

Yourkowski

CITY OF HOMER
HOMER, ALASKA

RESOLUTION 04-77

A RESOLUTION OF THE CITY COUNCIL OF HOMER, ALASKA,
OPPOSING GOVERNOR MURKOWSKI'S PROPOSAL TO ALLOW
INCREASED POLLUTION (MIXING ZONES) IN SALMON STREAMS.

WHEREAS, Alaska wild salmon are renowned worldwide for being clean, fresh and healthy; and

WHEREAS, Alaska salmon require clean water and healthy habitats to thrive and reproduce; and

WHEREAS, Farmed salmon have created significant social and economic dislocations for Cook Inlet Fishermen; and

WHEREAS, Alaska salmon marketing hinges on consumer preference for fish coming from clean, pristine waters; and

WHEREAS, Alaska salmon support countless families and communities throughout the state, and form part of the cultural fabric which makes Alaska unique; and

WHEREAS, The Murkowski Administration has proposed rule changes which will increase pollution in salmon streams; and

WHEREAS, Salmon health, salmon habitat and salmon marketing will suffer under the Murkowski Administration's proposal.

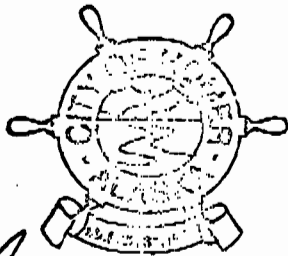
NOW, THEREFORE BE IT RESOLVED that the Homer City Council hereby opposes Governor Murkowski's proposal to allow increased pollution (mixing zones) in salmon streams.

PASSED AND ADOPTED by the Homer City Council this 13th day of September, 2004.

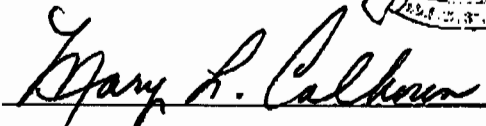
CITY OF HOMER



JACK CUSHING, MAYOR



ATTEST:



MARY L. CALHOUN, CMC, CITY CLERK

Fiscal Note: NA



"The mission of the Council is to represent the citizens of Cook Inlet in promoting environmentally safe marine transportation and oil facility operations in Cook Inlet."

Members

September 20, 2004

Alaska State Chamber of Commerce

Ms. Nancy Sonafrank
Environmental Specialist
Alaska Department of Environmental Conservation
610 University Drive
Fairbanks, AK 99709

Alaska Native Groups

Environmental Groups

Re: Comments on Proposed Changes and Revisions to Title 18, Chapter 70 of the Alaska Administrative Code, on Mixing Zones and Water Quality Standards

Recreational Groups

Dear Ms. Sonafrank,

Aquaculture Associations

Cook Inlet Regional Citizens Advisory Council (CIRCAC) submits the following comments regarding the proposed revisions to the Mixing Zone provisions of the Alaska Water Quality Standards in 18 AAC § 70.240 on behalf of our member organizations.

Fishing Organizations

The Cook Inlet Regional Citizens Advisory Council (CIRCAC) is a nonprofit corporation organized exclusively for the oversight, monitoring, assessing and evaluation of oil spill prevention, safety and response plans, terminal and oil tanker operations, and environmental impacts of oil tanker and oil terminal operations in Cook Inlet under the provisions of Section 5002 of the Oil Pollution Act of 1990, (OPA 90). Our mission is to represent the citizens of Cook Inlet in promoting environmentally safe marine transportation and oil facility operations in Cook Inlet. CIRCAC consists of 13 members representing boroughs, cities and municipalities in the Cook Inlet region, as well as Alaska Native groups, commercial fishing, and aquaculture, tourism, recreational and environmental interest groups.

City of Kodiak

City of Kenai

City of Seldovia

City of Homer

As an oversight group charged with protecting the environment from the impact of oil pollution, we are pleased to have observed major improvements in pollution prevention and response planning in Cook Inlet. CIRCAC has spent years working with stakeholder groups, state and federal agencies, spill responders, and oil companies to protect our precious natural resources from industrial pollutants. We have participated in efforts to improve oil spill prevention measures, enhance response capabilities, and develop site-specific response strategies to prevent spilled oil from contaminating sensitive coastal environments, especially fish spawning habitat. The revisions to state mixing zone regulations currently proposed by the Alaska Department of Environmental Conservation (ADEC) has the potential to nullify years' worth of diligent work by allowing for the intentional pollution of our priceless salmon streams by industrial effluents. Not only does this proposal violate provisions of the Clean

Kodiak Island Borough

Kenai Peninsula Borough

Municipality of Anchorage

Cook Inlet Regional Citizens Advisory Council • 910 Highland Avenue, Kenai, AK 99611-8033
Phone: (907) 283-7222 • Fax: (907) 283-6102

Water and US EPA Guidance, it creates a dangerous and unnecessary precedent by giving ADEC the discretion to allow for intentional discharges of pollutants into anadromous fish streams. CIRCAC strongly opposes the proposed regulations as written.

Comments on Regulatory Changes

ADEC proposes to change the regulations at 18 AAC 70 by repealing Sections 245, 250, 255, 260, and 270 of Title 18 of the Alaska Administrative Code. The changes have been offered by ADEC in an attempt to "improve clarity and reduce redundancy." The new regulations contain a provision to allow mixing zones in certain fish spawning areas, and provide consideration for mitigating measures to offset the "potential adverse impacts of mixing zones on aquatic resources."¹

Removal of statewide ban on mixing zones in anadromous or resident fish or shellfish spawning or rearing areas is bad environmental policy

Opening the door to potential degradation of Alaska's anadromous fish spawning habitat is bad environmental policy. The proposed revisions give ADEC the sole discretion to approve mixing zones in streams, rivers, or other flowing fresh water areas if "available evidence reasonably demonstrates that the mixing zone will not...adversely affect the capability of an area to support spawning, incubation or rearing of anadromous or resident fish."² The new language modifies the legality of mixing zones in spawning areas with the language, "only if it finds that available evidence reasonably demonstrates that the mixing zone will not ...adversely affect..." spawning areas.³

In its summary of the proposed changes, ADEC explained its rationale for relaxing the mixing zone regulations in spawning areas and presented three situations in which it envisioned allowing mixing zones in fish spawning waters.⁴ However, the regulatory language provides no comparable level of guidance, essentially allowing ADEC to unilaterally approve a mixing zone for any pollutant at any time.

CIRCAC cannot conceive of a reason to open the door to potential degradation of our fragile shellfish rearing and fish spawning habitat, when so many state and federal agencies, recreational and commercial fishing groups, and oil companies, to name a few, have gone to such great lengths to protect these resources. The proposed regulations are ambiguous and assign broad discretionary authority to ADEC to make decisions regarding fisheries biology and aquatic ecology that are beyond the agency purview.

¹ Notice of Proposed Regulations issued by ADEC July 26, 2004 accessed online at <http://notes3.state.ak.us/pr/pubnotic.nsf>.

² Proposed 18 AAC 70.240(c)(4)(E).

³ Proposed 18 AAC 70.240(c).

⁴ See Sonafrank, Nancy, 2003-2005 Triennial Review, Proposed Water Quality Standards Revision Summary: Mixing Zones at <http://www.state.ak.us/dec/water/wqsar/trireview/trireview.htm> (last visited August 13, 2004)

The proposed regulatory changes create a loophole for polluters

Through discussions with ADEC staff, on August 17, 2004⁵ CIRCAC understands that ADEC's rationale for proposing changes to the mixing zone regulations stems in part from specific cases where existing mixing zone permits have faced renewal challenges because the permitted activity had presumably modified the environment to the effect of creating spawning habitat where none existed before. We can only presume that such cases are a rare exception, as experience in the Lower 48 has demonstrated that the net effect of industrial effluents on the coastal environment has generally been one of negative impacts to fish habitat, rather than creation of new anadromous streams. But if ADEC's goal is to address such aberrant cases, we recommend that the Department craft a regulatory provision that maintains the ban on mixing zones in fish spawning habitat and instead allows for an appeal process to address such specific, unusual cases. The appeal process should provide for outside agency review and unanimous concurrence from the Alaska Department of Fish and Game and the Alaska Department of Natural Resources to win the appeal. ADEC does not have the expertise in fisheries biology and aquatic ecology to be the sole arbiter of such a decision. Exceptions to the mixing zone ban in anadromous streams should be allowed only in the narrow instance where a previously permitted mixing zone can be proven to have created new spawning habitat. CIRCAC fears that, once ADEC begins to grant exceptions that impact water quality in anadromous streams, the door will be open for increased pollution from regulated facilities, including the oil industry in Cook Inlet.

The proposed regulations do not include a process for public participation and interagency review

Because there is such an enormous public stake in protecting our aquatic resources in general and specifically our fish habitat, we recommend that ADEC revise the proposed regulations to describe the procedures for intergovernmental consultation and public participation as required under 18 AAC 70.015(c).

The proposed mitigation provision suggests that the health of Alaska's anadromous fish spawning habitat can be bartered

The health and balance of Alaska's anadromous fish habitat is of vital importance to each and every one of CIRCAC's member organizations. Healthy fish runs are a primary concern of Alaska Natives, commercial and sports fishers, aquaculture groups, tourism interests, recreational users, and environmental stakeholder groups. The proposed regulations add the following mitigation requirement: "In determining whether to authorize a mixing zone under this section, the department will consider...any additional measures that would offset potential adverse effects to the aquatic resources present."⁶ This provision may allow a permit holder to undertake mitigation practices regarding mixing zones in instances where it otherwise would not

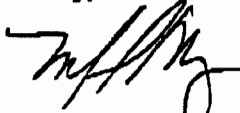
⁵ Personal communications, Tim Robertson and Nancy Sonafank.

⁶ 18 AAC 70.240(b)(4).

have been allowed to discharge at all. The requirement is vague and grants ADEC broad, unchecked discretion in interpreting what constitutes "consideration of additional measures." We cannot conceive of an acceptable mitigation measure that would fairly compensate our constituents for damages to anadromous fish habitat.

Thank you for your consideration of these comments. If you have any questions, please feel free to contact me at (907) 283-7222.

Sincerely,



Michael L. Munger
Executive Director

CITY OF SOLDOTNA, ALASKA

MEMORANDUM

To: Mayor and Council
From: Tom Boedeker, City Manager *TJB*
Date: September 7, 2004
Subject: Proposed ADEC mixing zone regulation changes

There has been a great deal of comment regarding the proposed ADEC changes to mixing zone regulations. Much of the comment gives the impression that mixing zones are not currently allowed in salmon streams and this would now allow them to be permitted. The truth is that mixing zones meeting the standards can be permitted under current regulations, but there is a prohibition of issuing a mixing zone permit in "an area of anadromous fish spawning" regardless of whether any adverse impacts exist. The proposed regulation removes this absolute prohibition, but still maintains all the same standards that a mixing zone will not be allowed if there are any adverse impacts on spawning areas for anadromous fish.

With the exception of removing the prohibition of mixing zone in spawning areas the proposed regulations contain the same criteria for approving a mixing zone as in existing regulations. They combine several sections and reorganize them plus they change the wording on the burden of proof needed for a permit. The existing regulations provide that a permit will be denied if adverse conditions are found to exist. The proposed say the applicant cannot get a permit until they satisfactorily demonstrate that none of the identified adverse conditions will occur. It certainly does not lower the proof standard, and arguably, the proposed language puts a somewhat broader burden on the applicant than what is currently in place. Staff felt this might give more latitude to the ADEC to not approve a permit than under current regulations. Our concern was with this shift, not the question of allowing a mixing zone in a spawning area since neither version would allow one if there were any adverse impact. Given current practices we feel the change is not sufficient for us to object to those changes.

The question is whether this has any bearing on our discharge permits for the wastewater treatment plant. The answer is yes as the City has a mixing zone permit for discharge into the Kenai River. If a spawning area was identified somewhere in our existing mixing zone, the City could not get a renewal permit when the existing one expired or need modification due to repair or replacement of our outfall. This would be the situation under our current regulations even if there was no harm resulting from the discharge. We could even filter all the particulates out and still not be allowed a permit. Alternative discharge options could cost millions of dollars. This is exactly what happened to the City of Valdez and Golden Heart Utilities (Fairbanks) when their permits came up for renewal. A copy of a frequently asked questions sheet from ADEC details the problem with the current absolute prohibition of a mixing zone in a spawning area, especially in Valdez where the salmon moved in and started spawning in the discharge flow. When the flow is cut off the "stream" the salmon started using will go away.

As far as other changes go, the regulations keep all the same criteria as exist now, but eliminate some of the specific details of how a mixing zone is calculated and require the use of computer modeling to demonstrate the mixing zone will meet the criteria in the regulations.

Will DEC be making mixing zone decisions alone, or will other agencies be consulted?

DEC has proposed guidance which calls for consultation with the Department of Natural Resources, Office of Habitat Management and Permitting and the Department of Fish and Game, Division of Sport Fish whenever it is considering designating a mixing zone in a spawning area. As the primary wastewater discharge permitting authority in Alaska, the Environmental Protection Agency also participates in most mixing zone decisions.

How would the proposed changes protect fish and spawning habitat? We envision three situations where a mixing zone could be designated in a spawning area.

- Some pollutants that affect water quality do not necessarily impact fish or fish spawning. For example, discharges that affect the color of receiving waters or bacteria concentrations usually have no effect on spawning and a mixing zone might be designated. On the other hand, there are pollutants such as sediments or chlorine which can adversely affect fish and fish spawning. The regulation would not allow mixing zones for those substances in spawning areas.
- Since fish do not all spawn at all times of year, discharges may be timed to avoid impacts to fish spawning and to protect eggs, juvenile fish and spawning habitat.
- There may be situations where adverse effects can be offset by habitat improvements or other measures that would maintain area spawning success, and fish populations and health.

Will the water quality affect the quality of fish products? The proposed regulation does not change any of the current water quality standards that protect fish from exposure to contaminants outside of mixing zones. The amendments also retain all of the current protections within mixing zones to guard against exposure to toxic and persistent pollutants or concentration of pollutants through food chain.

Are there real examples where the current ban on mixing zones in spawning areas is not working?

- In 1976, the City of Valdez constructed a ditch to carry treated municipal wastewater from their sewage lagoon to the nearby ocean. When the City of Valdez recently applied for a new permit, a mixing zone was not allowed because salmon had begun spawning in the treated effluent. The alternative would be expensive and unneeded treatment or a \$1 million pipe to convey the effluent to the ocean.
- Golden Heart Utilities in Fairbanks (GHU) is another example. GHU applied to renew a discharge permit for backwash water from its drinking water facility when it was discovered that grayling spawn in the mixing zone area. The discharge contains lime sludge, a water softening by-product that has been shown to have no effect on grayling spawning. Nevertheless, the current ban prohibits designating a mixing zone and any discharge. As a result, GHU has spent well over \$1 million to redesign its operation and is shipping lime to the Fairbanks landfill adding significant operating costs and shortening the life of the landfill.