

**ALASKA STATE LEGISLATURE
HOUSE RESOURCES STANDING COMMITTEE**

April 5, 2004

1:27 p.m.

MEMBERS PRESENT

Representative Nancy Dahlstrom, Co-Chair
Representative Beverly Masek, Co-Chair
Representative Cheryll Heinze, Vice Chair
Representative Carl Gatto
Representative Bob Lynn
Representative Nick Stepovich
Representative Kelly Wolf
Representative Beth Kerttula
Representative David Guttenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 546

"An Act relating to regulation of the discharge of pollutants from timber-related activities under the National Pollutant Discharge Elimination System; relating to waste treatment and disposal permits; making conforming amendments; and providing for an effective date."

- MOVED HB 546 OUT OF COMMITTEE

HOUSE BILL NO. 309

"An Act prohibiting the release of nonindigenous predatory fish into public water."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 546

SHORT TITLE: POLLUTION DISCHARGE & WASTE TRMT/DISPOSAL

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

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|----------|-----|---------------------------------|
| 03/25/04 | (H) | READ THE FIRST TIME - REFERRALS |
| 03/25/04 | (H) | RES, JUD |
| 04/05/04 | (H) | RES AT 1:00 PM CAPITOL 124 |

BILL: HB 309

SHORT TITLE: PROHIBIT RELEASE OF PREDATORY FISH

SPONSOR(S): REPRESENTATIVE(S) WOLF

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|----------|-----|--------------------------------------|
| 05/08/03 | (H) | READ THE FIRST TIME - REFERRALS |
| 05/08/03 | (H) | FSH, RES |
| 05/16/03 | (H) | FSH AT 7:30 AM CAPITOL 124 |
| 05/16/03 | (H) | Heard & Held |
| 05/16/03 | (H) | MINUTE(FSH) |
| 03/22/04 | (H) | FSH AT 9:00 AM CAPITOL 124 |
| 03/22/04 | (H) | Moved CSHB 309(FSH) Out of Committee |
| 03/22/04 | (H) | MINUTE(FSH) |
| 03/24/04 | (H) | FSH RPT CS(FSH) NT 3DP 2NR |
| 03/24/04 | (H) | DP: GARA, WILSON, SEATON; NR: OGG, |
| 03/24/04 | (H) | GUTTENBERG |
| 03/31/04 | (H) | RES AT 1:00 PM CAPITOL 124 |
| 03/31/04 | (H) | Heard & Held |
| 03/31/04 | (H) | MINUTE(RES) |
| 04/01/04 | (H) | JUD REFERRAL ADDED AFTER RES |
| 04/05/04 | (H) | RES AT 1:00 PM CAPITOL 124 |

WITNESS REGISTER

ERNESTA BALLARD, Commissioner
Department of Environmental Conservation (DEC)
Juneau, Alaska
POSITION STATEMENT: Presented HB 546.

DAN EASTON, Director
Division of Water
Department of Environmental Conservation
Juneau, Alaska
POSITION STATEMENT: Answered questions relating to HB 546.

OWEN GRAHAM, Executive Director
Alaska Forest Association
Ketchikan, Alaska
POSITION STATEMENT: Testified in favor of HB 546.

JONATHAN TILLINGHAST, Attorney at Law
Simpson, Tillinghast, Sorensen & Longenbaugh
Lobbyist for Sealaska Corporation
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 546.

MYRL THOMPSON, Member

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Wasilla, Alaska

POSITION STATEMENT: Testified during the discussion of HB 546.

ACTION NARRATIVE

TAPE 04-18, SIDE A

Number 0001

CO-CHAIR NANCY DAHLSTROM called the House Resources Standing Committee meeting to order at 1:27 p.m. Representatives Dahlstrom, Masek, Gatto, Lynn, Wolf, Guttenberg, and Kerttula were present at the call to order. Representatives Heinze and Stepovich arrived as the meeting was in progress.

HB 546-POLLUTION DISCHARGE & WASTE TRMT/DISPOSAL

Number 0080

CO-CHAIR DAHLSTROM announced that the first order of business would be HOUSE BILL NO. 546, "An Act relating to regulation of the discharge of pollutants from timber-related activities under the National Pollutant Discharge Elimination System; relating to waste treatment and disposal permits; making conforming amendments; and providing for an effective date."

Number 0148

ERNESTA BALLARD, Commissioner, Department of Environmental Conservation, (DEC), presented HB 546 on behalf of the Office of the Governor. She said she and the governor are extremely interested in the National Pollutant Discharge Elimination System (NPDES) program because it is the core tool that the state should have available to it to fulfill its responsibilities under the Clean Water Act (CWA).

COMMISSIONER BALLARD explained that HB 546 would instruct DEC to seek primacy, the primary responsibility from the U.S. Environmental Protection Agency (EPA) for permitting just timber-related waste discharges under the federal NPDES program. Upon approval, DEC and not EPA would issue discharge permits for the timber-industry sector in Alaska, she explained. The NPDES program actually covers a number of important industry sectors including not just timber, but also seafood, mining, oil and gas, and municipal sewage treatment facilities, which would remain under the jurisdiction of EPA.

COMMISSIONER BALLARD said this bill is simply a partial-primacy bill and gives DEC an opportunity to work out the method of assuming primacy in an industry sector where DEC has better expertise than EPA does. It is the state water quality standards and certification of a federal permit that allow the site-specific and risk-based conditions that make all of these permits possible and feasible in the unique circumstances that DEC encounters in Alaska, she said.

COMMISSIONER BALLARD went on to say that with a partial-primacy program, the other industry sectors have the opportunity to see how DEC approaches the regulations and works with EPA in a primacy situation. Referring to a letter of support from the Resource Development Council (RDC), she said DEC has worked closely with other industry sectors to ensure that there wouldn't be industry opposition to a partial-primacy approach.

Number 0342

COMMISSIONER BALLARD said primacy has a number of advantages. Referring to a DEC handout entitled "Partial NPDES Primacy for Timber-Related Wastewater Discharges," she said the most important expected benefit is that giving DEC primacy even just for the timber industry would begin a move toward holding Alaskans accountable to Alaskans for this extremely important activity in developing resources and protecting the environment.

COMMISSIONER BALLARD, noting that the mission priorities, level of effort, and performance measures in DEC's regulatory programs are subject to annual review and approval by the legislature, an extremely important process, added, "As long as EPA retains primacy, that opportunity is lost to Alaskans. The planning and budgeting for a federally run NPDES program does not offer this opportunity for state comment and control." Noting that a second important benefit is that a state-run program focuses on results, not process, she explained:

The state tools in our water quality standards allow us to do site-specific and risk-based permitting. We can adjust mixing zones, site-specific criteria, and naturally occurring conditions. We can look at issues that pertain to the circumstances of the discharge and write a permit that suits that discharge, and we are not bound by a single, common approach by all permits.

This ability has allowed us to work with situations which are unfamiliar to the EPA staff, as they are not

Alaskans, they're not here, they're not on the ground, and they're not often able to travel to the locations where the permits actually are located.

Number 0580

REPRESENTATIVE WOLF asked how many positions would be increased. He said he sees one position in the fiscal note and a contractual amount of \$300,000 in fiscal years 2005 and 2006.

CO-CHAIR DAHLSTROM noted the presence of Representatives Heinze and Stepovich.

Number 0668

DAN EASTON, Director, Division of Water, Department of Environmental Conservation, said a large part of [the amount] is for contractual legal assistance through the Department of Law (DOL) and for technical assistance.

REPRESENTATIVE WOLF asked if, in two years, that amount would drop to less than 15 percent.

COMMISSIONER BALLARD replied that it would take two years to write the regulations to implement the new statutory authority; once those are adopted, those requirements go away.

Number 0707

REPRESENTATIVE STEPOVICH spoke in favor of giving the state more control over discharge permits. He asked what problems would be alleviated by this bill.

COMMISSIONER BALLARD replied that 45 of 50 states have assumed primacy. The Clean Water Act is structured on the premise that states would assume primacy and run their own water discharge programs. Alaska is only one of five states that have not taken that step. She said EPA is responsible for writing, administering, and enforcing water discharge permits for industry. That program has been barely satisfactory in recent years, she opined; it is understaffed, and processing permits took years. It will not cost the state less, but more, to run its own program, but it will provide timely responses to permit applicants, she concluded.

REPRESENTATIVE STEPOVICH said it will cost the state more, but surmised that more will get done and the safety concerns will

all be met. He remarked, "It sounds like we can go after the resources in a safe manner, and we can finally do that instead of doing nothing and sitting on our hands."

COMMISSIONER BALLARD responded that DEC has not been "sitting on our hands," and, ironically, the federal CWA has two pertinent sections to these permits: Section 402, which writes the permit, and Section 401, which is the requirement that a federally issued permit or any permit is certified to maintain state water quality standards, and DEC provides that certification. The way that the program presently runs is this: the federal government proposes the permit, and then DEC goes through a second process, side-by-side, to certify that the federal permit will meet state water quality standards. She said DEC's water quality standards are already the basis for the federal permits, as well as the state permits, and there are often differences in interpretation of standards; this leads to protracted debates between EPA and DEC.

Number 1038

REPRESENTATIVE GATTO pointed to the analysis in the fiscal note where it says the bill directs DEC to seek authority from EPA. He asked if the bill is simply requesting EPA to "turn over the reins" to DEC.

COMMISSIONER BALLARD replied that it is slightly more complicated than that. Before EPA will even receive a request, it needs assurance that DEC has adequate statutory authority, and there are a few small fixes in this bill. She explained:

It's primarily an amendment to our core permitting statutory authorities. Those fixes are necessary to get the question asked, and they primarily have to do with our ability to charge fees, to fine, and to hold people negligent at the criminal level. Without those authorities, EPA would be inclined to say, "The state legislature hasn't really given you enough authority. We're not ready to talk yet."

This bill gives us all the authorities we need to be ready to talk; then we spend ... the next period of months working out with EPA all of the requirements that they will hold us to before they release the reins. You have to demonstrate that you have equestrian skills before the reins are put in your hands.

Number 1133

REPRESENTATIVE GUTTENBERG said, "Why don't we grab the whole pizza instead of just taking the slice that says timber?"

COMMISSIONER BALLARD said that was the department's original intent, but it was unable in the first year of this administration to successfully address all of the questions of all of the industry sectors, a number of which first wanted to see how this new program works out. The timber industry was ready, she said, and DEC and EPA had agreed to go ahead and pilot it.

REPRESENTATIVE GUTTENBERG asked what it meant that the timber industry was ready.

COMMISSIONER BALLARD said that the timber industry's major permitting issue is the log transfer facility (LTF), of which there are just under 100, divided among the U.S. Forest Service, Native corporations, and a few municipal facilities. The last five years have been characterized by pretty intensive effort on the part of the state and federal permitting staffs to understand and properly permit these LTFs. Most of the work has been done by DEC, which has the expertise, she said. That's why it makes sense to go ahead in the timber industry, where there is clearly established technical and regulatory excellence.

REPRESENTATIVE GUTTENBERG asked if this is limited to transfer facilities, not sawmills and other discharge processors.

COMMISSIONER BALLARD answered that the statute is for all timber-industry activities, the bulk of which are LTFs.

Number 1310

REPRESENTATIVE HEINZE asked Commissioner Ballard to further describe pollutants.

COMMISSIONER BALLARD replied that the principal issue in the timber industry is the residue from log loading and log handling, which is bark and chips. She said what is being discussed is the effects of wood in the marine environment: the bark that has fallen, the pile that has accumulated, the proper management of that pile, and the degree to which that pile influences the sea floor on which it sits and the water column above it.

REPRESENTATIVE HEINZE asked if the resins in the bark are poisonous to marine life.

COMMISSIONER BALLARD replied that the principal environmental issue is the smothering of the benthic community and the degree to which that smothering might have a population-level impact versus a site-specific impact. There are compounds that ultimately might result from the breakdown of that wood, and those issues would also be covered, as they are now, as the water quality standards are applied to the permitting of LTFs, she related.

REPRESENTATIVE STEPOVICH remarked, "Safely and by the book, we make sure that the water's fine." He asked if the bill would speed up the permitting process.

COMMISSIONER BALLARD said yes.

Number 1440

REPRESENTATIVE GATTO asked if there is a solution to correct the problem after the bark and residue have polluted the water.

COMMISSIONER BALLARD said the ideal permitting program would anticipate such issues before permitting to begin with, in order to protect the life of the benthic community and the water column. Once wood debris is on the floor, there are relatively few opportunities to correct it, such as capping it or dredging it, she added.

REPRESENTATIVE GATTO asked if both fresh water and salt water are being addressed.

COMMISSIONER BALLARD replied yes, it is a comprehensive program, but said she couldn't recall a freshwater impact.

REPRESENTATIVE GATTO suggested an accidental discharge into fresh water such as a river.

COMMISSIONER BALLARD said the bill would cover it, and added that The New York Times had referred to Tongass Narrows as a river.

REPRESENTATIVE WOLF suggested that the icing in fresh water would deal with the wood debris and tannic acid byproducts.

COMMISSIONER BALLARD said if there was an application for a log transfer in fresh water, DEC would take into consideration all of the site-specific characteristics including temperature.

Number 1613

REPRESENTATIVE KERTTULA asked if any other states split out industries in getting their primacy programs in place.

COMMISSIONER BALLARD deferred to Mr. Tillinghast. She said she believes there have been other instances.

REPRESENTATIVE KERTTULA referred to Section 5 of the bill, where it says notice can be given of the availability of a draft permit. She asked if that is a real change and requested clarification.

COMMISSIONER BALLARD said it is a real change, and it conforms to all of DEC's other permitting programs. It makes sense for DEC to notice a draft permit and not an application, she suggested. A good deal of work normally goes into perfecting an application, and it is inappropriate to encourage comment on something that DEC has not acknowledged as a completed and acceptable application, she explained.

Number 1745

REPRESENTATIVE GUTTENBERG asked what the status of the LTFs is and how the bill would affect permitting them.

COMMISSIONER BALLARD replied that LTFs in the state currently are permitted by EPA under a general permit. If the statute is passed, a transition period will be negotiated that will move those permits into DEC's jurisdiction, and the permit applicants will not be disadvantaged by that, she opined. At renewal time, DEC would be the responsible party for renewal, and there would be a continuity of permit coverage through the transition.

REPRESENTATIVE GATTO inquired if the disposal of sawdust is covered by this bill.

COMMISSIONER BALLARD said [HB 546] would authorize DEC to assume primacy for all timber-industry activities.

REPRESENTATIVE GATTO said the question comes up between clean air and clean water, and many times sawdust is simply

incinerated, and sometimes there is a conflict. He stated support for the bill.

COMMISSIONER BALLARD said DEC is the agency for jurisdiction for air also, and one advantage to having state primacy is that a situation like that is taken into consideration all the time.

Number 1921

OWEN GRAHAM, Executive Director, Alaska Forest Association, spoke in favor of HB 546, saying it will help ensure that site-specific permits take into account local conditions. He also said it is an opportunity to achieve water quality goals that the state has while streamlining the permitting process.

REPRESENTATIVE GUTTENBERG asked Mr. Graham how he feels about shifting the costs over to the industry.

MR. GRAHAM said he has talked to DEC about it, and the costs don't seem to be prohibitive for the large companies. He added that his organization may ask the state for an exemption for some of the smaller operations.

Number 2015

JONATHAN TILLINGHAST, Attorney at Law, Simpson, Tillinghast, Sorensen & Longenbaugh, Lobbyist for Sealaska Corporation, commented on the terms and limitations in the current general permitting for LTFs with the hope of putting some of the concerns about the discharge to rest. The general permit only authorizes discharges into salt water where there is strong tidal flushing so that the bark disperses, he said. The site cannot be located close to fish habitat or concentrated shellfish beds. These guidelines were developed back in the '80s by a team of federal, state, and private scientists called the Alaska Timber Task Force, he explained. The permit also provides that if the bark pile should ever exceed an acre, remediation is required, he noted.

MR. TILLINGHAST responded to the question of whether the bark leaches toxic chemicals. He referred to a two-year adjudication of that issue, saying experts had testified and an independent hearing had led to the conclusion that if the terms of the general permit are in compliance, toxic chemicals won't be leached.

Number 2175

MR. TILLINGHAST related that now two permits are needed, one from EPA and one from the state. The Clean Water Act does give states the opportunity to put that package together and have the state issue the whole thing, but Alaska is one of five states that have not done that, he said. Worse than needing two permits is that if someone wants to challenge the permit, that person can file two overlapping, duplicative legal proceedings, one in front of a state hearing officer and the other before the 9th Circuit Court of Appeals.

MR. TILLINGHAST said the 9th Circuit Court of Appeals proceedings have caused concern for many reasons. If this bill passes, the federal judiciary is taken out of the process entirely, and any challenge to the permit would be heard exclusively through the state process. Another advantage is that primacy "defederalizes" the permit decision and it becomes exclusively a state action; therefore, the possibility of having to do an environmental impact statement goes away, which significantly streamlines the permit process.

MR. TILLINGHAST emphasized that primacy is a big deal; for some industries, it may significantly change the way that permits are issued, but it's hard for those industries to predict how that is going to happen. Timber just has one general permit that DEC has already spent two years adjudicating and working on, and so all of the expertise is in Alaska already, he explained. If the NPDES program for the oil industry is changed, refinery permits would need to be dealt with, which would involve difficult engineering issues, as opposed to LTF permits, which are more straightforward, he said.

Number 2391

REPRESENTATIVE KERTTULA asked if the 9th Circuit Court of Appeals has original jurisdiction.

MR. TILLINGHAST explained that a person doesn't even get an administrative hearing in front of EPA; it goes straight from the administrator's pre-adjudicatory decision to a three-judge panel in the 9th Circuit Court of Appeals.

REPRESENTATIVE KERTTULA opined that [HB 546] is a good change. She asked for Mr. Tillinghast's take on LTFs and wondered if the streamlining still allowed for environmental protection.

MR. TILLINGHAST replied that the concerns that underlie the Endangered Species Act and the Essential Fish Habitat Program are in the state standards already and have been applied quite awhile.

Number 2518

MYRL THOMPSON, Member, Ogan is So Gone, Wasilla, inquired what the difference is between the cost of the EPA permit versus the DEC proposal. He also asked about the funding cuts in [coal bed methane] regulations and how this program could afford to be funded. He asked how many timber-related permits had been issued in recent years. He wondered if the tidal movement would move the bark out where it could collect away from the one-acre area, and whether the streamlined process means less public notice and public input.

COMMISSIONER BALLARD replied that she didn't have in front of her the schedule of the costs associated with the present timber program, but she explained what the costs would be under primacy. Currently, EPA doesn't charge for the service it provides to run the NPDES program, except through income tax. However, DEC charges a fee for certification and for general fund support. She said EPA won't provide any money to the state to run a primacy program, so those costs would have to be split between a general fund appropriation, which would be sought from the legislature, and fee income. This particular industry would not have excessive costs associated with it, because a general permit would continue to be used for the 98 LTFs currently eligible for participation, she added. They would all share the cost of the one general permit.

Number 2708

COMMISSIONER BALLARD went on to say EPA favors states that take primacy, and there is a \$40,000 grant available, which would be split between the two years; that would bear a significant cost of writing the regulations. Responding to the question about bark, Commissioner Ballard said the general permit currently requires, as would a state permit, observation that is performed through a dive. There is a protocol for diving; if there is movement of the bark, it would be noticed, she surmised, and reported in the dive survey.

COMMISSIONER BALLARD said the streamlining mentioned earlier by Mr. Graham referred to the consolidation of the federal government with jurisdiction for Section 402 and the state

government with jurisdiction for Section 401 processes, which means the permit applicant needs to deal with two separate agencies. The streamlining would be to consolidate the two sections of the Clean Water Act under the jurisdiction of DEC.

REPRESENTATIVE GUTTENBERG asked whether the difference between fees generated and costs would be about \$100,000 once the transition costs have been met.

COMMISSIONER BALLARD affirmed that, saying it is about one staff person.

REPRESENTATIVE GUTTENBERG asked if a second person would reduce expenses by bringing in more fee income because more work would be done.

COMMISSIONER BALLARD replied that the new employee would be added to a program group of about 25 employees.

REPRESENTATIVE GUTTENBERG asked about spreading around the \$100,000 hole in general funds to get rid of it.

COMMISSIONER BALLARD responded that the air program is more heavily permit-recipient funded than the water program is, so the legislature has dealt with such issues; from time to time, the balance has been shifted, which could be discussed at the time the program is implemented.

Number 2882

REPRESENTATIVE HEINZE asked what the Department of Natural Resources (DNR) thinks of the bill.

COMMISSIONER BALLARD said it is an administration bill and, by virtue of that, is supported by all departments.

REPRESENTATIVE GATTO used the terms "biological oxygen demand" and "anaerobic decomposition" and asked about the effects that spread well beyond the acre [of bark]. He asked if those two terms were considered in the two-year study.

COMMISSIONER BALLARD answered that those are among the parameters within the state water quality standards. The department is responsible to affirm that a permitted situation is likely to achieve state water quality standards. Therefore, the permitting authority has the responsibility to assert and

demonstrate that the permit will achieve the state water quality standards.

Number 2959

CO-CHAIR MASEK moved to report HB 546 out of committee [with individual recommendations and the accompanying fiscal notes].

[Not on tape, but reconstructed from the committee secretary's log notes, was that there was no objection and HB 546 was reported from the House Resources Standing Committee.]

HB 309-PROHIBIT RELEASE OF PREDATORY FISH

TAPE 04-18, SIDE B

Number 2960

CO-CHAIR DAHLSTROM announced that the final order of business would be HOUSE BILL NO. 309, "An Act prohibiting the release of nonindigenous predatory fish into public water." [Before the committee, adopted as a work draft on 3/31/04, was Version W, labeled 23-LS1097\W, Utermohle, 3/23/04.]

Number 2930

REPRESENTATIVE WOLF, sponsor of HB 309, said some legal questions had been brought forward at the last bill hearing, and he thought it would be appropriate for the bill to be reviewed by the House Judiciary Standing Committee.

CO-CHAIR DAHLSTROM commended Representative Wolf for requesting that the bill receive another committee of referral, which she said she thought was appropriate.

Number 2910

CO-CHAIR MASEK moved to report CSHB 309, Version 23-LS1097\W, Utermohle, 3/23/04, out of committee with individual recommendations and the accompanying fiscal notes, and asked for unanimous consent.

REPRESENTATIVE GUTTENBERG objected. He asked if the bill had received a [referral] to the House Judiciary Standing Committee.

CO-CHAIR DAHLSTROM answered yes.

REPRESENTATIVE STEPOVICH expressed concerns that previously asked questions should be answered by the House Judiciary Standing Committee before the bill leaves committee. He asked what recourse there would be if the [\$1,500 fine amount] wasn't changed in that committee.

Number 2844

REPRESENTATIVE WOLF explained that he'd talked with the chair of the House Judiciary Standing Committee and had expressed concerns about [the amount of the fine]. He said he wanted to give the department a few more "teeth" with regard to catching people who are transporting live pike, because it is an issue that costs the State of Alaska a tremendous amount. He said \$40,000 [the cost to ADF&G to exterminate yellow perch knowingly deposited in a lake on the Kenai Peninsula] isn't "small change."

CO-CHAIR DAHLSTROM said she'd also had a conversation with members of the House Judiciary Standing Committee concerning several items such as the class C felony and the fine amount, and whether those are equitable and equal to the crime. She said she believes that committee is the appropriate place for [the bill] to go. She said it would then go to the floor and "if people don't feel right about it, it won't leave the floor."

[HB 309 was held over. The motion to report CSHB 309, Version 23-LS1097\W, Utermohle, 3/23/04, out of committee was left pending with an objection.]

ADJOURNMENT

There being no further business before the committee, the House Resources Standing Committee meeting was adjourned at 2:18 p.m.