

STATE OF ALASKA

**DEPT. OF ENVIRONMENTAL CONSERVATION
DIVISION OF WATER
DIRECTOR'S OFFICE**

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The Honorable Paul Seaton
House of Representatives
Alaska State Capitol, Room 102
Juneau, AK 99801-1182

Re: HB 74

Dear Representative Seaton:

Thank you again for the opportunity to testify on HB 74 at the House Fisheries Committee meetings on February 7 and 12. Several questions came up during the hearings. I've paraphrased those questions, and provided answers, along with some clarifying information.

CSHB 74 does not simply reinstate the Department's spawning area protections that have been in regulation since 1995. Rather, it represents a significant departure from the Department's prior regulations. HB 74 defines spawning area on a spatial basis only. While the Department's prior regulations were silent on the definition of spawning area, in practice, the Departments of Natural Resources and Fish and Game have historically and currently define spawning areas using both spatial and temporal aspects when evaluating projects involving waterbodies. This is an important distinction when considering mixing zones.

1. What facilities will not be able to get a mixing zone authorization under HB 74?

Facilities that currently have an authorized mixing zone that relies upon timing restrictions to avoid spawning impacts (except those placer mines specifically addressed in HB 74) could not be re-authorized under HB 74. These facilities' mixing zone authorizations are limited to times when spawning is not occurring. While HB 74 allows for timing restrictions for mixing zones for placer mines, it does not address other facilities that currently rely on timing restrictions to avoid spawning times. Examples of such facilities include:

- Village domestic wastewater lagoons that have a current permit and mixing zone authorization to discharge to a river when fish are not spawning will not qualify for the "grandfather" clause of HB 74, Section 1, AS 46.03.065(b). The "grandfather" clause is dependent upon an "area where spawning was not ongoing at the time of the initial authorization and the mixing zone became a spawning area after the date of the initial authorization". These facilities were initially authorized to discharge to an "area" that was already a spawning "area" (defined by HB 74 as a physical location) when the mixing zone was authorized. As such, they do not qualify for the "grandfather" provision in section (b) of the bill.

Currently unpermitted domestic wastewater discharges cannot obtain a mixing zone authorization under HB 74 involving a spawning area, even if spawning began after the facility first began discharging. Some village domestic wastewater lagoons do not discharge to surface waters. Others must occasionally discharge to a river. Unfortunately some village lagoons don't yet have a permit from EPA, and would therefore not be eligible for a mixing zone if it involves spawning areas (defined only spatially) under HB 74 when they are first permitted. They will not qualify for the "grandfather" clause because they don't have a prior authorization, even though they are existing facilities. They also, under HB 74, cannot utilize the timing restrictions that were available both under old DEC regulations and under the current DEC regulations.

Existing and future industrial dischargers with previously authorized mixing zones where spawning begins in the mixing zone after initial authorization can not be re-authorized under HB 74. The same situation that exists for domestic discharges, i.e. spawning begins in a mixing zone after initial authorization, can also happen to industrial discharges. Example:

- Golden Heart Utilities (GHU). Spawning grayling were identified in their previously authorized mixing zone. See the description of this situation under question number 3. GHU is an industrial discharger that would not qualify for the "grandfather" clause under HB 74.

Domestic wastewater dischargers that are NOT municipal or village dischargers, where spawning begins in the mixing zone after initial authorization cannot be re-authorized under HB 74. Not all owners and operators of domestic wastewater systems are municipal or village governments. Examples include school districts, health clinics, and remote lodges; subdivision and other community systems operated by private non-profits; and community systems run by private, for profit companies.

Placer mines that cannot meet the 500' mixing zone length restriction imposed by HB 74 cannot be re-authorized under HB 74. There are about 28 placer mines that have authorized mixing zones that exceed 500' in length. These mines are already

doing everything they can to ensure that the mixing zone is as small as practicable. They would not qualify for a mixing zone under HB 74, even though they currently operate without adverse impacts to spawning fish.

2. How many inspections does DEC conduct? How many are domestic vs. industrial wastewater dischargers? How often does DEC collect independent samples? Are inspections announced or unannounced?

Fiscal Year	Domestic Wastewater Facility Inspection	Industrial Wastewater Facility Inspections	Total Inspections	% that included sample collection
FY 05			128	23%
FY 06	18	54	72	13%
FY 07- <i>first half year</i>	31	41	72*	22%

*In FY 07 DEC is increasing the number of compliance and enforcement staff in preparation for primacy of the federal wastewater discharge permit program.

These numbers do not include any inspections or monitoring that might be done by EPA, DNR or ADF&G.

DEC has not kept records regarding whether or not inspections were announced or unannounced, but many of the inspections are announced in order to ensure that the facility will have the appropriate staff available during the inspection.

3. How many facilities have requested a mixing zone and how many has DEC denied?

The DEC permit database does not specifically track whether permittees have an authorized mixing zone, however, during the last legislative session, DEC estimated that there are approximately 440 authorized mixing zones. DEC cannot track those facilities that chose not to apply for a mixing zone authorization knowing that they couldn't comply with the stringent mixing zone provisions. Facilities generally don't apply if they know they can't be approved.

DEC denied mixing zone authorizations for three placer mines under the current general permit for placer mines. Habitat biologists determined that there was no time when wastewater could be discharged to avoid fish spawning.

Golden Heart Utilities in Fairbanks (GHU) is another example where DEC has denied a mixing zone. GHU applied to renew a discharge permit for backwash water from its drinking water facility when it was discovered that grayling spawn in

the mixing zone. The discharge contains lime sludge, a water softening by-product that has been shown to have no effect on grayling spawning. Nevertheless, the spawning area provision of DEC's old regulations prohibited designating a mixing zone for any discharge.

While DEC did not deny the mixing zone for a domestic wastewater discharge permit for the Pogo Mine camp, the owner had to conduct extensive surveys of the Goodpaster River in order to find a small area where State habitat biologists concurred was not suitable for spawning. Pogo placed their domestic outfall in that location in order for DEC to approve a small mixing zone for domestic wastewater which, due to the innocuous nature of the discharge, would not have affected fish spawning anywhere on the river.

4. The term "useful life" appears in State statutes multiple times. Why does the use of this term in HB 74 cause DEC concerns? Will DEC amend prior testimony on the issue?

DEC, with assistance from the attorney general's office has evaluated other uses of the term "useful life" in Alaska Statutes. The term, or its plural variant, appears in 13 different sections of Alaska Statutes, in a wide variety of contexts. Its usage ranges from the leasing of state lands for oil pipelines (AS 38.35.110) to care of elderly Alaskans (AS 47.45.240). In one context, salmon tax credits, the Legislature has defined the term, somewhat circularly, as "the useful life of equipment that is or would be applicable for purposes of depreciation." AS 43.75.036(i)(5). See also AS 43.75.035(i)(5). The legislature has simply used the term, without definition, in the various other statutory contexts where it appears.

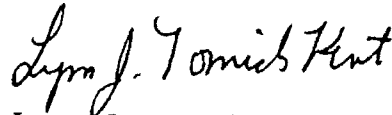
Two of the statutes where the term is used do involve DEC. AS 29.60.520 governs the award of grants to municipalities that have been affected by the release of a hazardous substance. The statute allows grant moneys to be used to repair or replace equipment whose "useful life" has been shortened by its use in cleaning up such a release.

The other statute with a connection, however attenuated, with DEC is AS 46.11.900, the definitions that govern a program designed to encourage energy conservation in publicly financed buildings. Lending institutions are directed to consider the "life cycle energy costs" when financing buildings. AS 46.11.050(a). The definitions explain that "life cycle cost" is determined over the "useful life" of the building.

Neither of these two statutes, nor any of the other existing 11 statutes where the term is used, sheds any light on how the same term might be interpreted and applied in the new proposed context of HB 74. While not an insurmountable issue, the Department would need to define the term in practice or in regulation in order to consistently apply it to the mixing zone requirements. While complete facility

abandonment is clear cut, DEC would need to evaluate whether any of a wide range of facility modifications represents the end of the "useful life" of the facility and it is now considered a new facility that no longer meets the "grandfather" clause of HB 74. Examples include changes that increase or decrease the volume of discharge; decrease the toxicity of the effluent; increase the concentration of effluent; treat the wastewater using different treatment technologies; and facility maintenance and upgrades.

Sincerely,



Lynn J. Tomich Kent
Director

cc: House Special Committee on Fisheries
House Resources Committee