

ALASKA STATE LEGISLATURE
HOUSE SPECIAL COMMITTEE ON FISHERIES

January 28, 2010
10:21 a.m.

MEMBERS PRESENT

Representative Bryce Edgmon, Chair
Representative Wes Keller, Vice Chair
Representative Craig Johnson
Representative Charisse Millett
Representative Cathy Engstrom Munoz
Representative Robert L. "Bob" Buch
Representative Scott Kawasaki

MEMBERS ABSENT

COMMITTEE CALENDAR

HOUSE BILL NO. 46

"An Act requiring the Department of Environmental Conservation to collect and make available to the public certain information relating to water pollution; prohibiting certain mixing zones in freshwater spawning waters; and requiring a public comment period for certain sewage system or treatment works modifications."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 46

SHORT TITLE: MIXING ZONES/SEWAGE SYSTEMS

SPONSOR(S): REPRESENTATIVE(S) SEATON

01/20/09	(H)	PREFILE RELEASED 1/9/09
01/20/09	(H)	READ THE FIRST TIME - REFERRALS
01/20/09	(H)	FSH, RES
03/31/09	(H)	FSH AT 10:15 AM BARNES 124
03/31/09	(H)	Heard & Held
03/31/09	(H)	MINUTE(FSH)
01/28/10	(H)	FSH AT 10:15 AM BARNES 124

WITNESS REGISTER

REPRESENTATIVE SEATON
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented HB 46, as prime sponsor.

LYNN TOMICH KENT, Director
Division of Water
Department of Environmental Conservation (DEC)
Anchorage, Alaska

POSITION STATEMENT: Responded to questions on HB 46.

TOBY SHIELDS
Nome, Alaska

POSITION STATEMENT: Testified on HB 46.

BOB SHAVELSON, Executive Director
Cook Inlet Keeper
Homer, Alaska

POSITION STATEMENT: Testified in support of HB 46.

ACTION NARRATIVE

[10:21:16 AM](#)

CHAIR BRYCE EDGMON called the House Special Committee on Fisheries meeting to order at 10:21 a.m. Representatives Edgmon, Johnson, Keller, Millett, Munoz and Buch, were present at the call to order. Representative Kawasaki arrived while the meeting was in progress.

[10:21:38 AM](#)

HB 46-MIXING ZONES/SEWAGE SYSTEMS

CHAIR EDGMON announced that the only order of business would be HOUSE BILL NO. 46, "An Act requiring the Department of Environmental Conservation to collect and make available to the public certain information relating to water pollution; prohibiting certain mixing zones in freshwater spawning waters; and requiring a public comment period for certain sewage system or treatment works modifications."

[10:23:58 AM](#)

REPRESENTATIVE SEATON, Alaska State Legislature, explained the purpose of mixing zones. He said that that anyone can discharge effluent, as long as it meets the water quality standards established by the state. If the discharge does not meet the standards, they can apply for a mixing zone permit from the Department of Environmental Conservation (DEC). The permit

allows an area of water to be designated for dilution of the discharge, creating a mixing zone. It is at the edge of the mixing zone that the water quality standard must be met. There are parameters regarding size, but some zones are as large as 1 1/2 miles long to allow enough area for dissipation of the pollutants to occur. He said that formulating the discharge rate and volume, and the dilution rate, establishes the mixing zone area. The current bill has three components. The first is that it would reflect the pre 2002 understanding for permitting a mixing zone in a spawning area. A progression of regulation changes has resulted in the identification of a spawning area by the presence of fish actively spawning. This type of identification resulted in the permitting of temporal permits, and allows mixing zones to occur if fish are not present. The bill re-establishes charted spawning areas to be the gravel beds where nests occur. The bill does not affect broadcast spawners, but only nest building fish. The second component is the public disclosure aspect of the bill, which allows Alaskans the right to know what is being discharged into the state's lakes and rivers. He said that discharge monitoring and data recording requirements are established under the Environmental Protection Act (EPA). The bill upholds the Freedom of Information Act (FOIA) in requiring accessible reports to be posted on the DEC website. Finally, the law addresses waste water sewage lagoons. The current law does not require public notice, when a sewage lagoon is expanded. Specifically, he reported that a lagoon near Homer increased discharge from 1,500 to 6,000 gallons per day (gpd). The zone is near a residential area, and the residents were not notified of the change, or provided a public process for comment. The bill stipulates that an expansion of a sewage lagoon, to over 50 percent of the original size, DEC would require DEC to notify area residents and provide an opportunity for public in a similar way as occurred for the original permit.

[10:29:22 AM](#)

REPRESENTATIVE SEATON directed attention to the amendments in the committee packet. The first amendment:

Page 3, line 24, following "for a":
Insert **"commercially operated"**.

The intent is to clarify that a sewage lagoon is a commercially operated facility, not a home septic system. The next amendment:

Page 3, following line 21,

Insert "(4) "useful life" to mean the anticipated time in which a facility can continue to be operated without replacement or major renovation."

The intent is to provide a definition paragraph. The final amendment reads:

Page 3, line 5. After "authorization" deletes "."

Insert "," or for an area where spawning was ongoing at the time of initial authorization, if that authorization occurred more than five years prior to the effective date of the bill."

He explained that all three amendments are in response to DEC concerns contained in the department's letter dated February 13, 2007, [Re: HB 74].

[10:32:43 AM](#)

REPRESENTATIVE JOHNSON asked if there is a definition of commercially operated.

REPRESENTATIVE SEATON responded that the bill pertains to a facility that receives waste from outside sources, charges a fee, and discharges the waste material.

REPRESENTATIVE JOHNSON pointed out that municipalities may also accept offsite waste.

[10:34:04 AM](#)

The committee took an at-ease from 10:34 to 10:35.

[10:35:38 AM](#)

REPRESENTATIVE MILLETT queried whether this legislation is a reaction to a situation or pro-active protection.

REPRESENTATIVE SEATON said that it re-establishes the legislation that was in effect prior to 2002, which provided protection for spawning areas but was changed in 2003. He pointed out that nearly all of the current mines were permitted under the legislation prior to the 2003 changes. The pro active aspects of the bill includes the disclosure aspect, which is information that is gathered routinely and will now be made available to the public in line with disclosure laws. The bill

does react to the situation at a sewage facility, located in the sponsor's district, which has been allowed to expand without public notice. The odor and associated concerns were apparent, but a public hearing was not required, and this legislation establishes a requirement for public process.

[10:38:34 AM](#)

REPRESENTATIVE MILLETT inquired why the mixing zone statutes changed in 2003.

REPRESENTATIVE SEATON explained that the 2002 election resulted in legislation that was focused on streamlining, which affected a number of procedures. The coastal zone management districts were no longer allowed to qualify or designate habitat, as an example. At the time there was a concern for the Donlin Creek Mine request for a discharge pipe permit to empty into a spawning area. Under the existing 2002 requirements the pipe would have required relocation upstream, and this may have been the catalyst for changes to the mixing zone regulations that occurred in 2003.

CHAIR EDGMON underscored that the 2003 mixing zone changes were made in regulation not statute.

REPRESENTATIVE SEATON said that a question has arisen whether DEC should be deferred to regarding this topic, but there is precedent for this action, given the statute established for cruise ship mixing zones.

[10:41:46 AM](#)

REPRESENTATIVE MUNOZ noted that it appears these issues are covered by the federal Clean Water Act (CWA), and supported by DEC, and she questioned the need for statutory change to existing standards.

REPRESENTATIVE SEATON stressed that this will not set or change established standards. However, when effluent does not meet the standards, certain conditions must be met in order to discharge. Standards may not be exceeded in a spawning area, for instance.

REPRESENTATIVE MUNOZ asked whether an entity would be allowed to exceed the standards under the current legislation, and if so how is it possible.

REPRESENTATIVE SEATON answered that a permit is issued to allow discharge of material that exceeds the standards; essentially using public water to meet the standards through dilution to the edge of the mixing zone. It is the reason why DEC issues permits, which are not needed if water quality standards are not exceeded. The bill does not preclude permitted discharge, save for discharges that would impinge upon spawning areas.

REPRESENTATIVE MUNOZ asked if there are examples of discharges that are currently allowed in spawning areas.

REPRESENTATIVE SEATON directed attention to the committee packet and the list of mixing zones, and what will be exempt from this legislation.

[10:47:44 AM](#)

REPRESENTATIVE KELLER asked whether this would prevent expansion of some existing sewage facilities.

[10:48:32 AM](#)

REPRESENTATIVE SEATON pointed out that the useful life exemption covers current facilities, and allows for expansions and upgrades.

[10:49:04 AM](#)

LYNN TOMICH KENT, Director, Division of Water, Department of Environmental Conservation (DEC), pointed out that mixing zones are part of DEC water quality standards, and are allowed under federal law. The public process to revise water quality standards, including mixing zone regulations, allows for public review and comment. Once changes are adopted by the state, they are also subject to review and approval by the EPA. The changes made to DEC regulations in 2006 are still pending approval by EPA, thus, the department is operating under the "old" regulations. The old regulations included a prohibition on mixing zones in spawning areas for all anadromous fish, including trout and grayling. A recognition was made, when these regulations were adopted, that exceptions would need to be made to the prohibition, but none were included. The pending, 2006 regulations, have retained the prohibition of mixing zones in salmon spawning areas, with the one exception of a grandfather clause that recognizes salmon invading a permitted area. The regulations pertain to domestic and industrial waste water facilities, should salmon move into a permitted discharge

area. An important change, she pointed out, is that under the new regulations, DEC could authorize a mixing zone in a spawning area if the pollutants were found to not have an effect on the fish. Regarding the public notice issue, she stated that any permit request to discharge into surface water requires public notice and a comment period, even if the facility is unchanged. Only small facilities, discharging less than 2,500 gallons, are excluded from this requirement, and are usually discharging to a subsurface location.

[10:54:00 AM](#)

REPRESENTATIVE MUNOZ referred to Page 2, and the inclusion in Sec. 2, subparagraph (J), the species rainbow trout. She asked how this legislation would affect permitting a mine, such as the one near Juneau, which has been permitted to use Lower Slate Lake as a depository for tailings.

[10:54:46 AM](#)

MS. KENT indicated that the permitting for Lower Slate Lake was provided under a different section of the CWA, allowing for the disposal of solid material. She stated that she would provide further information regarding the terms of this EPA NPDES (natural pollutant discharge elimination system) permit to the committee.

[10:55:55 AM](#)

REPRESENTATIVE SEATON pointed out that it is not considered discharge into Lower Slate Lake, but rather fill, hence the different permit.

[10:56:31 AM](#)

REPRESENTATIVE MUNOZ opined that in discharging the tailings, water is involved, and she requested further information.

[10:57:08 AM](#)

CHAIR EDGMON inquired whether the regulations in place today define salmon mixing zones, both temporally and spatially.

[10:57:29 AM](#)

MS. KENT responded that the pending regulations recognize salmon spawning areas as specific locales, as well as a timing issue.

These regulations specify that a mixing zone may neither have an impact during spawning activity, nor on future spawning.

[10:58:22 AM](#)

CHAIR EDGMON concluded that the temporal and spatial concerns are addressed. He then opened public testimony.

[10:59:02 AM](#)

TOBY SHIELDS, directed attention to Section 3, line 25, and read: "will result in an increase in discharge volume of more than 50 percent from the volume originally authorized..." and stated his understanding that currently if the permit were modified by 10 percent it would require public testimony. Also, would an increase in volume require public testimony, if it were part of the design.

[11:00:28 AM](#)

REPRESENTATIVE SEATON explained that municipal wastewater/sewage plants operate under different regulations than do private, commercially operated facilities. The 50 percent expansion clause pertains to the private facilities and does not affect municipal operations.

[11:01:29 AM](#)

MS. KENT reminded the committee that any permit, even a renewal of an existing permit, to discharge to surface water, requires a public review.

REPRESENTATIVE SEATON referred to the committee packet, and the letter, dated October 17, 2007, from Renee Evans of DEC, regarding the Homer Honey Bear Septage Disposal Facility. The letter indicates that the expansion of the facility, to increase discharge from 1,500 to 6,000 gpd, was acknowledged and accomplished via an internal administrative plan review in lieu of the permit process, negating the need for a public review. A public process was requested, but denied, and public objection persists. He reported that the local residents have not received any satisfaction.

[11:03:28 AM](#)

MS. KENT drew attention to her letter of April 9, 2009, to the committee chair, clarifying the situation. In this particular

case, the septage lagoon percolates to the subsurface with no discharge to surface water. The original permit was for 1,500 gpd. A recent inspection revealed that the facility has an average discharge of just over 1,600 gpd, which is not directed to surface water. Because the facility is discharging beyond their permit limit, the owners are undergoing a design and engineering review for approval by DEC to ensure that the facility can handle the increased volume. She said, that to her knowledge, the facility has not sought an increase to discharge 6,000 gpd. It is departmental policy that facilities discharging less than 2,500 gpd to the subsurface be authorized to operate via a plan review in lieu of a permit. Regulation does not require public notice for this type of authorization.

[11:05:42 AM](#)

BOB SHAVELSON, Executive Director, Cook Inletkeeper, stated support for HB 46 and reported that Inletkeeper has been involved in the mixing zone issue since it surfaced in 2003. He opined that the streamlining effort resulted in a rollback of coastal management protection, creating devastation to the habitat at that time, and spawning the contentious mixing zone issue. The use of mixing zones embraces the belief that dilution is the solution to pollution, despite the public's concern that toxic substances and fish habitat do not mix. Correcting MS Kent's previous statement, he clarified that within the complicated CWA, the term mixing zone does not exist. Mixing zones were crafted through creative rule making. When Congress passed the CWA, in 1972, the intent was for pollutants to meet a standard at the end of a discharge pipe. Mixing zones have become the exception that has swallowed the rule, and instead of decreasing toxins in our nation's waters, they have become a permit to pollute. Returning to Representative Munoz's question of why this issue should not be left to the EPA process, he said, in EPA Region 10, Alaska is the only state that does not have their salmon listed as an endangered species. With the support of stringent state regulation and law, Alaska has avoided the pitfalls of the other states. Pro active state protection for Alaska's fisheries is imperative. Without a statutory change, decisions will be left to discretion, which has a way of creating problems. He provided an example in Cook Inlet where the Trading Bay oil and gas separation facility has an authorized mixing zone that stretches for more than a mile across. The volume of toxins that the company can discharge was tripled when this permit was issued, and the CWA is not met within the mile zone. He opined that Alaska is not immune to negative impacts on its fisheries. The world class sockeye

salmon run to the Frazier River, in British Columbia, Canada, is a case in point. Over the past 20 years 37,000,000 salmon returned to that river. In the past ten years that fishery has collapsed. He opined that this is due to governmental mismanagement, and short sited development goals, and stressed that HB 46 is one step towards ensuring continued future salmon production throughout Alaska.

[11:11:23 AM](#)

CHAIR EDGMON closed public testimony.

[11:11:30 AM](#)

REPRESENTATIVE SEATON responded to a previous question referring to a DEC letter of June 17, 2005, contained in the committee packet, from Gretchen Keiser. Turning to the fourth page headings for "Outfall 001-Dishcharge of mine water to Sherman Creek," and "Outfall 002-Dishcharge of tailings effluent water from the Tailings Storage Facility (TSF) to East Fork Slate Creek," he paraphrased from the fourth page, which read as follows [original punctuation provided]:

Effluent limitations and monitoring frequency for the parameters contained in Table 1 of the Preliminary Final Permit. No mixing zone is authorized. ... Effluent limitations and monitoring frequency for the parameters contained in Table 3 of the Preliminary Final Permit. No mixing zone is authorized.

REPRESENTATIVE SEATON presumed that apparently no mixing zone was necessary for that mining operation to continue development.

[11:13:06 AM](#)

MS. KENT concurred, and will provide further information to the committee regarding the Kensington Mine permit.

[11:13:45 AM](#)

CHAIR EDGMON requested the department's position on the bill.

[11:14:16 AM](#)

MS. KENT stated that the department has not taken a firm position on the bill because "there are a lot of provisions that

we think are unclear and duplicative of things that are already in place."

[11:14:31 AM](#)

CHAIR EDGMON stated that the bill would be held for further consideration.

[11:15:51 AM](#)

ADJOURNMENT

There being no further business before the committee, the House Special Committee on Fisheries meeting was adjourned at 11:16 a.m.