON concurred with Senator Giessel on the delays of road projects. He noted that a Mat-Su Valley road project was delayed one year, and the project increased over \$2 million from the delay. He thanked the commissioners for their culvert work in the Mat-Su Valley for fish passage but noted that water must be stopped for a period of time to put the new culverts in and the initiative would not allow the water to be stopped. He said he was worried about some of the culvert replacements within the Mat-Su Valley's streams and roadways. He remarked that the culvert work that was done to improve the fish habitat and increase the amount of fish has been wonderful and suggested that committee members look at the new culverts.

CHAIR MEYER announced that the next department is the Alaska Department of Natural Resources (DNR). He conceded that all departments will be impacted by Ballot Measure 1 but remarked that he anticipated DNR would have the most impact.

[3:17:20 PM](#)

ANDREW T. MACK, Commissioner, Alaska Department of Natural Resources, Anchorage, Alaska, referenced the department's mission and what the department does as follows:

Our mission: develop, conserve, and maximize the use of Alaska's natural resources consistent with the public interest. Public interest is something that is a common theme that runs through virtually every decision we make and if you look at the criteria that comes to water authorizations and land-use plans, the public interest is always an important question that we answer.

What we do: manage the state's land, water, and mineral resources on behalf of Alaskans. We have a land portfolio of 105 million acres and a water portfolio of 45 million acres, a total of 150 million acres; this is a very important, perhaps the most important responsibility. We also have some really important understandings that go along with our responsibility to all Alaskans, one of the most important is that we have an important trust relationship between the State of Alaska and Alaska native corporations.

COMMISSIONER MACK explained that the Alaska Native Claims Settlement Act (ANCSA) passage in 1971 entitled 44 million acres to the native corporations. He noted that implied in ANCSA was that there would be development, on the North Slope there would be a pipeline system built, and there also would be an opportunity for those entities to develop their land; for example, the development at the Red Dog Mine, a project that now has the opportunity to extend into state land. He said the department expects to work cooperatively with the native corporations that own land in the Red Mine area as well as looking to the native corporations for their guidance and their perspective on the initiative issue as well.

[3:21:00 PM](#)

He referenced "DNR Roles & Responsibilities" as follows:

- DNR provides for the protection of fish and wildlife habitat in its land management plans and land and water-use authorizations/permits.
- DNR manages the use and diversion of water on all lands in Alaska.
- DNR works with ADF&G and ADEC on specific management plan guidelines and authorization/permit conditions related to fish and wildlife resources.

He summarized as follows:

The general gist of our ownership interest is that we would develop that land for the benefit of Alaskans, and it is really a forward-meaning statement and it's a forward-meaning law which indicates that as general principle we look to develop our lands responsibly.

[3:23:01 PM](#)

KYLE MOSELLE, Associate Director, Office of Project Management and Permitting, Alaska Department of Natural Resources, Anchorage, Alaska, referenced "Impact of Initiative on DNR" as follows:

- The initiative focuses primarily on Title 16 fish-habitat permits and ADF&G statutory authorities.
- However, if passed into law, the initiative may constrain DNR statutory authorities to appropriate water (AS 46.15).
- DNR water authorizations/appropriations are used for:
 - Transportation projects:
 - Ice roads to access oil and gas projects;

- Airports/docks;
 - Highways.
- Mining/industrial projects:
 - Operations and diversions;
 - Disposal of hard rock and coal mine tailings.
- Pipelines
- Residential/commercial construction projects
- Municipal:
 - Water and sewer;
 - Schools and other municipal buildings/projects.
- Many other smaller projects

MR. MOSELLE continued as follows:

When you are talking about water it's everywhere, it's ubiquitous in our state, but it's held in common under Title 8 of the Alaska Constitution. DNR manages that water and we have to determine what is the best use of that water in our permitting, that's really where the initiative is going to start to affect what we do potentially.

3:25:01 PM

He referenced the "DNR Water Authorizations" categories as follows:

- Reservation of Water:
 - The statutory purposes for a reservation include the protection of fish and wildlife habitat, migration, and propagation (AS 46.15.145)
- Traditional Water Rights:
 - AS 46.15.080 Public Interest Criteria includes:
 - The effect on fish and game resources and on public recreational opportunities;
 - Permit and certificate can include conditions requiring fish protection.
- Temporary Water Use:
 - Must consult with ADF&G and ADEC prior to issuance;
 - Includes conditions which protect ecosystems (fish and wildlife).

He addressed "Large Project Coordination" as follows:

- The DNR Office of Project Management and Permitting (OPMP) may coordinate the review of larger scale projects in the

state, such as transportation, oil and gas, mining, and alternative energy projects.

- OPMP facilitates multidisciplinary agency teams to review project plans and inform individual agency decisions.

MR. MOSELLE emphasized that the initiative only modifies the authorities of ADF&G in Title 16 with fish-habitat permits and continued as follows:

When you are talking about a larger project or a complex project, hopefully what the committee is starting to see now that we are three or four presentations in here is that a relatively simple activity, let's say a culvert, it's not just a single permit, it's a fish-habitat permit, it's a temporary water-use authorization to temporarily divert the stream so that the culvert can be installed, so it's multiple permits. When you start to scale that up to a dam project that would impound water, yes it requires a fish-habitat permit which would be affected by the changes that the initiative proposes and the authorities of Fish and Game, but then there are also other agencies, DNR has to consider a certificate to construct that dam, to operate that dam, it's a jurisdictional dam under DNR's authorities as well. So, you start to have overlapping jurisdictions, but to be clear the initiative only amends or modifies the authorities of Fish and Game, so it's Title 16.

In our presentation and in the affidavit submitted by Mr. Dave Schade, [Chief of the Water Resources Section, Alaska Department of Natural Resources], there is this consideration though of does that allow DNR to consider the best use of that water if the activity is unable to be approved by Fish and Game.

[3:28:31 PM](#)

He referenced a diagram on the inter-agency coordination that demonstrated the extensive coordination between state and federal agencies for a large mine project:

- Alaska Department of Natural Resources,
- Alaska Department of Revenue,
- Alaska Department of Environmental Conservation,
- Alaska Department of Health and Social Services,
- Alaska Department of Law,

- Alaska Department of Fish and Game.

[3:30:46 PM](#)

CHAIR MEYER commented on resource development as follows:

As you know, a lot of times projects are started and then they expand as they go forward with their production or their mining.

If a project is permitted now and they want to expand, it's my understanding that they would have to fall under the new initiative if they want to expand that project. Is that your understanding as well?

MR. MOSELLE answered that Chair Meyer's observation and query would essentially be his understanding. He explained that authorizations by all agencies define the scope of the activity that can occur. He specified that an expansion of scope currently approved would require a minimum of an amendment of current approvals, if not a new permit entirely.

CHAIR MEYER noted all the streams that the Trans-Alaska Pipeline System (TAPS) had to go over. He asked how the governor's proposed gas pipeline through the Alaska Gasline Development Corporation (AGDC) would get permitted under the initiative.

COMMISSIONER MACK answered that he believed AGDC is on record saying that the initiative would make it nearly impossible to permit the proposed gas pipeline.

[3:33:02 PM](#)

SENATOR GIESSEL commented as follows:

As I recall, AGDC has commented that they cross over 600-stream crossings and we've heard how difficult it is for DOT&PF to protect those banks. I know that TAPS actually has bridges that carry that pipeline and so I would assume the gas pipeline would have something similar.

She addressed the inter-agency diagram and noted the public notice requirements. She asked how long the public comment periods are and if the comment periods occur simultaneously or in sequence.

MR. MOSELLE noted that the inter-agency diagram's key references as follows:

- Formal authorization;
- Advisory role;
- Public notice required;
- Courtesy public notice.

MR. MOSELLE detailed that the diagram shows when public notice is required by statute or regulation for an authorization. He noted that each permit has different governing statutes and regulations. He said public notices are variable, but most are 30 days.

He noted that the diagram shows that fish habitat does not have a requirement for public notice; however, the initiative does require a public notice that is multi-tiered, a requirement that is more complicated than what is indicated in the diagram.

He pointed out that the diagram references coordination for a major mining project with an assumption that the fish-habitat permit would be a major fish-habitat permit that would fall under the public notice requirements outlined in the initiative.

[3:35:57 PM](#)

SENATOR GIESSEL asked to clarify that present public notice is a 30-day period in which the public can comment by submitting their comments to the various departments.

MR. MOSELLE replied that he would have to refer back to the initiative.

SENATOR GIESSEL responded that she was addressing present public notice and noted that the department presently has public notice.

MR. MOSELLE answered as follows:

For example, the waste management permit, there is a public notice requirement in DEC's statutory authorities, I don't know it off the top of my head.

SENATOR GIESSEL asked whether DEC accepts public comment.

MR. MOSELLE answered yes, public comment is accepted for the waste-management permit process.

SENATOR GIESSEL replied as follows:

What I'm trying to establish is do we accept public comment now for permits or authorizations or would this be a whole new thing we've never allowed public comment before?

MR. MOSELLE referenced the inter-agency diagram and answered that the departmental activities noted within red boxes accepts public comment as part of the public notice.

SENATOR GIESSEL replied as follows

Many of the departments who have spoken so far have pointed out that they would have to be writing new regulations. Regulatory projects that come out of departments also have a public notice which allows a 30 day, generally, public comment period and actually I believe if I'm not mistaken, those departments have to take into consideration that public comment before they actually solidify those regulations. Is that also your understanding?

[3:37:24 PM](#)

MR. MOSELLE concurred with Senator Giessel.

SENATOR GIESSEL explained that her intent is to understand the current public comment process where citizens can speak up and participate in the process. She noted that she mentioned earlier that an area in her district must use water tenders to haul water for fighting fires. She referenced Mr. Moselle's presentation on "DNR Water Authorizations:"

- Reservation of Water:
 - The statutory purposes for a reservation include the protection of fish and wildlife habitat, migration, and propagation (AS 46.15.145)
- Traditional Water Rights:
 - AS 46.15.080 Public Interest Criteria includes:
 - The effect on fish and game resources and on public recreational opportunities;
 - Permit and certificate can include conditions requiring fish protection.
- Temporary Water Use:
 - Must consult with ADF&G and ADEC prior to issuance;
 - Includes conditions which protect ecosystems (fish and wildlife).

SENATOR GIESSEL noted that the water tenders she previously referenced would fall under the "public interest criteria" for "traditional water rights." She continued as follows:

I'm not sure where these tenders can withdraw water from water bodies that are nearby. Is there authorization required now? Would it become more complicated with the initiative?

MR. MOSELLE replied as follows:

I'm not familiar with that specific example that you are asking about but in general terms, yes, if somebody or an entity or individual is using water on a sustained basis they would need a water right and in the statute cited there, there is some thresholds identified, so if it's over a certain gallon-per-day-type use then it moves you from a temporary water use to a water right needing. Generally speaking, yes, water for somebody's well system or collecting water from any surface waterbody for use in their home, that would be a water use that you would need to have a right for if you are over the limits that are identified in the statute.

The second part of your question was how might that change with the passage of the initiative and I will read a statement from Mr. Dave Schade's affidavit that speaks to that, he concludes in his testimony that, "Enactment of 17FSH2 would deprive the Department of Natural Resources of authority to determine that the use of anadromous fish habitat as defined in the initiative would best serve the public interest by use for many large projects such as mines, dams and pipelines." So, I think that he is speaking about water use there and the department's need to define the public interest and the best use of that water as part of our appropriations process and he's concluding that the enactment of that would deprive the department of the ability to do that.

[3:40:41 PM](#)

SENATOR GIESSEL addressed TAPS and noted that Alyeska Pipeline has 60 to 80 permits a year to continue operating TAPS regarding crossing water bodies and going through riparian areas. She asked how the initiative would affect Alyeska's permit renewals. She pointed out that grandfathering is not permanent.

MR. MOSELLE answered as follows:

I think generally speaking, any long-linear project is going to face challenges with the ability to maintain their fish-habitat permits and the example you are giving is an existing permitted activity that might require maintenance or might require adjustment in scope of their activities, and as you've heard previously in testimony that those would be amendments to or revisions of their current fish-habitat permits and so I would expect those to then fall under provisions of the new law if this were to pass.

[3:42:11 PM](#)

COMMISSIONER MACK commented as follows:

One of things that we've tried to evaluate but has been difficult to understand the implications is in the case of an existing pipeline and TAPS is the most notable example, but all across the North Slope and in Cook Inlet there are hundreds of pipelines that are common-carrier pipelines and they all fall under the State Pipeline Coordinator's Office which is part of DNR, and most of them have long existing right-of-ways that have been established and we've been trying to assess what access are to those rights because even though sometimes they are 50-year easements or 50-year right-of-ways, they do expire and then they have to be renewed and in many cases there is a review of the right-of-way and what the terms are and it's very difficult for us because we've not been able to pin point the impact on the renewals of existing pipelines.

SENATOR COGHILL commented as follows:

In reading the initiative it looks to me like the commissioner of Fish and Game is prohibited from issuing a permit unless you come up with a mitigation plan because it says, "Major commit to an applicant may be made only if," and then it gives 5 conditions and one of those conditions is the mitigation issue which it looks to me like the permit conditions and mitigation measures have about 14 different criteria including even the use of "overburden" which I think would probably, if they're not even allowed to issue a

permit if "overburdened" is used at all anywhere near a possible impact of a stream or a water body that could impact the stream, sounds to me like the "overburden" issue would be the key point that would say, "The issue cannot be permitted under this proposal." Is that the way you read it? The section I'm looking at is "section 885" which is under (e), "The commissioner may issue a major commit to an applicant only if," and then it gives the 5 conditions, one of those conditions is the mitigation measures, not withstanding the other measures, and the mitigation measures have about 14 different criteria, "overburden" being one of them.

[3:45:06 PM](#)

COMMISSIONER MACK answered as follows:

It's a very important question because overburden in Alaska is almost the first issue that you deal with when you open up a materials site, when you want to engage in plaster mining, if you want to build some sort of larger scale process. People do forget though on the North Slope the first thing you have to do when you build facilities is remove the overburden, then you get to business of getting a pour permit which allows you to place spill, gravel on the tundra, and then you start building additional parts of your project.

So, I would agree with your interpretation of this, Senator Coghill, in that not allowing offsite mitigation and not allowing somebody to mitigate their project in different ways, in creative ways, will limit the ability of an applicant in all of those settings, materials site, DOT, or it could be a private landowner who wants to exploit the gravel-mineral resource I mentioned. Alaska native corporations in many cases, they are a gravel owner and they are providing material to build community infrastructure, roads and playgrounds. Plaster miners who are small mom-and-pop operations to larger. Look at Fort Knox for instance which just had some really fantastic news where they now have a clear path to extend the life of that mine past 2030, they continue to employ 600 from Fairbanks, the average wage is \$100000 a year, the first thing they will have to do into that new area is to deal with the overburden

issues, it makes it very, very difficult for them, and there are many settings where this takes place.

3:47:13 PM

SENATOR COGHILL claimed that the issue turns into an exclusive right question, which is a constitutional question. He referenced Article 8, Section 13 regarding water rights for fish and water, and read the following:

All surface and subsurface waters reserved for the people for common use except mineral and medicinal waters are subject to appropriation. Priority of appropriation shall give prior right, except for public water, supply and appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, not exclusive uses, concurrent or otherwise as prescribed by law and to the general reservation of fish and wildlife.

He commented as follows:

So, we are supposed to protect our fish and wildlife, but it's not exclusive and I think that is one of the things that we need to continually remind ourselves of is it's a balance between what in our constitution says we are supposed to be able to do "mineral;" in fact, it says, "The policy is encouraged settlement of its land and development of its resources." So, that is the balance we are continually trying to catch and I think those people who brought this initiative forward have one view in mind and that is an exclusive right and it just appears to me as we go through this law that's exactly what they want to do, and I don't blame them, fish are very important, but not exclusively important, they are just very important. I think we've done a pretty good job of it and I just wanted to make the point that if you can't get a permit to use water in Alaska because if anything from the overburden to this NEPA process which would be devised by significant impacts then it becomes an exclusive right and I think that would be the challenge we would have to go forward on.

3:49:29 PM

CHAIR MEYER noted that a lot of Alaskan communities like Juneau have hydro as their main source of energy and noted previous testimony that doing a major hydro project under the initiative

might be impossible. He asked if repairs, modifications or expansions to existing hydro projects would fall under the initiative.

COMMISSIONER MACK asked to go back to Senator Coghill. He referenced Mr. Schade's affidavit, [Chief of the Water Resources Section, Alaska Department of Natural Resources], regarding the issue of water-rights permits that says the following:

Will issue a water-right permit if not unduly affected the right of prior appropriated proposed means of diversion of construction are adequate, proposed use of water has been official and proposed appropriation is in the public interest.

He noted that the previous statement was a statutory public definition. He continued to address the criteria for "public interest" as defined in AS 46.15.080 (b) as follows:

Sec. 46.15.080 (b), criteria for issuance of permit, in determining the public interest, the commissioner shall consider:

(1) the benefit to the applicant resulting from the proposed appropriation;

(2) the effect of the economic activity resulting from the proposed appropriation;

(3) the effect on fish and game resources and on public recreational opportunities;

(4) the effect on public health;

(5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation;

(6) harm to other persons resulting from the proposed appropriation;

(7) the intent and ability of the applicant to complete the appropriation;

(8) the effect upon access to navigable or public water.

COMMISSIONER MACK continued as follows:

My point in reading these eight criteria that are laid out in statute is to say that we've thought about these things, the Legislature has put those words on a piece of paper, we take them very seriously and we considered those issues, and it is a very difficult process, and we as a state have the ability to make determinations and when we see concerns being expressed we can highlight those concerns. When we see a project where we can safely mitigate and the vast majority of the projects we see are well within that category, many of them mentioned here today, we can move forward with those decisions, but public interest is well covered in statute and it is a balance between our appropriating the water and a whole list of criteria laid out in the affidavit.

3:52:16 PM

CHAIR MEYER asked if existing hydro projects that require modifications, changes or repairs would fall under the initiative. He inquired if the department has heard from communities regarding the impact from the initiative, even villages that need to replace culverts.

MR. MOSELLE replied as follows:

I think it is similar to the questions that have been asked about an existing project that then would come under the purview of the new law if the initiative were to pass. I think the answer remains the same that if the action expands beyond the scope of what is currently permitted it's the understanding that the law would be under the purview of the law to review those expansions under an amendment for the fish-habitat permit. So, if the activity required a fish-habitat permit and currently has one and they expand the scope of their activity they would need to go back to the department for an amended or new fish-habitat permit if the law is the initiative at that point that would be the law that ADF&G would have to follow to adjudicate that.

CHAIR MEYER reiterated that his question was if Mr. Moselle believed that the communities and municipalities know what impact the initiative would have on the projects he previously noted.

MR. MOSELLE replied that he did not have the information that Chair Meyer requested.

CHAIR MEYER remarked that the communities and municipalities are not asking.

3:54:18 PM

SENATOR WILSON asked what the difference was in the Title 46 and Title 16, and if the new initiative changes Title 16. He continued as follows:

Right now, DNR has the authority under sort of the docks or some of the highways and airports. How does that change? What is the trigger point for them to comply with the new Title 16 changes which sort of has [inaudible] authorities in Title 46?

COMMISSIONER MACK replied as follows:

I think there's really a greater issue at play and here is the issue, we have an obligation as a state to responsibly develop our resources. We take very seriously our obligation to make sure that the resources we were given access to at statehood are developed, and if there's another agency which frustrates or bars our ability as a resource state to continue to maximize the value of those resources, then we have in my mind colliding authorities and those colliding authorities could have a significant impact on Alaska.

To try to answer how long it will take to put together a "reg" package, I don't know. The "regs" would be at the Department of Fish and Game, we would be looking at this and evaluating all of the permutations. We would be trying to answer questions about rights-of-ways and things like that, but at its core if the DNR is not meeting its mandate and we are not leasing property or companies to go and explore for oil, if we cannot for instance move in and get the permits that we need to develop or explore then ultimately develop [ANWR 1002 Area], then I have some serious concerns about that area right now based on this, then we really have to sit down and think hard about what we are doing as a state.

3:56:46 PM

CHAIR MEYER stated that he appreciated all four commissioners being at the committee meeting. He said he did not recall the Senate State Affairs committee having four commissioners at one of its hearings. He opined that the appearance of the four commissioners show the importance of the initiative to the administration and to the State of Alaska.

SENATOR GIESSEL commented as follows:

What is also striking, and I appreciate the highlighting, how these departments work together and have been working together collaboratively to make sure everybody is doing their part to protect all our resources, most effectively fish.

3:58:05 PM

LARRY HARTIG, Commissioner, Alaska Department of Environmental Conservation (DEC), Juneau, Alaska, provided an overview of the department's duties as follows:

DEC's duties and authorities to set water quality standards and to issue permits authorizing the discharge of waste water into the waters of the state are found in Title 46 of the Alaska statutes, and similar to the testimony you heard from DNR, even though the initiative wouldn't change provisions in Title 46, it's limited to certain provisions in Title 16, it would however affect DEC's exercise of its duties under Title 46, and it could do these in ways that would also impact our operating budget as detailed in the cost statement that we prepared for the initiative.

We understand that the committee of course is also interested in what potential cost impacts the initiative might have on our permittees so people who have waste water discharge permits from us, that's harder for us to estimate for several reasons. First, it could impact people that get permits in the future, we can't really forecast who might come in for a permit, what their project might look like, what the requirements of that permit might look like. Second, it could impact people who have permits now. Our waste water discharge permits have a life of five years, typically, they come up for renewal every five years and so when that permit comes up through renewal

similar to DNR's testimony, we would be applying the current law in looking at the renewal of that permit, and if the initiative passed we would look at what new requirements might have to be put into that permit as a result of the initiative provisions and that could then impact permittees and they would have to either perhaps adjust their discharge or add treatment or something like that.

So, we don't have a detailed cost estimate or cost estimates for that, but in our testimony, we will try to describe some circumstances where that could arise.

[4:00:38 PM](#)

ANDREW SAYERS-FAY, Director, Division of Water, Alaska Department of Environmental Conservation, Juneau, Alaska, commented on how Ballot Measure 1 will affect departmental activities as follows:

In making the connection to how this initiative will affect activities that DEC is responsible for and then for people who apply for permits or authorizations from DEC, the main connection is through the connection with or water quality standards and fish protection, and then that plays out with this authorization. So, I will start with a description of our water quality standards to give you that background.

He addressed page 2 in his presentation, "Alaska Water Quality Standards (WQS)" as follows:

- Protect public health and the environment through:
 - Designation and protection of water uses, such as growth and propagation of aquatic life;
 - Establishing acceptable levels of pollutants (known as water quality criteria);
 - Enhanced review for high quality waters.
- Set through a public process with review by U.S. Environmental Protection Agency (EPA).
- EPA leads consultation on endangered species, fisheries issues under the Magnuson-Stevens Act, and with tribes.
- Used to prevent polluted water, identify polluted waters, and recognize clean water.
- Identified at 18 AAC 70.

[4:04:22 PM](#)

MR. SAYERS-FAY addressed page 3, "National Pollutant Discharge Elimination System (NPDES) Framework" as follows:

- Clean Water Act & Amendments:
 - Established the NPDES Program (Section 402):
 - Point sources of wastewater discharging pollutants into waters of the United States require a NPDES permit.
 - Authorization of State Programs.

He addressed page 4, "Primacy Transfer and APDES Framework" as follows:

- The State's wastewater discharge program under the Clean Water Act is called the Alaska Pollutant Discharge Elimination System (APDES) Program.
- Statutory authority is provided in Alaska Statute 46.03.
- Implementing regulations are provided in 18 AAC 83.

He addressed page 5, "APDES Permit Development Process" as follows:

- Receive complete permit application.
- Evaluate potential impacts to receiving water quality from the proposed wastewater discharge:
 - Consider pollutants, flow, seasonality, and fish presence;
 - For discharges to freshwater, review ADF&G's Anadromous Waters Catalog to determine if the waterbody is listed:
 - Consult with ADF&G and applicant on spawning determination if discharge is to an anadromous waterbody.

He addressed page 6, "Fish Spawning Determination-Impacts" as follows:

- In fish spawning areas, wastewater discharge not eligible for mixing zone per Alaska water quality standards:
 - Mixing zone is a limited area in the waterbody where wastewater is allowed to mix with the ambient water before meeting water quality criteria.
- Without a mixing zone, state water quality criteria must be met at end of discharge pipe.

MR. SAYERS-FAY referenced a diagram on page 6 that provided an example of mixing zones for aquatic life in a lake. He explained that the diagram showed the outfall from a discharge pipe had two areas, the noted initial "Acute Aquatic Life Criteria Met," and the "Chronic Aquatic Life Criteria Met" and detailed the requirements for the two mixing areas.

He summarized that whatever is discharged for the pipe that exceeds the water quality criteria as it goes into the water must mix rapidly and appropriately so that it is not going to have an effect on the water bodies.

4:08:14 PM

He continued as follows:

The key significance of this initiative is that there's a connection between our water quality standards which say we can't authorize a mixing zone if it's a spawning area and our reliance on the anadromous water catalog to say is this an anadromous water therefore you can't have a mixing zone and the applicant will have to do more work to clean up what they are discharging and the significance of the potential implications for them later, but that's the issue.

Earlier there was a discussion about potential overlapping authorities between some of the agencies that were here today. DEC is setting standards for the water quality. DNR is setting standards and requirements if you want to take water out or use it and they obviously want to do that in a manner that does not affect water qualities today, but ADF&G may notify DEC; and ADF&G obviously has the fish protection prospective and , in fact and they have much more expertise in that, so that is why DEC is relying upon them.

So, a change to how ADF&G operates saying under this initiative that all waters are anadromous means that essentially all waters can no longer have mixing zones from DEC's prospective for this water permit.

He addressed page 7, "Standard Provision in an APDES Permit" and referenced as follows:

- Permit is a legal document like a contract.
- Limitations (numeric and narrative) on discharge.
- Best management practices or operational plans.
- Monitoring and record keeping requirements.
- Reporting under penalty of perjury.
- Standard conditions:
 - Duty to comply,
 - Duty to allow DEC on-site for inspections.

MR. SAYERS-FAY referenced page 8, "APDES Permit Document Reviews" as follows:

- Preliminary draft permit shared with permittee and state & federal agencies for 10-day review period.
- Draft permit and supporting documents are public noticed for a minimum of 30-days:
 - Major permits are public noticed in a newspaper of local circulation;
 - Public meetings and hearings may occur.
- Proposed final permit shared with permittee and state & federal agencies for 5-day review prior to issuance.

He referenced page 9, "APDES Permit Issuance and Administrative Appeal" as follows:

- Wastewater discharge permit issued for a term up to five years.
- Upon issuance, permits may be administratively or judicially appealed.

[4:11:21 PM](#)

He referenced page 10, "Compliance with APDES Permits" as follows:

- During the permit term, DEC will periodically:
 - Inspect the treatment facility and discharge site;
 - Review on-site records and submitted monitoring reports.
 - Permittees are required to timely notify DEC of noncompliance events that potentially threatens public health or the environment.
 - DEC can reopen, modify or terminate a permit.

He referenced page 11, "Fiscal Impacts to DEC Relating to the Potential Passage of 17FSH2" as follows:

- Rebuttable presumption that all waters in Alaska are anadromous, and therefore no mixing zone per State water quality standards (WQS).
- DEC statutorily required to review all existing permits with mixing zones in freshwater.
- For new systems, or at renewal for existing, would need to meet water quality standards at the end of discharge pipe:
 - Increased complexity for engineering plan review;
 - More stringent permit limits.
- Cost statement includes a new permit writer and new engineer.

[4:14:02 PM](#)

MR. SAYERS-FAY commented as follows:

One of the key questions about the initiative is its unknown right now what kind of schedule we could allow for an existing facility to come into compliance and we would have to consult with the attorney general on things like that.

For a new project if they are not one that is going to startup right away, if they are a year or two down the road with statutory requirements that change, they have some opportunity to work with ADF&G, see if they can get a site-specific review, it may or may not really be anadromous, there might be time to do that. If they are a new project that is an immediate need then they are just going to have to assume that it is anadromous and that's going to affect them in the cost and design of their project.

We don't have a sense right now as to what ADF&G's process would be. Proving the negative that there's never anadromous fish there is much harder than going out to see if they do occur, so that's something they would have to develop. We don't know whether we have the discretion on a renewal to delay and allow ADF&G to do a proper analysis which DOT talked about, it takes several years, those two-time frames might not [inaudible].

As a result, most applicants either new or if they are up for renewal is probably going to have to assume that they now need to meet water quality standards at the end of the pipe, and for a lot industries that's a

very dramatic change of how business is operated right now and that would have a cost for them and that would have time for them to investigate how that would occur.

4:15:49 PM

CHAIR MEYER noted that Senator Hughes called in a question regarding how often water-sewer facilities must be renewed. He recalled that renewal was typically five years and a renewal that came up after the new initiative passed would have to meet the new initiative's standards.

MR. SAYERS-FAY answered correct.

CHAIR MEYER asked Mr. Sayers-Fay to address private homes that are not on public-water systems and rely on septic tanks. He asked if the new initiative would affect private homes with septic tanks that can leech into the ground.

MR. SAYERS-FAY answered that there is a subset of private homes with septic tanks that could be affected by the initiative. He specified that the most immediate effect would be if the private home had a direct discharge to a surface-water body and that would come under the APDES program; a domestic home that has a septic tank would not have that kind of coverage, so that home would not be affected. He continued as follows:

What could come up would be is if you have, and there are a lot of areas in the state where there's a lot of connection between shallow ground water and surface water bodies, and if there is some measured impairment in that water body, that is the type of contaminants that would be in the septic system, and if that particular contaminant is something that ADF&G is concerned about for anadromous fish habitat protection, I think that the language in the initiative would cause ADF&G to take a broader look at those types of issues and it might lead to saying, "We can't have anymore added to this potential problem of septic systems in a shallow groundwater system that seems to be having [inaudible] about it." So, I would say it would be a much smaller universe, but the potential is there.

CHAIR MEYER asked if the initiative could affect landfills.

MR. SAYERS-FAY answered that some landfills could be affected by the initiative and detailed as follows:

Landfills have a different series of permits. The Division of Water does issue solid waste permits in relationship to mines. There's a different division that deals with your more typical landfill operation, but if that landfill operation, as many do, have a leachate collection system where water is percolating through the landfill if it's not lined and that water is collected and then has a discharge to a surface waterbody, they would need an APDES permit and so they could become affected by this initiative.

[4:18:41 PM](#)

CHAIR MEYER remarked that the initiative has a broad reach.

SENATOR WILSON noted that there are a couple of waterways in the Mat-Su Valley where people are arguing about water quality due to septic tanks. He asked how many mix-water-zone entities there are that have permits currently in the state.

MR. SAYERS-FAY answered that he would have to get back on the exact number. He noted an earlier question regarding septic systems and reiterated that septic systems would not have mixing zones.

SENATOR WILSON asked how the initiative would affect the cruise ships' water discharge.

MR. SAYERS-FAY answered as follows:

Our understanding of the initiative, and it's subject to going back and reading the language because it is fairly broad, is that it is intended to apply to fresh waters and so that would not affect the cruise ships operating in marine waters; but, the language of the initiative is, there is brackish waters when you have that transition and if you are in a port and you a stream coming in and things we would have to double check just to make sure that is the case.

SENATOR WILSON replied as follows:

But if the language is broad enough as the Department of Law said that there is no determination of how far in the termination of the water definitions and that

could be so that cruise ships could be potentially stopped from discharging waste water within Alaska waterways, all Alaska waterways.

MR. SAYERS-FAY answered as follows:

My recollection is the references that I'm referring to under the water-quality standards about the mixing zones are specifically for freshwater environment, that's where we are referring back to saying that you cannot have a mixing zone in a spawning area and so we don't have the same kind of language in the marine environment and I can double-check that. So, although the [Department of Law] has said the initiative's scope may be marine waters, it's the scope of our water quality standards that makes the intersection with the initiative and so I think that's different.

[4:21:17 PM](#)

SENATOR COGHILL addressed rainwater discharge as follows:

One of the things we have done over the last number of years is rain water discharge, mitigation improvements and up in the Interior all of water runs off into the Chena or the Tanana River, but we've done quite a bit of work on trying to make sure that sediment and other things are taken care of. How would this impact that because I have four or five streams that would be impacted by any rainwater discharge and those have some impact, and this just raises a question from me, it will impact fish probably, minimally, but I know that we've gone through quite a process on doing that. Are we gauged by city size? Are we gauged by economic capacity on rain water discharge?

MR. SAYERS-FAY answered as follows:

There are a couple of elements to the answer, first of all, ADF&G within the language of the initiative would have a pretty broad requirement to consider whether that is causing any impact, so their fish-habitat permits may very well come into play there.

For DEC, there's a distinction in the Clean Water Act between what is called non-point sources and point sources, so in a simple way if you have a water treatment facility with a pipe coming out, you can

think of that as a point source, but the boundaries are blurred, so if you have a construction site because that's a human activity that you have control over during the building site and you have the ability to manage the water runoff, that is actually considered a point source, though when you consider all of the rain flowing off of people's rooftop houses, that's considered a non-point source. For our water-quality standards for the type of permit you would need where the mixing zone question comes up, that would only be for a point source. So, in general that would not occur, but there are, when you get to, as you alluded to, when you get to a certain size of a community, so Anchorage and Fairbanks you would have what is called a municipal-stormwater-separate-sewer system, you end up sort of at a scale that is deemed to be that you can have enough influence on the discharge of things like stormwater, so then you do need a permit and then it would be subject to whether or not you would have a mixing zone.

[4:24:00 PM](#)

SENATOR COGHILL commented as follows:

You take for example Nenana, which I grew up in, we are not going to be a municipal although they have a water system, they don't have the discharge system, or Tanana or Fort Yukon. We live right on the streams of migrating fish and the impacts would be something. I would think that small communities might want to be aware of what they do from dumping snow into the river to rainwater run-off, or irrigation ditches for small farms, things like that. I just think that the presumption creates a huge definition problem.

SENATOR GIESSEL referenced slides 9 and 10 in the DEC presentation. She noted that on slide 9, "APDES Permit Issuance and Administrative Appeal," and specified that the bullet point, "Upon issuance, permits may be administratively or judicially appealed." She asked Mr. Sayers-Fay to explain what the previous statement meant and to confirm that the statement was what was presently being done by DEC.

MR. SAYERS-FAY answered yes and explained as follows:

There are a number of public-comment periods of different lengths where different people are allowed

to comment at that stage in the process, but by the time you get to issuance, if you've been participating in that public process there are two opportunities for you to appeal the decision. There is an informal appeal to the director of the division, which in this case is myself. There is also a more formal appeal process to the commissioner of the department, which would be Commissioner Hartig, but there is a question of standing and so you have to have raised the issue that you feel was not adequately addressed and in the permit you would have to have commented on that through the process and you have to have participated, then depending on which path you are on there's different regulations about the timing and how that is resolved. If it is at the formal level the commissioner can make a determination as to whether or not things like it gets sent back to the division for adjustment or there's an adjudicatory hearing on the topic or there's a decision about, "Four issues were raised and two issues were not previously raised so they are not pertinent, one not appropriate, but one still needs to be resolved," so it can go a number of different directions.

4:26:39 PM

SENATOR GIESSEL replied as follows:

What I'm wanting to call out here is the fact that there actually is lots of opportunity for the public to engage in this permitting process. So then as I look at slide 10, the last bullet says, "DEC can reopen, modify or terminate a permit." So, it sounds like what you are saying on this slide is that you continue to monitor and inspect, and if there's violations you take action. Is that accurate?

MR. SAYERS-FAY answered as follows:

Yes, that is accurate. We often refer to what we call an escalating enforcement response, we would start with compliance assistance, we would help put their documents in order, make sure that they understand that we take a sample to see if it's not contaminated so that we understand the result is accurate, all the way up to pursuing civil penalties and other things, and or going through some of these items that are mentioned in the last bullet about reopening,

modifying the permit, and there are formal steps to that and opportunities for the public to comment if we are changing a permit.

CHAIR MEYER remarked that DEC is constantly updating their regulations pertaining to fish and protecting fish. He noted that he had heard that the state is using regulations that are over 60 years old and asked for Mr. Sayers-Fay to comment.

MR. SAYERS-FAY answered as follows:

I think it is a better question for ADF&G but one thing I will mention is that through the Clean Water Act various new information comes up about what is an appropriate water quality criteria and EPA is constantly issuing recommended criteria and then states have a period of time in which to review and figure out how they are going to apply that in their state and if they don't act within a certain window then EPA can come in. So, revisions to the water quality standards either to protect human health or other uses beyond fish or for fish, they do get updated over time.

[4:28:55 PM](#)

CHAIR MEYER asked to address representatives from ADF&G. He noted that the fish-habitat rules have not been updated for a long time and that was the reason for the initiative. He pointed out that during the meeting the fish-habitat's rules were noted as having been strengthened on an ongoing basis. He asked ADF&G to confirm his previous statement.

MR. BENKERT answered as follows:

Yes, although [AS 16.05.871] hasn't changed since 1962 it's not like we are permitting the same way that we were in 1962. We've continuously evolved our process over the years, some examples of that are I mentioned blasting, we just blew up the Eklutna Dam. We have sent folks out in the field, our Juneau office has done a really good job of developing new blasting standards up to modern standards, they went out and measured a bunch of blasts, they developed a new criteria as to what is allowable so that we can protect incubating eggs and juvenile fish in a water body so there are certain distances and it's a fairly technical thing but that was recently updated and

that's a new standard that we utilize to inform our permitting decisions.

Another good example is working with [DOT&PF], we have an MOU with them for culvert designs, that MOU is a little bit old now, but we are currently updating that MOU to modern standards; those are the types of things that we've developed to help inform our permitting decisions utilizing the best available information and the most modern information possible. We have lots of technical reports, we go out there and conduct research to determine what impacts are, we've done research on impacts of plaster mining for instance, we go out and look at the turbidity plume coming out of a plaster-mining operation, how it also kind of feeds into the DEC presentation where we see how far down that turbidity plume goes and see how much it impacts anadromous fish or even resident fish. Anadromous fish streams they supposed to have zero discharge, but those are just some examples. We also have working guidelines that we use for our permittees to help inform their permitting decisions, so it's kind of our manual as to how we go about issuing permits on certain situations.

So, it's an ever-evolving thing, when we get new information, we try to incorporate that into our working guidelines so that we are meeting the most modern standards that are available. We are looking all of the time to improve the process and obviously we do not permit today the same way we did in 1962, we take a lot more things into consideration as the knowledge in the field continues to develop.

[4:32:28 PM](#)

CHAIR MEYER remarked that salmon is very important in Alaska and is something that ADF&G takes very seriously, as everyone does. He asked if ADF&G considered Alaska as a leader as it pertains to fish and habitat management.

MR. BENKERT answered yes. He provided examples of the department's use of Pacific Northwest and worldwide research that is used in Alaska's projects. He added that the previously noted culvert assessment program is an example of a collaborative effort with federal and state agencies for fish passage in the Mat-Su Valley.

CHAIR MEYER reiterated that the committee's meeting is unusual where four commissioners are in attendance and commented as follows:

I think we are realizing how important this initiative is, not only to the state but our municipalities, villages and homes, perhaps.

He asked committee members for their closing statements.

[4:35:50 PM](#)

SENATOR WILSON commented as follows:

This topic has sort of opened up sort of the large impact it has for a lot of industries, a lot of folks just think it is oil and gas, mining type of piece of legislation but it really affects what I see as sort of local municipalities, airlines, housing developments, harbors, tourism, highway projects, and fish improvement projects, and this is just a wide spanning ballot initiative that I hope folks take a closer look at overall together.

[4:36:32 PM](#)

SENATOR GIESSEL commented as follows:

One of the things that a lot of times we hear from the public is "Oh, state government, those people don't know what they are doing," I think today we really saw an example of some very knowledgeable commissioners but frankly, some even more knowledgeable division directors and specialists in their departments who really know these subject and are working hard to make Alaska's standards the highest in the U.S. I just want to thank all of you for your hard work. Commissioner Hartig of course has been in his position for coming on 10 years, pretty impressive, certainly gathered a lot of knowledge in those years. So, I just want to thank all of the commissioners and division directors and folks that spoke today.

[4:37:20 PM](#)

SENATOR COGHILL commented as follows:

One of the things that we found out today was there's a lot of breadth or broadness in this initiative and ambiguity in some of the definitions, that is a place

that the courts will end up having to define because it will be two years before we can even look at them which means the departments will have to implement things that they will end up in the courts with before the Legislature really can take a look at it and I think that speaks to why a legislative process is better in some of these more technical, very highly protective important parts of our habitat issues.

I think the people of Alaska hopefully will get a look at the fact that the legislative process is a little better at asking how and why, and if you are going to go to court, the court will come in and look at what did you mean when you said that, at this particular point it is a wide open discussion on what did they mean because you don't have them in front of you.

I think today we got a good indication of how we would implement if it comes your way and what some of the issues are, but for me as a legislator the ambiguity is striking and many times, we have to make compromises that create ambiguity but at least we've had the debate in public on what that question really is. Probably as the judiciary chairman I probably fall into that litigation problem, but the reality is in Alaska any project is going to face litigation and the more ambiguity you have in this law or the more breadth you have in it, the more open to interpretation it is and contention. So, that's the way I take it today, but I do want to thank the department, I think they are facing into this very deliberately.

[4:39:21 PM](#)

CHAIR MEYER commented as follows:

I too want to thank everyone for coming out today and I certainly have learned a lot and I've been doing this for a while. Hopefully the public as well has learned that your process is a very public process and very open and one that you take very seriously, and we appreciate that too. We all live here in the state and we all love our fish and our salmon.

[4:40:04 PM](#)

SENATOR EGAN thanked those that testified and noted that he enjoyed the overview.

CHAIR MEYER announced that the committee does not have any other meetings planned and the committee will wait and see what occurs in the courts and go from there.

4:40:26 PM

There being no further business to come before the committee, Chair Meyer adjourned the Senate State Affairs Committee at 4:40 P.M.