

ALASKA STATE LEGISLATURE
HOUSE SPECIAL COMMITTEE ON FISHERIES

February 12, 2007
8:35 a.m.

MEMBERS PRESENT

Representative Paul Seaton, Chair
Representative Kyle Johansen
Representative Craig Johnson
Representative Gabrielle LeDoux
Representative Peggy Wilson
Representative Bryce Edgmon
Representative Lindsey Holmes

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 74

"An Act prohibiting mixing zones in freshwater spawning waters."

- HEARD AND HELD

HOUSE BILL NO. 41

"An Act returning certain duties regarding habitat management from the Department of Natural Resources to the Department of Fish and Game; and providing for an effective date."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 74

SHORT TITLE: BAN MIXING ZONES IN SPAWNING AREAS

SPONSOR(S): REPRESENTATIVE(S) SEATON, GARA, LEDOUX

01/16/07	(H)	PREFILE RELEASED 1/5/07
01/16/07	(H)	READ THE FIRST TIME - REFERRALS
01/16/07	(H)	FSH, RES
02/05/07	(H)	FSH AT 8:30 AM CAPITOL 124
02/05/07	(H)	Scheduled But Not Heard
02/07/07	(H)	FSH AT 8:30 AM CAPITOL 124
02/07/07	(H)	Heard & Held
02/07/07	(H)	MINUTE(FSH)

02/12/07 (H) FSH AT 8:30 AM CAPITOL 124

BILL: HB 41

SHORT TITLE: TRANSFER HABITAT DIV FROM DNR TO F&G

SPONSOR(S): REPRESENTATIVE(S) GARA

01/16/07 (H) PREFILE RELEASED 1/5/07
01/16/07 (H) READ THE FIRST TIME - REFERRALS
01/16/07 (H) FSH, RES, FIN
02/09/07 (H) FSH AT 8:30 AM CAPITOL 124
02/09/07 (H) Heard & Held
02/09/07 (H) MINUTE(FSH)
02/12/07 (H) FSH AT 8:30 AM CAPITOL 124

WITNESS REGISTER

LYNN TOMICH KENT, Director
Division of Water
Department of Environmental Conservation
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to HB 74.

KRISTIN SMITH
Copper River Watershed Project
Cordova, Alaska
POSITION STATEMENT: Testified in support of HB 74.

STEVE BORRELL, Executive Director
Alaska Miners Association
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to HB 74.

DR. ROLAND MAW
United Cook Inlet Drift Fishermen's Association;
Past President, Kenai Wild
Kasilof, Alaska
POSITION STATEMENT: Testified in support of HB 74.

JOHN NELSON
Kokhanok Village, Alaska
POSITION STATEMENT: Testified in support of HB 74.

JIM KULAS, Environmental Manager
Red Dog Mine
Teck Cominco Alaska Incorporated
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to HB 74.

LANCE TRASKY, fisheries biologist
Anchorage, Alaska

POSITION STATEMENT: Testified in support of HB 41.

KERRY HOWARD, Executive Director
Office of Habitat Management and Permitting
Department of Natural Resources
Juneau, Alaska

POSITION STATEMENT: During hearing of HB 41, provided background information regarding OHMP and answered questions.

JOHN BITNEY, Legislative Liaison
Governor's Legislative Office
Office of the Governor
Juneau, Alaska

POSITION STATEMENT: During hearing of HB 41, provided clarification of the governor's letter to the chair of the Board of Fisheries, dated February 8, 2007.

ACTION NARRATIVE

CHAIR PAUL SEATON called the House Special Committee on Fisheries meeting to order at [8:35:13 AM](#). Representatives Johnson, Johansen, and Edgmon were present at the call to order. Representatives Holmes, Wilson, and LeDoux arrived as the meeting was in progress.

HB 74-BAN MIXING ZONES IN SPAWNING AREAS

[8:35:28 AM](#)

CHAIR SEATON announced that the first order of business would be HOUSE BILL NO. 74, "An Act prohibiting mixing zones in freshwater spawning waters." [Before the committee is CSHB 74, Version LS0337\M, Bullock, 2/6/07, adopted on February 7, 2007.]

[8:36:54 AM](#)

CHAIR SEATON directed the committee's attention to a generalized discussion of the definition of "placer mine" and "mechanical dredging" as well as the covers of three fact sheets from the Environmental Protection Agency (EPA) that discuss the aforementioned.

[8:38:19 AM](#)

LYNN TOMICH KENT, Director, Division of Water, Department of Environmental Conservation (DEC), provided testimony in opposition of HB 74. Ms. Kent paraphrased from the following written statement [original punctuation provided]:

The Department is opposed to CSHB 74(FSH) for the following reasons:

1. CSHB 74(FSH) is not necessary to protect anadromous salmon from either a scientific or a perception basis.

The Department of Environmental Conservation's regulations prohibit mixing zones in anadromous salmon spawning areas. CSHB 74(FSH) would put in statute the same protections for the five species of anadromous salmon that have been part of DEC's regulations since 1995.

While these protections are not necessary from a scientific perspective, they go beyond science to address the need to protect salmon marketing and the public perception that Alaska's salmon are clean and healthy.

2. There is no justification for extending the current mixing zone prohibition designed to protect the salmon marketing effort to protect "non-salmon" fish species.

CSHB 74(FSH) would prevent DEC from authorizing a mixing zone in a non-salmon fish spawning area even in cases where science can show the mixing zone will have no adverse effect on spawning. There is no justification for extending the mixing zone prohibition which is intended to protect salmon marketing efforts to non-salmon fish species. Alaska needs to encourage and support responsible community growth and development of its natural resources.

DEC's regulations allow exceptions to the prohibition of a mixing zone in "non-salmon" spawning areas when site specific conditions show that the fish species will be protected or any adverse impacts will be mitigated as determined by habitat and fisheries biologists with the Departments of Fish and Game, and Natural Resources, under their mitigation requirements, just as they do for other activities that occur in waterbodies.

Alaska's communities and businesses should be allowed to use mixing zones if fish are protected. There is no justification for restricting responsible community growth and resource development that can comply with the state's requirements for the growth and propagation of fish.

3. CSHB 74(FSH) would prohibit mixing zones in spawning areas for lampreys and smelts.

DEC would be prevented from authorizing a mixing zone in all anadromous fish spawning areas. Lampreys and smelts are fish species included in the definition of anadromous fish. Unlike the importance of salmon to Alaska's social and economic wellbeing, DEC does not believe non-salmon anadromous fish species justify an absolute prohibition on mixing zones that can comply with the scientifically based water quality standards for growth and propagation of fish.

4. CSHB 74(FSH) would prohibit reauthorization of mixing zones that have become a fish spawning area unless the discharge was from a municipal wastewater facility, or the waterbody is an artificially constructed facility.

It is possible for mixing zones to become spawning areas even though spawning was not occurring when the mixing zone was first authorized. DFG has discovered fish spawning in a mixing zone previously authorized for a drinking water utility, and in some cases for domestic wastewater facilities. Successful fish spawning in a mixing zone is at least partial evidence that the water quality in the mixing zone is not harmful to fish. Allowing mixing zones in areas that have become successful spawning areas should be allowed for any facility type, not just municipal wastewater facilities or artificially constructed facilities. Businesses and communities should not lose their mixing zones just because they are doing such a good job treating their wastewater that fish start spawning in them.

5. CSHB 74(FSH) includes a definition of "area" that is counter to both past and current practices by the Departments of Fish and Game and Natural Resources

when determining spawning areas on both a spatial and temporal basis.

The relative sensitivity of Alaska's fish resources is seasonal. Impacts from responsible community and resource development can be avoided by limiting uses and activities to times of the year when the fish resources are not there or other seasonal conditions eliminate adverse impacts to the fish resources. Alaska's resource agencies have traditionally employed "seasonal restrictions" to control development impacts to the environment.

There are dozens of currently permitted facilities with discharges that do not have an adverse effect on fish, in part due to timing restrictions imposed on their discharge via permit conditions. DEC's regulations also prohibit mixing zones that would adversely affect the capability of the area to support future spawning, incubation, and rearing activities. CSHB 74(FSH) would require the Department to cancel those permits (other than for placer mines) and limit future permitting in similar situations without any net environmental benefit to the fish.

6. CSHB 74(FSH) will create a temporary inequity between existing placer miners and new placer miners.

Placer mines with mixing zone authorizations under the current general permit do not have to comply with the proposed CSHB 74(FSH) restrictions of AS 46.03.065(c) until the general permit is reauthorized - currently scheduled for the fall of 2010. Any new placer mines seeking permit coverage would have to comply with the new restrictions of CSHB 74(FSH) immediately. This would set up a double-standard for existing vs. new placer mines during the next few mining seasons.

7. CSHB 74(FSH) would prohibit re-authorization of mixing zones for placer mines that cannot operate with a mixing zone limited to 500 feet.

There are approximately 28 placer mines that have an authorized mixing zone greater than 500 feet in length - the proposed limitation in CSHB 74(FSH). These facilities, under current regulatory requirements, have already done everything they can do to ensure the

mixing zone is as small as practicable. It is likely that many of these facilities could not be re-permitted under the proposed 500 foot mixing zone limitation, even though they are currently operating without an adverse impact to spawning.

8. CSHB 74(FSH) relies upon a new undefined term, "useful life" when referring to renewal of a mixing zone authorization for a municipal wastewater facility.

As many facilities age, they are upgraded to varying degrees from minor modifications to almost complete reconstruction. DEC knows of no standard or criteria for determining a facility's "useful life." Introduction of the concept of a "useful life" raises questions about what constitutes a modification or upgrade to a facility vs. reconstruction at the end of a facility's "useful life."

The "useful life" of a facility is also irrelevant to the properties and effects of a mixing zone or the methods necessary to protect fish.

9. CSHB 74(FSH) is inconsistent with the current statute for protection of fish and game (AS 41.14.870), interference with salmon spawning streams and waters (AS 16.10.010), or submission of plans and specifications (AS 16.20.060).

Alaska's legislature has enacted a protective legal framework for all waters important to fish with additional protections for rivers, lakes and streams that are important for salmon spawning, rearing, or migration. State approval must be received from DEC, DNR, or DFG prior to the construction in, or use of waters important to fish spawning, rearing or migration.

CSHB 74(FSH) prohibits all mixing zones in all anadromous fish and other specifically listed fish spawning areas. However, CSHB 74(FSH) does not amend or repeal the provisions in other state law that permit the use of fish spawning areas if there are no adverse impacts from that use. CSHB 74(FSH) conflicts with current legislative policy not specifically amended or repealed by CSHB 74(FSH).

10. CSHB 74(FSH) will impact Alaska's municipalities and villages.

CSHB 74(FSH) provides for renewal of existing mixing zones for municipal or village treated sewage discharges when spawning begins to occur in the mixing zone after one is authorized. In all other cases, though, the bill prohibits mixing zones for discharges of treated municipal sewage to anadromous and other fish spawning areas. Some fish species, Arctic grayling for example, are ubiquitous and spawn throughout Alaska's river systems. CSHB 74(FSH) would preclude the use of mixing zones to authorize the discharge of treated sewage from a large number of village sewage treatment lagoons that discharge to interior river systems where Arctic grayling spawn. The alternative of treating sewage from villages to a level where no mixing zone would be required would involve exorbitant costs and is simply not feasible.

11. Mixing zones are already strictly regulated under existing regulations.

Before authorizing any mixing zone in any waters (fresh or marine, with or without spawning area considerations), the Department must consider 19 specific regulatory provisions. Many of them are designed specifically to protect aquatic life. For example, the Department must find that the designated and existing uses of the waterbody as a whole, including growth and propagation of aquatic life, will be maintained and protected, and that overall biological integrity of the waterbody will not be impaired. In addition, a mixing zone *cannot* be authorized if it will result in an acute or chronic toxic effect in the water column, sediments, or biota outside the boundaries of the mixing zone; result in a reduction in fish or shellfish population levels; result in permanent or irreparable displacement of indigenous organisms; adversely affect threatened or endangered species; form a barrier to migratory species or fish passage; contain pollutants that bioaccumulate, bioconcentrate, or persist above natural levels in sediments, water, or biota; or cause lethality to passing organisms.

In summary, mixing zones are not a blanket approval to discharge pollutants into water. Their size and shape are calculated by engineers using mathematical models and site specific information including the concentration of pollutants, water volumes and flow rates.

Once authorized, many permits require the permittee to monitor the concentration of pollutants in the discharge and to monitor the waterbody at the edge of the mixing zone to ensure that all water quality standards are being met at the edge of the mixing zone. DEC also conducts independent inspections and independent monitoring of permittees.

[8:48:35 AM](#)

CHAIR SEATON asked if, prior to 2006 and the implementation of the new regulations [which are mirrored in HB 74], the division denied villages mixing zones for municipal wastewater treatment plants.

MS. KENT explained that many villages have lagoon systems and the lagoons are nondischarging for most of the year. Those lagoons and facilities have been permitted to discharge at certain times of the year in order to avoid spawning times. Therefore, if the seasonal restrictions aren't available to the village, the village won't be able to discharge its lagoons.

[8:49:42 AM](#)

CHAIR SEATON asked, "Under the current regulations, as written, that define spawning areas, you had not denied any permits. Is that correct?" He also asked if that was correct in the previous decade.

MS. KENT answered, "I'm not sure." In response to Representative LeDoux, Ms. Kent agreed to find out whether permits had been denied under the current regulations. She then related that the mixing zone authorization for the Pogo Mine's domestic wastewater discharge from its mining man camp wasn't denied. However, the company was required to perform extensive studies of the Good Paster River in order to find a small place in the river that was underlain by bedrock and unsuitable for fish spawning, which would be used for its domestic wastewater discharge outfall. In response to Representative Johnson, Ms.

Kent agreed to inform the committee of the number of applications.

8:51:50 AM

CHAIR SEATON inquired as to why Ms. Kent believes the language "useful life," which is used throughout statute, is different in this case. He requested that Ms. Kent update her testimony with regard to that distinction.

MS. KENT said that she hasn't reviewed the other statutes referring to "useful life." However, she said that she's well aware of the facility upgrades occurring in rural Alaska. She noted that she would review that language.

8:53:04 AM

CHAIR SEATON related his understanding that there may be some inordinate discrimination between new placer miners and existing placer miners. He recalled the practice of provisions grandfathering in existing facilities until new permits are available, such as the general permit that will be reissued in 2010.

MS. KENT explained that the legislation is written such that anyone who isn't currently placer mining but wishes to be covered this summer will need to apply for coverage under the existing general permit and comply with the restrictions specified in HB 74. For instance, any new placer miners would have to comply with the limitation on the length of the mixing zone. In further response to Chair Seaton, Ms. Kent said that the only difference is that HB 74 is drafted such that it would apply differently to the existing permitted placer mines and those seeking a permit between now and the reauthorization of the general permit.

8:55:06 AM

KRISTIN SMITH, Copper River Watershed Project, informed the committee that the Copper River Watershed Project is a membership nonprofit that focuses on the entire Copper River region. The project represents the salmon economies of the Copper River region. She further informed the committee that the Copper River watershed relies on a commercial salmon fishing economy, subsistence salmon economy, and a growing sportfishing salmon economy. She related that the Copper River region's salmon economy amounts to about \$20 million annually on average.

Therefore, [the Copper River Watershed Project] supports banning mixing zones in spawning areas. She emphasized that fish are a public resource and should be managed for the public benefit. Allowing mixing zone pollution in public waters benefits a few, not the general public. Furthermore, mixing zones need to be banned from spawning areas at all times because of the harm caused by residual pollutants. Public waters have to be managed for all forms of pollution in order to be effective and spawning areas have to be treated as such rather than a particular point in time. Ms. Smith related that water quality treatment in the Copper River region has illustrated that the long-term polycyclic aromatic hydrocarbons bioaccumulate and micro-organisms can accumulate in their tissue. However, the state water quality standards don't take bioaccumulation into account, but rather only measure acute episodes of pollution. It's critical to move HB 74 through, she said. She then expressed her outrage at having to testify on this subject again.

[8:58:54 AM](#)

STEVE BORRELL, Executive Director, Alaska Miners Association, provided testimony in opposition to HB 74 as well as Version M, which he characterized as more onerous than the original legislation. Mr. Borrell provided the following testimony:

States are allowed to authorize mixing zones under the Clean Water Act because in some situations no other alternative exists to handle some discharges. In Alaska most of the mixing zones are for sewage discharges by municipalities and a few mining operations also need mixing zones to comply with the very stringent discharge limits that are in place. Mixing zones are the option of last resort and authorized by DEC only after no other feasible alternative is determined. Mixing zones are sized based on the flow of the receiving water and by law must be "as small as practicable". That term appears in law throughout EPA regulations, in statute, and in state. Mixing zones are not allowed when salmon spawning is occurring; timing restrictions currently placed on mixing zones so they cannot be used when salmon are spawning. The CS to House Bill 74 adds the words "at any time" and would eliminate use of mixing zones even when spawning was not occurring. DEC would not be able to issue mixing zones "at any time" if spawning ever occurs in that area.

The second change made ... by the committee substitute adds the term "a turbidity mixing zone". There is a hidden problem within this addition of the term. Turbidity modifications are currently allowed for placer and dredge miners and this is, in essence, the mixing zone. However, EPA and DEC, after several years of study and multiple legal challenges, determined that turbidity was a reasonable surrogate for naturally occurring arsenic and that if a very low limit was placed on turbidity, the permit would be protected for arsenic in the discharged water as well. Therefore, with the change made by the CS, the use of turbidity as a surrogate would likely not be allowed. The bill appears to grandfather municipalities that currently have mixing zones that become a spawning area after the mixing zone is approved. However, if the municipality needs to expand, to modify, or make some change to the sewage plant, it would require a different permit and it would no longer qualify and could no longer have the same mixing zone or any mixing zone. It is my understanding that this is the situation for the City of Palmer where changes have occurred in the Matanuska River since the permit was issued and the discharge area for the Palmer sewage is now a spawning bed for salmon. This bill is likely to contribute to the demise and closure of some villages. By not being able to obtain a mixing zone, the bill will add one more huge costly hurdle to villages that are already struggling to survive. The bill makes no provisions for the many villages and municipalities that do not now have a discharge permit, and therefore do not have a mixing zone. These villages ... typically have a sewage lagoon and each spring when water is either pumped or drained off the top and pumped into an adjacent stream or river. In the spring of the year, the river is high and provides a mixing zone for the discharge from the lagoon.

A cursory view of discharge permits now in effect provides some interesting results. First off, it appears that every fish processing plant in either fresh or salt water already has a mixing zone. These mixing zones vary from a few meters to several hundred meters in size.

MR. BORRELL then reviewed the specifics of mixing zones in the following areas: Palmer, Point Barrow, Soldotna, Kenai,

Dillingham, King Salmon, and Homer. He mentioned that there are various fish processing plants on the Kenai River, but he didn't have the details of the permits. Mr. Borrell opined:

This bill does not address the real question. The real question: Is there adverse impact due to these mixing zones or due to any other mixing zones. If there is adverse impact, no mixing zone should be allowed irrespective of whether it involves a municipality, a fish processing plant, a village, or a mine. If there is no adverse impact and that's the purpose of the science that's required to obtain such a permit and there are no other practical alternatives, a mixing zone may be appropriate. All discharges must be treated equally and the same rigorous science must be applied before any mixing zone is approved.

[9:07:04 AM](#)

CHAIR SEATON noted that the City of Palmer has provided a letter in support of HB 74.

[9:07:41 AM](#)

REPRESENTATIVE LEDOUX asked how villages and municipalities have fared prior to the regulatory change last year.

MR. BORRELL said that he didn't know the details of the situation prior to the regulatory change. Under the current regulations, it appears that a village can obtain a mixing zone [permit] in a resident fish spawning area, he surmised. However, under the legislation those villages that don't currently have a mixing zone wouldn't be able to obtain one. He recalled a DEC EPA meeting several years ago in which the EPA representative admitted that many remote villages don't have permits of any kind and mentioned that they can't get to everything.

[9:09:50 AM](#)

CHAIR SEATON, in response to Representative Johnson, clarified that in essence House Bill 328 of the Twenty-Fourth Alaska State Legislature is identical to [HB 74].

[9:10:29 AM](#)

DR. ROLAND MAW, United Cook Inlet Drift Fishermen's Association; Past President, Kenai Wild, began by noting his agreement with Ms. Smith's comments regarding the hydrocarbon issue. Dr. Maw related his support of HB 74. With regard to marketing salmon, he said that perception is the reality. He then recalled his attendance at the Chefs of America convention where he displayed the Kenai Wild salmon product. The chefs held cards that specify endorsed products available to them, products that are in question for consumption, and products that wouldn't be purchased. There was some question about Alaska salmon as some of the salmon products from Alaska were listed in the questionable category. However, Kenai Wild, Kenai, and Bristol Bay salmon as well as southeast troll salmon were listed in the endorsed products category. He recalled spending a lot of time discussing the handling procedures, environment in which the fish were raised, and about heavy metals and other contaminants. Therefore, he surmised that if Alaska isn't careful with this mixing zone issue, some of Alaska's products won't be supported or listed in the endorsed category.

[9:16:21 AM](#)

JOHN NELSON stated support for HB 74. He highlighted that he lives in an area with pristine waters. In fact, the area is part of the sockeye capital of the world. Additionally, the village utilizes Lake Iliamna water for human consumption. With regard to earlier testimony that villages have the obligation to pump/discharge their sewer lagoons in fresh water, Mr. Nelson stated his disagreement. He informed the committee of various villages, including the Village of Kokhanok that don't discharge contaminated water into [fresh water].

[9:18:26 AM](#)

REPRESENTATIVE LEDOUX related her understanding then that the Village of Kokhanok isn't concerned about any dire consequences that Mr. Borrell discussed in relation to village wastewater systems.

MR. NELSON replied, "No, no I wasn't. No, I just wanted to make a commentary of that."

[9:19:04 AM](#)

JIM KULAS, Environmental Manager, Red Dog Mine, Teck Cominco Alaska Incorporated, began by saying that he is calling on behalf of Teck Cominco and its partner NANA Regional

Corporation. He related Red Dog's opposition to HB 74, and opined that existing regulations adequately protect spawning. He explained that at the Red Dog Mine two mixing zones are necessary and are used, although they are only used as a last resort. The mine has done exhaustive work to treat its discharge to meet the best standards possible. The discharge permitting process is very rigorous and detailed. For instance, the Red Dog Mine had a permit renewed by EPA that took eight years to obtain. Furthermore, to obtain a mixing zone permit requires considerable study and science to justify it. He explained how this is monitored by the state annually and how the Red Dog Mine spends over \$1 million per year to monitor its discharge. Again, the mixing zones were a last resort as the mine was spending almost \$5 million per year to treat and discharge water and roughly \$50 million in capital costs to construct the [treatment] plant. The aforementioned illustrates the effort before requesting a mixing zone. In the case of Red Dog Mine, what it discharges meets drinking water standards for metals. However, the mixing zone is necessary for pH and dissolved solids. Mr. Kulas pointed out that the Red Dog Mine has been discharging for 18 years and through all the exhaustive studies, no aquatic harm has been identified. In fact, the fish population downstream from the mine's discharge has increased over the life of the operation. Therefore, Mr. Kulas reiterated that the existing regulations allow for protection. With regard to the question of grandfathering, he pointed out that all of the permits issued by EPA only have a five-year life. Therefore, he questioned how satisfactory grandfathering would be for a permit with a limited life.

[9:23:16 AM](#)

CHAIR SEATON related his understanding, "So, you were able to get your mixing zone permit and do this for the decade before January 1, 2006, you've been able to operate. Is that correct?"

MR. KULAS replied yes, adding that the Red Dog Mine has been discharging since 1990.

[9:23:40 AM](#)

CHAIR SEATON inquired as to the difference between the situation 10-12 years ago and today. He also inquired as to why Red Dog Mine was able to operate and survive under the previous regulations and why it would be difficult to return to those previous regulations.

MR. KULAS explained that in the case of the Red Dog Mine, the original discharge permit was based on a technology standard. That permit and those limits were relatively easy to achieve. Subsequent to the issuance of that permit, EPA changed its permitting requirements to what's considered a water-quality based standard. At that point, the permit limits were much lower and thus the mixing zone was required. He informed the committee that the Red Dog Mine has to change its operation to respond to the Grayling spawning period such that the discharge is decreased so that the mixing zone isn't required. The aforementioned is achieved with state oversight during which a biologist is brought on site to observe spawning and inform the mine when it has concluded.

[9:26:08 AM](#)

REPRESENTATIVE WILSON asked if Mr. Kulas is saying that the standards and requirements are more stringent now.

MR. KULAS replied yes. When EPA changed the basis for writing the permit limits from a technology basis to a water-quality basis, the permit limits were ratcheted down considerably. For example, in the case of zinc the Red Dog Mine was allowed 1,500 parts per million (ppm) in its discharge and that was decreased to 198 ppm, which is almost 10-fold. The aforementioned occurred on virtually every permit limit.

[9:26:59 AM](#)

CHAIR SEATON, upon determining no one else wished to testify, closed public testimony.

[HB 74 was held over.]

HB 41-TRANSFER HABITAT DIV FROM DNR TO F&G

[9:27:31 AM](#)

CHAIR SEATON announced that the final order of business would be HOUSE BILL NO. 41, "An Act returning certain duties regarding habitat management from the Department of Natural Resources to the Department of Fish and Game; and providing for an effective date."

LANCE TRASKY, fisheries biologist, began by informing the committee that for 31 years he was a fisheries research biologist, habitat biologist, and regional supervisor for the

former Division of Habitat within the Alaska Department of Fish & Game (ADF&G). Mr. Trasky paraphrased from the following written remarks [original punctuation provided]:

I am testifying today to voice my strong support for House Bill 41 which would reverse former Governor Murkowski's Executive Order 107 and returns the responsibility to protect salmon streams and prevent blockages of fish streams to the Department of Fish & Game where it rightfully belongs.

Such an action will accomplish two things. First, it will help to restore public confidence in the state's regulatory system which was badly eroded during the Murkowski administration. Secondly, it will place the authority on how to protect our socially, economically, and culturally valuable fisheries resources back in the hands of Department of Fish & Game fisheries biologists with a statutory mandate and the expertise to protect, preserve, maintain and where possible extend the fish and wildlife resources in the interest of the economy and well being of the state, as the founding fathers of this state intended.

Alaska's founders witnessed decades of fisheries and fisheries habitat mismanagement when other interest trumped conservation. The founders also witnessed the final demise of the once great salmon fisheries of the Pacific Northwest in the 1950's and had predicted that the loss of habitat as a result would be the biggest long-term threat facing Alaska's fisheries as well as the subsistence, commercial and sport fishers who depend upon them. As the framework of state government was taking shape, a heated debate ensued between Alaskan fishermen and those involved in mining, logging, and hydropower development regarding how state government would be organized in addition to deciding what functions various agencies would have. Miners and loggers wanted a traditional system with a Department of Natural Resources and a simple fish and game management division having no authority in critical habitat decisions. Fish interests wanted a separate Department of Fish & Game. They also wanted this department to have an equal voice in state resource management decisions, a constitutional mandate for sustained yield, and the statutory authority to prevent the destruction of anadromous

fish habitat on public and private lands, as well as to prevent blockage of fish passage from dams and other obstructions. Fisheries interest won out and for 43 years this was the law of the land.

Unfortunately in 2003, Governor Murkowski was able to do what our founding fathers feared most. By transferring the Anadromous Fish Act and the Fish Ways Act to the Alaska Department of Natural Resources (ADNR) and implementing a Memorandum of Agreement granting ADNR oversight of the Federal Fish and Wildlife Coordination Act, and radically changing the Alaska Coastal Management Program; Governor Murkowski was able to funnel all of the authority to approve development projects into the ADNR. He also appointed manager who shared his views to implement his vision. He set Alaska on the same dead-end road that the former salmon producing western states followed.

The transfer of these statutory authorities and programs has directly affected the consideration that fish habitat and subsistence, commercial, and sport fishermen receive in state resource development and permitting decision in several ways:

1. ADF&G and ADNR have very different missions. ADF&G has the statutory mandate to protect and maintain fish resources, while ADNR has the mandate to develop the states' renewable and non-renewable resources. Removing the responsibility to protect fish habitat from ADF&G makes it much easier for ADNR to inappropriately sacrifice fish habitat to facilitate non-renewable resource development.

2. The balance that state founders sought in resource development decisions has been lost. Some people have tried to make the argument that ADNR employees would protect fish as diligently as they did at ADF&G. These people must not have heard of corporate culture. The transfer of staff and authorities is akin to moving the Mercedes design team to Hyundai and then expecting that they will still be building Mercedes.

3. Over my career I was involved with many different development projects where the Department of Fish & Game and ADNR had very different positions on ADNR

projects and activities affecting fish, wildlife and public use. Examples include:

- One example was the issue of requiring logging operations on state and private lands to follow the law and submit plans for stream crossing structures to review for adequacy before construction. Loggers and ADNR did not want ADF&G's Habitat Division to require loggers to obtain permits from ADF&G to build roads across fish streams. ADF&G asserted its authority under the Anadromous Fish Act and Fish Ways Acts and continued to require loggers to get permits.
- A second example is mixing zones in spawning areas. The Alaska Department of Environmental Conservation (ADEC) proposed to change their regulation's to allow mixing zones for harmful substances in fish spawning areas during both the Hickel and Knowles Administration. Habitat Division led the ADF&G's opposition to the change and it was withdrawn both times. After the Habitat and Restoration (H&R) Division was transferred to ADNR and the change [ADEC proposed regulations on mixing zones] was supported by ADNR; no one in ADF&G fought it.

[9:33:59 AM](#)

MR. TRASKY continued:

4. One question which comes up often is how has permitting changed now that it is administered by ADNR? Because there is no public notice requirement for the thousands of ADNR fish habitat permits issued annually, the only people who know if these permits effectively protect fish habitat are the ADNR person issuing the permit and the applicant. The same is true for violations of these permits. I do not have access to these permits but asked this question of a number of state, federal and private biologists who have experience in ADF&G fish habitat permitting and are knowledgeable about fish habitat permitting before and after the transfer of ADF&G's permit authority to ADNR. I won't disclose their names or positions because of concerns about retaliation. However, here is what I was told about the differences:

A. Comments from Federal Biologists:

1. I review federal projects affecting fish and wildlife and do not see ADF&G or ADNR-Office of Habitat Management and Permitting (OHMP) as a player in projects any more. Often no one from ADF&G or OHMP even attends project meetings.
2. My agency has no relationship with ADF&G or ADNR-OHMP any more. Staff at one OHMP office does not even return calls.
3. The policy at OHMP seems to be to narrowly interpret their responsibilities to permitting within the banks of anadromous streams and stream blockages. Overshadowing issues such as activities which may impact a watershed seem to be ignored. There is little interest in wildlife issues.
4. The few former ADF&G H&R staff that remains at OHMP seems to be trying to do a good job. The new hires that attend project meetings rarely open their mouths. Most of them do not seem to know much about the issues that they are dealing with.
5. Consultants have asked me why ADF&G and OHMP no longer asks any tough questions related to environmental documents for the road, oil and gas, and mining projects they are working on.
6. Some of the best biologists have left OHMP when they had an opportunity to return to ADF&G or retire.

[9:36:12 AM](#)

MR. TRASKY continued:

B. Comments from State Biologists:

1. OHMP staff has lost the close working relationship with ADF&G staff and the information that they provided on projects. There is no priority in OHMP to solicit ADF&G input on

projects, particularly projects that ADF&G may not like.

2. Regional OHMP staff does not receive any support on enforcement actions.
3. The permits that the OHMP leadership wants us to write do not contain project specific conditions and are largely unenforceable. The emphasis is on reducing review time and increasing permit numbers, not a high level of fish habitat protection.
4. For a fisheries or wildlife biologist, working at ADNR is a dead end. For career advancement they will need to go elsewhere.
5. A number of experience habitat biologists left ADNR when the opportunity arose. They were replaced with people with little or no experience.
6. ADNR-OHMP biologists are discouraged from participating in multi-agency working groups which are working on means to avoid impacts on fish and wildlife and from attending project meetings. Biologists don't do coastal reviews, or review subdivision plats that the Borough sends over even though the development would affect a salmon stream.

[9:37:38 AM](#)

MR. TRASKY summarized as follows:

In summary I believe that the changes that former Governor Murkowski made during his administration substantially reduced the protection that fish habitat receives both at the policy level and the issuance of permits for individual projects. It also increases the risk that large projects will be approved. Projects that will have very significant short and long-term impacts on fish and wildlife resources as well as commercial, subsistence and sport fishermen who depend on these resources. I urge you to restore the balance in state resource decisions and pass HB 41.

[9:38:25 AM](#)

KERRY HOWARD, Executive Director, Office of Habitat Management and Permitting (OHMP), Department of Natural Resources (DNR), mentioned that committee members should have a book of background information on OHMP. She related her understanding that the committee has a copy of the letter Governor Palin sent to the Board of Fisheries indicating her intent not to move the habitat office back to DNR. Therefore, Ms. Howard said that she would provide some background about OHMP in hopes that it would help explain some of the things Governor Palin considered in her decision.

[9:39:39 AM](#)

MS. HOWARD turned the committee's attention to the first page of the book provided by OHMP, which specifies the agency's mission statement as follows: "The mission of the Office of Habitat Management and Permitting is to protect Alaska's valuable fish and wildlife resources and their habitats as Alaska's population and economy continue to expand." She highlighted that the agency's mission is derived from the Alaska State Constitution. Article VIII specifically addresses the state's natural resources, Section 1 specifies: "It's the policy of the state to encourage the development of its resources by making them available for maximum use consistent with the public interest." Section 4 specifies: "Fish and all other replenishable resources belonging to the state shall be utilized, developed, and maintained on the sustained yield principle." Therefore, OHMP's mission is intended to acknowledge and implement the aforementioned constitutional responsibilities. Some interested parties have asserted that DNR and ADF&G have very different mission statements and that having the habitat office at DNR, habitat won't be protected as well. However, both agencies must abide by the constitution and both have statutes that refer to "conservation and development". Ms. Howard highlighted that AS 44.37.020(a) says, in part: "The Department of Natural Resources shall administer the state program for the conservation and development of natural resources" while AS 44.39.020 specifies, in part: "The Department of Fish and Game shall administer the state program for the conservation and development of the state's commercial fisheries, sport fish, birds, game, and fur-bearing animals." Additionally, AS 16.05.020(2) requires the commissioner of ADF&G "to manage, protect, maintain, improve, and extend the fish, game and aquatic plant resources of the state in the interest of the

economy and general well-being of the state." Ms. Howard pointed out that the statutes of the former habitat division were unchanged when it was moved to DNR. Therefore, the biologists at OHMP implement the exact same statutes that are implemented at ADF&G. Furthermore, biologists at DNR work closely with biologists at ADF&G in implementing duties and routinely consult with them on matters for which they have data and expertise and incorporate that information into permitting decisions. The aforementioned is specified in a memorandum of understanding (MOU) between the two agencies. She then pointed out that the second page of the book reviews the division's statutory responsibilities and priorities. The division's priorities are the issuance of fish habitat permits, active participation in the Forest Resources and Practices Act, participation in the Alaska Coastal Management Program, participation as a team member with multi-agency reviews that involve large project, and maintain and update the anadromous waters catalog.

[9:42:41 AM](#)

MS. HOWARD then directed attention to the organizational chart, which illustrates that OHMP is a small organization. The division has 37 full-time positions statewide, which are delineated into 7 area offices. There is also an OHMP staff position in the Joint Pipeline Office. Ms. Howard acknowledged that there was a great amount of turnover when OHMP was moved to DNR. However, 42 percent of OHMP's staff are former habitat and restoration employees and since vacancies have been filled, over 79 percent of OHMP's staff are from ADF&G. Additionally, the qualifications for a habitat biologists are the same as those for being a habitat biologist in ADF&G. Ms. Howard highlighted that in addition to OHMP there is a habitat office in ADF&G, which is called Region V Habitat. Essentially the Region V office in ADF&G has the same number of staff as OHMP. The two divisions, she said, work together professionally and collegially in order to ensure there's no duplication of duties and share information and knowledge.

[9:44:18 AM](#)

MS. HOWARD highlighted that the book she provided includes a PowerPoint presentation that provides additional information regarding what OHMP does as well as additional missions and measures. The book also includes a short white paper that provides additional information regarding Executive Order (EO) 107 and the changes that accompanied it. Ms. Howard then

directed attention to the MOU between ADF&G and DNR regarding reviews of land and water use activities. The MOU was originally signed in October 2003 and has been amended four times to provide additional clarity and specificity as well as delineate how coordination between OHMP and ADF&G is accomplished. She explained that OHMP, in addition to its Title 41 permit responsibilities, has the lead role reviewing resource development projects unless they are within or significantly impacting a legislatively designated special area for which ADF&G has the lead. However, she acknowledged that other divisions at ADF&G have information and expertise that would be useful in making permit decisions on large projects. Page 6 of the MOU specifies that OHMP either directly coordinates with ADF&G staff, Category 2, or Region V Habitat is asked to consolidate ADF&G comments, Category 3, and provide to OHMP. The categorization of the project is dependent upon the activity itself and the potential significant adverse impacts. Significant adverse impacts always result in the project being a Category 3. The following are examples of Category 3 projects: South National Petroleum Reserve-Alaska (NPR-A), Abbott Loop Extension, Beluga Coal, Juneau Access, Knik Arm Crossing, and a general placer permit. The Pebble Project was initially a Category 3 project, but last fall it was decided that ADF&G should have a full seat at the table, entirely separate from OHMP and the MOU was amended to do so. Ms. Howard confirmed that OHMP isn't reviewing subdivision plans, but pointed out that it's because the MOU gives that responsibility to biologists at ADF&G.

[9:46:49 AM](#)

MS. HOWARD highlighted that Governor Palin's letter [dated February 8, 2007] says that she will have the commissioners of ADF&G and DNR review the MOU in order to ensure that interagency cooperation, responsibilities, and exchange of information are working well. In fact, the first meeting for the aforementioned is the coming Thursday. In conclusion, Ms. Howard recalled Representative Gara's opening remarks on HB 41 when he said that the state has an important duty to protect the fisheries. The aforementioned duty, she said, was taken seriously when the habitat division was housed in ADF&G and it continues to be taken seriously by biologists at DNR.

[9:47:25 AM](#)

REPRESENTATIVE JOHANSEN related his understanding that OHMP is an awful place to work and staff are afraid to speak their mind.

He asked Ms. Howard to comment on that. He then asked if most of OHMP's employees are classified employees and members of the state employee's association.

MS. HOWARD commented that reasonable people can disagree. She guaranteed the committee that there are no sideboards, constraints, or threats to her staff. She explained that only two employees of OHMP, herself and the operations manager, are partially exempt and the remainder are classified employees. Ms. Howard opined, "When people disagree, it's often easy to resort to second hand information to try to construct an argument about how bad you think that they are. But I would welcome anyone to bring forward a specific project where they think my staff has not done their job, they're not participating, they're shirking their duties, and let's talk about specifics. Let's not talk about generalities and innuendos because just last week ... I had a two-day meeting with my area managers and they were, quite frankly, offended that some parties were saying that they felt like they weren't doing their job."

[9:49:12 AM](#)

REPRESENTATIVE JOHANSEN asked if OHMP's classified employees have a grievance process if they feel they are being kept quiet.

MS. HOWARD confirmed that there is a process, but deferred to union representatives. She informed the committee that there hasn't been a single grievance filed. She said she would welcome the committee to invite any of her staff to testify in regard to how they feel about their jobs.

[9:50:13 AM](#)

REPRESENTATIVE JOHNSON related his understanding that anyone who came forward with a grievance would be protected under the state's whistleblower's statute.

MS. HOWARD noted her agreement. She reiterated that she is offended to hear that she and her operation's manager threatened retribution, which she said was unfounded and ungrounded. She also said that she would happily speak with members about specifics.

[9:50:43 AM](#)

REPRESENTATIVE JOHNSON cautioned the committee with regard to unnamed sources. If someone has a grievance, then he/she should come forward and state it.

[9:51:11 AM](#)

CHAIR SEATON reminded members that when someone testifies, members should consider the source and its reliability and work through what it means.

[9:52:29 AM](#)

REPRESENTATIVE JOHANSEN related that the concern with regard to the working environment at OHMP came from the opening remarks of the sponsor as well as from public testimony.

[9:52:54 AM](#)

REPRESENTATIVE HOLMES recalled testimony regarding the level of transparency of the discussion, depending upon the location of the habitat division. She further recalled that the notion was that when the division was under ADF&G, there would be a commissioner-level discussion between the division through ADF&G and the commissioner of DNR with regard to permits and other decisions in question. With the division within DNR, that debate will now occur within a single department and ADF&G may not be involved at all. Representative Holmes requested comment on the aforementioned transparency issue.

MS. HOWARD acknowledged that business was done differently when two different departments were involved in the decision-making. However, all of the decisions remain public documents and public information. She recalled that [prior to the division's transfer to DNR], on large projects, particularly coastal zone projects, ADF&G, DNR, and DEC would all forward comments to the governor's office in the Alaska Coastal Management Program to be put forward as a state position. There were informal elevation procedures should the finding be objectionable to any of the commenters. The same process still happens, it merely occurs within DNR. Ms. Howard said that she and her staff submit comments to the Office Project Management and Permitting (OPMP), which consolidates comments from the various divisions of DNR. She emphasized that any project larger than a bed box results in the staff of OHMP communicating with biologists at ADF&G, and therefore the comments forwarded [by OHMP] incorporate comments from ADF&G. Again, the [comments are submitted to OPMP, there's an elevation process, and informal discussions. Ms. Howard said

she didn't believe there have been many elevations, which she interpreted to mean that staff are coming to agreement on projects between discussions among themselves. She noted that she routinely discusses projects with her staff and if it's important enough, it's brought to the commissioner's attention. Almost 2,500 permits a year are reviewed and although she said she doesn't know about every project and permit, she does know about the ones with potential for controversy. She related that most recently she briefed the commissioner on a project in which ADF&G proposed to use explosives within Trinity and Shell Creek, anadromous fish streams, to remove beaver dams. This permit was denied because OHMP staff didn't believe the use of explosives in an anadromous fish stream was protective of the fish or the habitat. Ms. Howard then related that she has worked in the habitat division under both departments, and opined that the staffs of both offices have done a good job representing the state's interests on fish and fish habitat.

[9:57:24 AM](#)

REPRESENTATIVE HOLMES inquired as to how often there are commissioner-level discussions between DNR and ADF&G with OHMP in DNR versus when the division was located in ADF&G.

MS. HOWARD said that she doesn't have exact numbers, but opined that it's less [with OHMP under DNR] which she attributed to changes in the coastal management program. Under the old coastal program, the habitat standard specified that the division "shall maintain or enhance" and if that couldn't occur, then there was a three-part test to reach a different outcome. The changes to the coastal management program included an attempt to streamline the standards by eliminating any standards that already duplicated what other state and federal agencies did. Therefore, changing the threshold and eliminating duplication, OHMP has less on which to comment under the habitat standard.

[9:59:10 AM](#)

REPRESENTATIVE EDGMON commented that with budget cuts and the need to move development projects forward while protecting fisheries, the two departments should be merged. He said that although he is saying it facetiously, he recalls being a former employee of an agency and that departments have different missions and cultures. Furthermore, there isn't a regulation or statute that doesn't carry a certain amount of discretion while upholding the process. Representative Edgmon opined, "I find it

hard to believe that ... the habitat division has the same makeup or the same outlook in the Department of Natural Resources as it would in the Department of Fish & Game." Furthermore, the division is physically located in a different place and thus doesn't interact with the directors of the divisions within ADF&G as before. The division is now interfacing with department employees, many of which are political employees whose background is in the industry and whose mission it is to make natural resource development take place. He reiterated that there have to be some differences. With regard to earlier statements regarding the governor's position, Representative Edgmon related his understanding that Governor Palin will revisit the decision to house the division within DNR after a year has elapsed.

MS. HOWARD noted that in the past there has been the notion to merge all three resource agencies, on which point she deferred to the legislature. She then pointed out that over half of the area offices [of OHMP] are located within ADF&G buildings.

[10:03:06 AM](#)

REPRESENTATIVE LEDOUX asked if, either when the division was under ADF&G or DNR, the public was able to receive internal memorandums in regard to particular projects. She posed a scenario in which the commissioners of ADF&G and DNR disagreed with each other, and asked if that would be open to the public.

MS. HOWARD answered that everything OHMP does is available to the public. Although all state agencies have the ability to have certain things that are deliberative confidential, that doesn't enter the realm of the permitting world, she said. In fact, [OHMP] routinely copies whoever wants to be copied on any permit comments or decisions. The ADF&G always receives a copy of everything OHMP writes.

[10:04:29 AM](#)

REPRESENTATIVE JOHNSON recalled prior testimony that indicated permits were issued and only the permitter and the permittee knew about it and that there wasn't public testimony or notice. He asked if the aforementioned actually happens.

MS. HOWARD said that Title 41, under which OHMP operates, doesn't have a public notice requirement which was the case under the former habitat division, Title 16. However, that

doesn't mean that the public can't obtain documents or aren't made aware of them.

[10:05:43 AM](#)

JOHN BITNEY, Legislative Liaison, Governor's Legislative Office, Office of the Governor, returned attention to the letter from Governor Palin to the chair of the Board of Fisheries, dated February 8, 2007. To clarify the letter, he stated that despite this letter, the governor is concerned about habitat protection. When Governor Palin took office, some of the acting commissioners were charged with reviewing options and making recommendations regarding the best course of options. The following three options were presented to the governor for consideration: the status quo, evaluate the MOU and place it in review between DNR and [ADF&G], or return the habitat division back to ADF&G. The governor chose to keep the habitat division at DNR, but asked the departments to review the MOU in order to evaluate what changes are necessary to improve interagency cooperation. The aforementioned could be done over the course of a few weeks or months and include some outreach to the stakeholders and interested parties. Mr. Bitney related that although the governor is sympathetic to the concerns regarding the move to DNR, she also recognizes that simply moving offices back and forth is disruptive. The governor, he further related, is willing to review the protection issues and reconsider anything necessary following a full review of the MOU.

[10:10:51 AM](#)

CHAIR SEATON asked if, regardless of the fate of HB 41, there is a timeframe that limits the governor's authority to change the departments by EO.

MR. BITNEY said that's his understanding.

[10:11:45 AM](#)

REPRESENTATIVE HOLMES asked if the governor's office is making any particular request as to how the committee treats HB 41.

MR. BITNEY reiterated that if more information comes to light, the governor's office will remain open. He further reiterated that the governor doesn't want to be disruptive.

[10:13:06 AM](#)

CHAIR SEATON announced that HB 41 would be held for further testimony and committee discussion.

[10:13:28 AM](#)

ADJOURNMENT

There being no further business before the committee, the House Special Committee on Fisheries meeting was adjourned at 10:13 a.m.