MEMORANDUM

State of Alaska

Department of Law

TO: Commercial Fisheries Entry Commission

FROM: Thomas E. Lenhart TEL
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SUBJECT: Constitutionality of Vessel Based Limited Entry

Senate Bill 54 and House Bill 156 would extend the current vessel based limited entry system for five more years beyond the current sunset date of December 2013. Because this program limits entry into two fisheries by controlling the number of permitted vessels instead of the number of permitted skippers, some questions have been raised as to whether this statute may result in fisheries that are so exclusive as to run afoul of the Alaska Constitution. The short answer is "no".

The vessel based entry program was first created by the Alaska Legislature in 2002, and was extended for five years in 2008. Each time, the proposed legislation was reviewed by the Department of Law and found to have no constitutional flaws. The program has now been in place for 10 years, and there have been no legal challenges to the validity of the authorizing statutes.

Looking back about 40 years to the history of limited entry in Alaska, the initial attempt at limiting entry encountered problems with the Article VIII provision of the State Constitution reserving the State's fish and wildlife for the common use of the people and with the section 15 prohibition on creation of exclusive rights. As a result, the Constitution was amended in 1972 by adding a sentence to section 15 carving out the explicit authority to limit entry into fisheries for the enumerated reasons. The Constitution does not specify whether such limitation into fisheries shall be accomplished by limiting the number of skippers or the number of vessels.

Following the amendment of the Constitution, the Legislature created the Commercial Fisheries Entry Commission and authorized it to limit "participants and vessels into the commercial fisheries in the public interest and without unjust discrimination." AS 16.43.010. The language of this original authorizing statute appears to clearly contemplate that the commission may limit either skippers or vessels in a fishery based on the judgment of which approach in a given fishery best serves the public good. The subsequent specific authorization of a vessel based limitation in the scallop and hair crab fisheries in 2002 is completely consistent with the purpose statement set forth in AS 16.43.010.

Given that the Constitution clearly allows for the limitation of fisheries as an exception to the prohibition on exclusive rights, and that the provisions in AS 16.43.450 limiting the number of vessels participating in two shellfish fisheries are completely consistent with the statutory purposes of the overall limited entry program set forth in AS 16.43.010, there are no facial issues with regard to constitutional authority or statutory consistency presented by SB 54 or by the existing vessel based program. This is the third time that the Department of Law has reached this conclusion.

However, it has been suggested that the vessel program as applied has nevertheless created a fishery that is so exclusive as to violate the Article VIII prohibition on exclusive fisheries. This suggestion does not appear to be supported by the facts. Because the hair crab fishery has been closed, this review will focus solely on the scallop fishery, but should be applicable to the hair crab fishery as well.

The initial number of scallop vessel entry permits was eight. While this number is lower than most fisheries, it is certainly not unprecedented. At least 10 other limited entry fisheries in Alaska have received 10 or fewer initial permits. CFEC website: http://www.cfec.state.ak.us/astatus/B6410P_C.HTM. The reasons for the small size of each fishery are fishery specific. However, the fact that biology, economics, or other valid considerations dictates a fishery with few participants (or vessels) does not equate to an unconstitutionally exclusive fishery.

In the case of the scallop fishery, the number of current active participating vessels has been reduced due to market forces and voluntary actions of the permit holders. Neither the statutes nor any actions of the Commission have forced this reduction. Therefore, even if the current number of participating vessels is believed by some to be so few as to be exclusionary, it is not the result of State action and the State has not created an exclusive fishing right. Holders of permits not currently fishing are free to reenter the fishery at any time. This market dynamic can be observed in many other limited fisheries, such as the Southeast salmon seine fishery, where a large percentage of valid permits were not being fished. This fishery has recently been the subject of a federally funded permit buy-back.

The issue of a reduction in active fishing permits as the result of the formation of cooperatives has been addressed by the Alaska Supreme Court. In the case of *Grunert v. Alaska Board of Fisheries,* 139 P.3d 1226 (Alaska 2006), the court examined a regulation promulgated not by the CFEC but by the Board of Fisheries. This regulation specifically authorized the creation of fishing cooperatives. The court decided this case on the grounds that the board had exceeded its authority in promulgating a regulation without statutory authority. As a result, no constitutional questions were reached.

The Alaska Supreme Court has addressed the constitutional issue of exclusivity in *Johns v. Commercial Fisheries Entry Commission,* 758 P.2d 1256, 1266 (Alaska 1988). In this case, the court noted that "the optimum number provision of the Limited Entry Act is the mechanism by which limited entry is meant to be restricted to its constitutional purposes." That is, the statutes creating limited entry provide a safeguard against market forces or other circumstances creating an overly exclusive fishery. When conditions warrant, the Commission can conduct a study to determine the optimum number of permits under current conditions. If the current number of permits is too low, additional permits can be sold at market value. In the case of the optimum number for vessel based permits, the purposes for conducting an optimum number study include promoting the economic health and stability of the fishery and to promote broad access to the fishery. AS 16.43.470.

In the case of vessel based permits, the statute also includes another protection against exclusivity. Alaska Statute 16.43.450(e) authorizes the Commission to adopt regulations to limit the number of vessel permits held by one person or by a group of related permit holders if necessary to "prevent the excessive concentration of ownership of vessel permits in the fishery." This provision, coupled with the optimum number provision, provides ample authority to assure the vessel based program does not become excessively exclusive.

As a final consideration, there is a fundamental difference in how a vessel limitation and a skipper limitation controls the number of fishers actually participating in a fishery. If instead of a vessel limitation the scallop fishery had nine skipper permit holders, only those nine individuals could "participate." That is because any vessel fishing must have the individual permit holder on board at all times under a skipper system. However, under a vessel based system, a permitted vessel may be fished by an unlimited number of different skippers. Therefore, if the vessel owner chooses to use a system of rotating crews or leases the vessel to multiple skippers or operators on some shared basis, then many more than nine fishers may have the opportunity to participate in this fishery. Legally, either approach is permissible.

In conclusion, there are no issues of constitutionality or statutory inconsistency raised by SB 54 and HB 156.

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