

**ALASKA STATE LEGISLATURE
HOUSE RESOURCES STANDING COMMITTEE**

March 16, 2005

1:15 p.m.

MEMBERS PRESENT

Representative Jay Ramras, Co-Chair
Representative Ralph Samuels, Co-Chair
Representative Jim Elkins
Representative Carl Gatto
Representative Gabrielle LeDoux
Representative Kurt Olson
Representative Paul Seaton
Representative Harry Crawford
Representative Mary Kapsner

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 153

"An Act relating to regulation of the discharge of pollutants under the National Pollutant Discharge Elimination System; and providing for an effective date."

- MOVED CSHB 153 (RES) OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: HB 153

SHORT TITLE: POLLUTION DISCHARGE & WASTE TRMT/DISPOSAL

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

02/16/05	(H)	READ THE FIRST TIME - REFERRALS
02/16/05	(H)	RES, FIN
03/14/05	(H)	RES AT 1:00 PM CAPITOL 124
03/14/05	(H)	Heard & Held
03/14/05	(H)	MINUTE(RES)
03/16/05	(H)	RES AT 1:00 PM CAPITOL 124

WITNESS REGISTER

BRIAN KRAFT
Bristol Bay Alliance
Fishing Lodge Owner

Bristol Bay, Alaska
POSITION STATEMENT: Testified against HB 153.

DAN EASTON, Director
Division of Water
Department of Environmental Conservation (DEC)
Juneau, Alaska
POSITION STATEMENT: Answered questions on HB 153.

CAMERON LEONARD, Senior Assistant Attorney General
Natural Resources Section
Department of Law
Fairbanks, Alaska
POSITION STATEMENT: Answered questions on HB 153.

ROBERT ROBICHAUD, Manager
Wastewater Permit Unit
Northwest Region
Environmental Protection Agency (EPA)
Seattle, Washington
POSITION STATEMENT: Answered questions regarding HB 153.

BEN BROWN, Legislative Liaison
Department of Environmental Conservation
Juneau, Alaska
POSITION STATEMENT: Answered questions on HB 153.

ACTION NARRATIVE

CHAIR JAY RAMRAS called the House Resources Standing Committee meeting to order at [1:15:14 PM](#). Representatives Crawford, Samuels, Seaton, Olson, LeDoux, Kapsner, Ramras, and Elkins were present at the call to order. Representative Seaton joined the meeting soon after it was in progress.

HB 153-POLLUTION DISCHARGE & WASTE TRMT/DISPOSAL

CO-CHAIR RAMRAS announced that the only order of business would be HOUSE BILL NO. 153 "An Act relating to regulation of the discharge of pollutants under the National Pollutant Discharge Elimination System; and providing for an effective date."

BRIAN KRAFT, Owner, Fishing Lodge, said he helped start the Bristol Bay Alliance, which is a non-profit group devoted to help educate locals about issues that may adversely affect their Native cultural ways of life. He said state primacy for the National Pollutant Discharge Elimination System (NPDES) will

mean less staff to help enforce and inspect activities, which could adversely affect habitat and waterways. The state of Alaska has spent time and financial resources in promoting wild and fresh Alaska salmon, and should look at more staffing and enforcement instead of less to ensure that habitat and salmon bearing streams are protected. He said people who depend so heavily on salmon for subsistence deserve more consideration.

MR. KRAFT said primacy would create bigger state government. The federal government is willing to oversee and bear the costs, he said, and Alaska should be looking at ways to streamline state government. He concluded that he finds it troublesome that permit writers will be working closely or contracted by the permittees, as if the fox is in charge of the henhouse. If the state is leaning one way or another, pro-development or anti-development, it would be too easy for local permit writers to be influenced, he said.

REPRESENTATIVE CRAWFORD suggested that both federal and state programs run the risk of being politicized, and wouldn't it be better to have regulators closer to the operations.

MR. KRAFT said he sees the current administration as pro-development, and if a company wants to develop a mine, Alaska Department of Environmental Conservation (DEC) permit writers will be working for a governor who is pushing it. He added that it is easier to be influenced by the local government, especially in the small state that Alaska is. The federal regulators are further away from the pressures of local government, he stated.

CO-CHAIR SAMUELS said it could cut both ways, because Mr. Kraft could get frustrated with delays if he wanted a permit for his lodge. The bill is not trying to pick a side of pro or anti-development, he said.

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MR. KRAFT said the reduction in staff looks like less enforcement, and the costs will be shouldered by Alaskans.

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REPRESENTATIVE SEATON asked if small permits are done by DEC.

DAN EASTON, Director, Division of Water, Department of Environmental Conservation, said DEC does the small permits, but

the Environmental Protection Agency (EPA) does the vast majority of the permits.

REPRESENTATIVE LEDOUX noted that in the current system there is a special relationship between the EPA and tribal governments, and asked what the state will do about that.

MR. EASTON said it is complex, but EPA has an obligation for government-to-government consultation, and when the state applies to EPA for primacy, EPA will have to consult with the tribes. At that time, the tribes will likely ask EPA to add a condition that the state will have to do the same during permitting. It will be less formal, but it still will be an obligation, he said.

REPRESENTATIVE LEDOUX said there are many communities that have tribal governments. What happens when they need a permit, she asked.

MR. EASTON said DEC would treat a tribal permittee just as any other permittee.

REPRESENTATIVE SEATON said EPA and tribes have a sovereign-to-sovereign relationship, and he asked what the state relationship would be with the tribes.

MR. EASTON said DEC discussed this issue with attorneys, and the obligation is not sovereign recognition, it is simply an obligation for consultation before taking actions that could have a significant impact on a tribe. There will be no change on the status of tribal governments in Alaska.

REPRESENTATIVE SEATON asked if there will be a different level of consultation for tribes than any other group of citizens.

MR. EASTON said DEC's obligation is for public comment, and consultation is not an obligation of DEC. Tribes, DEC expects, would get consultation in addition to public notices.

REPRESENTATIVE CRAWFORD asked who decides what tribe is being affected.

CAMERON LEONARD, Senior Assistant Attorney General, Natural Resources Section, Department of Law, Fairbanks, said that currently the EPA decides itself what tribes are likely to be affected, and sometimes the state does not agree with EPA's

decisions. He said he is not sure how it would work under the state program.

ROBERT ROBICHAUD, Manager, Wastewater Permit Unit, Northwest Region, Environmental Protection Agency, said EPA identifies what tribes might be impacted by proposed permits, and then EPA will invite the tribe to meet with them--usually before the public notice. If the tribe requires formal consultation, a representative also meets with EPA when the permit is ready to be issued. The state would develop similar procedures and work with EPA on such when applying for primacy.

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REPRESENTATIVE SEATON said he talked with DEC and expressed concern with page 2, lines 3 and 4, regarding expanding the work group beyond the permittees so that the public will be involved.

MR. EASTON said DEC did not prepare anything. "The bill says the permittee will have access to the permit after the close of the public comment period. We have said on the record that [DEC's] intent...[would be that] we couldn't give the permittee exclusive access to the permit at that point in time, and that would be our intent that the permit would be made available after the public comment period closes to the permittee; it would be posted on the web; and would be made available to anybody that would have provided comment on the draft permit. We do think that is a legitimate and good point, but at this point we haven't prepared an amendment."

REPRESENTATIVE SEATON said that was one of his points he will bring up later, but currently he is speaking about the exclusive make-up of the work group.

MR. EASTON apologized and said DEC believes that the work group consisting of the permittees but open to the public works very well. He said he suspects it would be fine to open the meetings up to one or two members of the public.

1:43:45 p.m.

REPRESENTATIVE SEATON moved to adopt conceptual Amendment 1, as follows:

Page 2, line 3, after "permittees"
Insert ", the public"
Page 2, line 4, after "meet"

Insert "in a public forum noticed under rules of AS44.62"

CO-CHAIR SAMUELS objected so DEC can tell the committee what it does now with public notices. He said he doesn't have a problem with someone like Mr. Kraft joining the group, but "I would have a lot of problem with a work group this size, and we've got the Sierra Club and the Audubon Society and the Trustees for Alaska, and, and, and, because that's not what we're after, and I want to clarify that on the record that we don't want millions of dollars of outside money coming in with a vested interest in simply stopping development."

REPRESENTATIVE SEATON said the goal is to broaden the work group to include members of the public. We, as a legislative body, need to ensure that the Alaska public is involved, he said. The amendment does not define who that would be, and he does not want the public to be the majority of the work group.

CO-CHAIR SAMUELS said the public member should not be a permittee who is not affected by the particular permit involved. He removed his objection.

There being no objection, Amendment 1 carried.

REPRESENTATIVE SEATON noted that page 5, lines 12-14, gives the permittee an opportunity to discuss the permit with DEC after the public comment period and not in a public forum. "This is very problematic," he said. He stated that DEC just said it is not their intent. This could allow for a lot of pressure upon DEC staff while preparing a permit. A closed meeting is not DEC's intent, but that is what the legislation says, and Representative Seaton said he would like to amend it.

MR. EASTON said on line 12 after program, insert "or comments on a draft permit", and this would open the process to others.

REPRESENTATIVE SEATON said line 13--where the permittee can discuss the permit with staff--allows for private negotiations after a draft permit is issued. He said normally people can submit comments after a draft comes out, and no one has the statutory ability to discuss it privately with staff.

CO-CHAIR RAMRAS said he has many times gone to DEC prior to a final permit for his food service operations, "without forcing DEC to come out in a formal capacity." He said he has lived under item three and finds it a positive part of the process.

"Item 3, here, is one of the best features of DEC, as I find them to be a very accessible state agency that has been helpful and has accelerated the process in my dealings with them," he said.

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REPRESENTATIVE SEATON said this is not just a kitchen permit; it can be discharges that affect the general public. He offered conceptual Amendment 2 which will read:

Page 5, line 12, after "program"
Insert "or comments on a draft permit"

REPRESENTATIVE SEATON said, in response to Representative Gatto, someone applying for a permit might need to talk with DEC before the application or permit goes out for public review, and that is the appropriate time for give and take. But Section 3 gives the permittee the right to have private negotiations with DEC after public comments are done. This is not the appropriate time to change a permit, he opined. "It is a very unusual situation," he said.

CO-CHAIR SAMUELS said in the real world sometimes the permittee knows the most about the problems of a permit, and sometimes that expertise can help fix poor interpretations. "You don't want to change the general gist. You don't want someone coming in there and gutting it," he said.

REPRESENTATIVE SEATON said that is why, in the development of a permit, it is a good idea, but after the agency makes draft regulations, this amendment would allow the permittee or anyone who has commented to review the final permit.

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CO-CHAIR RAMRAS said he believes the committee agrees on conceptual Amendment 2 which says "or comments on a draft permit", but the current discussion is on a third amendment that hasn't been proposed.

Hearing no objection, Amendment 2 carried.

REPRESENTATIVE SEATON offered conceptual Amendment 3:

Page 5, line 13,

remove ", and to discuss it with staff of the department"

CO-CHAIR RAMRAS objected.

REPRESENTATIVE SEATON says this still allows a person to comment to the department to make clarifications, just like you do, but it does not become a negotiation outside of the public arena.

CO-CHAIR RAMRAS said closed caucuses are "where we get a lot of our work done."

CO-CHAIR SAMUELS asked what the appeal process is after the final permit.

MR. EASTON said the state has an informal appeal process, and there is an opportunity for an adjudicatory appeal to the commissioner.

CO-CHAIR SAMUELS asked if a permittee talked DEC into gutting a permit, would there be a process and a paper trail to take care of it.

MR. EASTON said that is correct.

CO-CHAIR SAMUELS said the original rule of the Federal Energy Regulatory Commission (FERC) "was 180 degrees and 10,000 miles from where we ended up. If we had to work off of the working draft model and not been able to interact with the staff, we don't know where we would have ended up," he said, because the legislature and all of the players were at the table to discuss common sense issues.

REPRESENTATIVE CRAWFORD said the chronology of Co-Chair Samuels' example is confused. The FERC rule was changed during the public comment period. Representative Seaton is referring to the permittee's opportunity to go in later with no public review.

REPRESENTATIVE SEATON clarified that what Co-Chair Samuels is talking about is Section 2, "which I didn't modify. You have draft regulations, you work through those," he said, and then this legislation allows the permittee to go in after the public process, after everything has been worked out, and negotiate for changes.

CO-CHAIR RAMRAS said he likes the way the bill reads now because it is useful for his restaurant to have one-on-one meetings with health inspectors to clarify and clean up things before a final permit. He opined that it is efficient and a time and money saver. "I haven't found that it circumvents the public process; I have found that it has enhanced my ability, as a member of the private sector, to have a responsive relationship with a government agency."

REPRESENTATIVE SEATON asked if currently a permittee can come in and discuss a final rule before it is issued and after the draft and public comment process.

MR. LEONARD said he believes that EPA does not allow that kind of consultation with the applicant. He added that there is nothing under state law that would prohibit this kind of consultation after public notice.

MR. ROBICHAUD said that once a permit has gone through a public process, EPA does not have consultation with anyone. He pointed out that if DEC makes significant changes resulting from such consultation, there will be a requirement to re-notice the permit.

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A roll call vote was taken. Representatives Seaton, Kapsner and Crawford voted in favor of conceptual Amendment 3. Representatives Elkins, LeDoux, Olson, Gatto, Samuels and Ramras voted against it. Therefore, conceptual Amendment 3 failed by a vote of 3-6.

REPRESENTATIVE CRAWFORD asked about the use of contractors.

MR. EASTON replied that the work group recommended using contractors to make sure DEC has sufficient resources to expedite complex permits.

[2:12:05 PM](#)

REPRESENTATIVE CRAWFORD asked if that is why there are fewer employees needed.

MR. EASTON said that is true in part, "but I don't want to leave you with the impression that the way that we can run the program with eight fewer employees is solely because we've privatized

some of the work and given it to contractors...probably some of it."

[2:12:50 PM](#)

MR. EASTON said that EPA makes good use of contractors.

REPRESENTATIVE SEATON inquired if the fiscal note contains the cost of contractors.

MR. EASTON said it does.

CO-CHAIR SAMUELS moved conceptual Amendment 4, which read [original punctuation provided]:

Page 5, Line 1

Add a new Section to read:

- **Sec. 6** The uncodified law of the State of Alaska is amended by adding a new section to read:

Annual Reports on Program Assumption and Execution

Within the first ten days of each annual Legislative session the department shall submit a report to both houses of the Legislature and to the Governor that includes the following information:

- (1) the Department's progress in preparing and submitting its application to the EPA by the intended deadline of June 30, 2006;
- (2) EPA's progress in reviewing the state's application and expected or actual date and contents of EPA's approval;
- (3) the Departments and EPA's progress during the five-year NPDES program transition period, describing which program responsibilities have been transferred to the Department, which retained by EPA, and whether the transition is on schedule; and
- (4) once the Department is running an approved NPDES permitting program, the time and costs associated with issuance of permits, compared to the time and costs it formerly took EPA to issue such permits.

- (a) The report under this section shall include:
- (1) Time for each permit issued from initial application to actual issuance of the permit;
 - (2) An explanation as to why, if the permitting process exceeds 18 months.
 - (3) The costs of issuing the permit to the department;
 - (4) The costs of issuing the permit to the permittee;
 - (5) Whether these costs are an increase or decrease; and
 - (6) How and why the increase or decrease was realized.

CO-CHAIR RAMRAS objected for discussion purposes.

CO-CHAIR SAMUELS said if timesavings are not realized with HB 153, the legislature has not done much. He said conceptual Amendment 4 will require DEC to report on the transition and if and why any permit takes longer than 18 months. This is a "hammer in here as that there'll be some consequences that...if the time savings do not happen and we're not streamlining the process, we want to know why, and we can revisit the entire issue."

CO-CHAIR RAMRAS assured that it is a friendly amendment that DEC agrees with.

REPRESENTATIVE LEDOUX said we may be closing the barn door after the horse leaves. She questioned spending time and money before being assured of the benefits.

CO-CHAIR RAMRAS noted that all but five states have taken over primacy.

2:16:30 P.M.

BEN BROWN, Legislative Liaison, Department of Environmental Conservation, said, "All prognostications are imperfect." This legislation begins a process towards assumption of primacy, he said, and the amendment is not just a report once primacy is gained, but it provides the legislature with information through the process. The supposition that state primacy will work better is in the fact that no state "has ever had primacy yanked back by the EPA."

CO-CHAIR SAMUELS said, "We know it is taking too long now," to have to deal with both the federal and state government, so he will support the legislation in order to try to streamline the process.

CO-CHAIR RAMRAS removed his objection.

There being no objection, Amendment 4 carried.

REPRESENTATIVE SEATON said he is concerned that the bill is adding 13 new employees in addition to the 254 that are proposed elsewhere in the governor's budget. He added that the legislature has tried to shift funding sources to the federal government instead of the general fund, and HB 153 does the opposite. He sees a similar issue with the state taking over the Alaska Coastal Management Program, and it is "one heck of a mess." Alaska is clashing with the federal government. He said the state will lose a lot of federal funds, and he hasn't seen enough evidence that there will be streamlining in time and money. He said he does not want to move forward on HB 153.

REPRESENTATIVE CRAWFORD said he likes the idea of having things done here in Alaska, but he has concerns over the use of contractors. Privatizing work that state employees could do usually brings little or no savings, and sometimes there is a financial loss.

CO-CHAIR SAMUELS moved to report HB 153 as amended out of out of committee with individual recommendations and the attached fiscal notes. Hearing no objection, CSHB 153(RES) was reported from the House Resources Standing Committee.

ADJOURNMENT

There being no further business before the committee, the House Resources Standing Committee meeting was adjourned at 2:23p.m.

[2:23:11 PM](#)