

**ALASKA STATE LEGISLATURE  
HOUSE SPECIAL COMMITTEE ON FISHERIES**

April 2, 2007

8:41 a.m.

**MEMBERS PRESENT**

Representative Paul Seaton, Chair  
Representative Kyle Johansen  
Representative Gabrielle LeDoux  
Representative Peggy Wilson  
Representative Bryce Edgmon

**MEMBERS ABSENT**

Representative Craig Johnson  
Representative Lindsey Holmes

**COMMITTEE CALENDAR**

HOUSE BILL NO. 189

"An Act relating to the policy for management of sustainable salmon fisheries."

- HEARD AND HELD; ASSIGNED TO SUBCOMMITTEE

**PREVIOUS COMMITTEE ACTION**

BILL: HB 189

SHORT TITLE: MGMT OF SUSTAINABLE SALMON FISHERIES

SPONSOR(S): REPRESENTATIVE(S) STOLTZE

03/12/07	(H)	READ THE FIRST TIME - REFERRALS
03/12/07	(H)	FSH, RES
03/26/07	(H)	FSH AT 8:30 AM BARNES 124
03/26/07	(H)	-- MEETING CANCELED --
03/28/07	(H)	FSH AT 8:30 AM BARNES 124
03/28/07	(H)	Heard & Held
03/28/07	(H)	MINUTE(FSH)
04/02/07	(H)	FSH AT 8:30 AM BARNES 124

**WITNESS REGISTER**

STEVE RUNYAN, Member  
Matanuska Valley Fish and Game Advisory Committee  
Wasilla, Alaska

**POSITION STATEMENT:** Testified in support of HB 189.

BRUCE KNOWLES

Alaska Outdoor Council (AOC)

Willow, Alaska

**POSITION STATEMENT:** During hearing of HB 189, testified that the salmon management plans don't take control from the department or the Board of Fisheries.

DICK BISHOP, President

Alaska Outdoor Council

Fairbanks, Alaska

**POSITION STATEMENT:** Testified in support of HB 189.

ALAN AUSTERMAN

Juneau, Alaska

**POSITION STATEMENT:** Provided testimony on HB 189.

LANCE NELSON, Senior Assistant Attorney General

Natural Resources Section

Civil Division (Anchorage)

Department of Law

Anchorage, Alaska

**POSITION STATEMENT:** During hearing of HB 189, expressed concerns.

#### **ACTION NARRATIVE**

**CHAIR PAUL SEATON** called the House Special Committee on Fisheries meeting to order at [8:41:46 AM](#). Representatives Seaton, Johansen, Edgmon, and LeDoux were present at the call to order. Representative Wilson arrived as the meeting was in progress.

#### HB 189-MGMT OF SUSTAINABLE SALMON FISHERIES

[8:41:58 AM](#)

CHAIR SEATON announced that the only order of business would be HOUSE BILL NO. 189, "An Act relating to the policy for management of sustainable salmon fisheries."

[8:42:26 AM](#)

CHAIR SEATON drew the committee's attention to the e-mail from Lance Nelson that's included in the committee packet.

[8:43:49 AM](#)

STEVE RUNYAN, Member, Matanuska Valley Fish and Game Advisory Committee, related his support for HB 189, which strengthens the policy for management of sustainable salmon fisheries by placing a guiding policy for the management of fisheries for all fishery user groups in Alaska into law versus regulation. At the most recent Board of Fisheries (BOF) meeting, the United Fisherman of Alaska presented a proposal to strike this policy from regulation. He opined that those in the Matanuska-Susitna Valley (Mat-Su Valley) view that as taking a huge step backward in the management of the state's fisheries. This legislation provides clarity with regard to the management of the fisheries. Mr. Runyan related that having this policy in regulation has been a wonderful tool for the sale of the state's commercial fish stocks and has allowed the wild salmon marketing. Furthermore, the policy has been a key in directing former Commissioner Campbell in identifying concerns and seeking management direction. In fact, former Commissioner Campbell was able to secure funding to perform salmon stock studies in the Susitna drainage. He opined that it's important for HB 189 to be enacted.

[8:47:04 AM](#)

CHAIR SEATON asked if Mr. Runyan, as a member of the Matanuska Valley Fish and Game Advisory Committee, is comfortable with taking the ability of the BOF to modify policies it creates out of its hands and fix it in state statute.

MR. RUNYAN related his understanding that HB 189 doesn't take authority away from the BOF but rather provides it direction. He directed attention to page 3, paragraph (4) and subsection (e) of HB 189, which read:

(4) public support and involvement for sustained use and protection of salmon resources shall be sought and encouraged in an open process.

(e) Nothing in the policy set out in this section is intended to expand, reduce, or be inconsistent with the statutory regulatory authority of the board, the department, or other state agencies with regulatory authority that affects the fishery resources of the state.

MR. RUNYAN opined that the intent of HB 189 is not to remove authority from the BOF.

8:49:03 AM

BRUCE KNOWLES, Alaska Outdoor Council (AOC), informed the committee that although he is representing the AOC, he also serves on the Matanuska Fish and Game Advisory Board and the Mat-Su Borough Blue Ribbon Outdoors Group. He recalled hearing many concerns with regard to the salmon management plan taking control from the department, the commissioner, and the BOF. However, that's not the case, he opined. The sustainable salmon management policy needs to be in place in order to establish salmon management plans in each area [of the state]. He highlighted that the sustainable salmon management plan is actually user neutral and places [all users] on equal terms. The available data is used to make the best choices. Mr. Knowles recalled also hearing that there will be many lawsuits over this [legislation]. However, he said that to his knowledge there haven't been any lawsuits over the sustainable salmon management policy since it was instituted. The only lawsuits he knew of were over the salmon management plans developed by the BOF and these lawsuits were brought forth by commercial fishing organizations. In fact, in the last decade there have been numerous lawsuits in the Cook Inlet concerning salmon management plans; these suits were brought forth by commercial fishermen. Mr. Knowles opined that the sustainable salmon management plans are necessary and will help resolve some of the problems in the Cook Inlet area.

8:52:26 AM

CHAIR SEATON surmised then that Mr. Knowles isn't concerned that other groups will now have a statutory provision under which to challenge decisions that are seen as not maintaining diversity to the maximum extent possible at the genetic level.

MR. KNOWLES pointed out that it has been proven in court that folks can sue under a management plan, which is merely set in policy and not in statute. Therefore, he didn't believe placing the policy in statute would make much difference, although it would require better information upon which the BOF makes its decisions.

8:54:13 AM

DICK BISHOP, President, Alaska Outdoor Council, began by relating support for HB 189. Mr. Bishop opined that the system in Alaska is a good system. The constitution lays out the principles of sustained yield, common use, et cetera and the

legislature has the opportunity and responsibility to implement that policy and philosophy through statute. Boards, such as the BOF can take it to the working level through the details of regulations. He noted his agreement that placing the sustainable salmon management policy in statute would provide a solid foundation upon which decisions can be made and confirm the board's ability and authority to choose management options consistent with statute and the constitutional provisions they interpret. Furthermore, this [legislation] ensures that the department provides the appropriate types and levels of information on a regular basis. He opined that [HB 189] is "a step in the right direction."

[8:57:55 AM](#)

ALAN AUSTERMAN opined that HB 189 appears to be a discrete fish stock management scheme. Although Mr. Austerman said he understood the frustration of those in the Upper Cook Inlet with regard to their fishery, he didn't believe this legislation to necessarily be the right answer. He said that he is more concerned with ADF&G's funding and what its mandates are in relation to establishing the real problems in the Upper Cook Inlet. He recalled that last year the Cook Inlet Regional Aquaculture Association came forward with a number of issues on the lake systems in the Upper Cook Inlet such that perhaps the fish that need to be produced aren't being produced. He opined that there seems to be a disconnect as to the holistic view of what occurs in the Upper Cook Inlet and why fish aren't returning to the area. Mr. Austerman remarked that as the state grows, the problems around the state and how they are handled become a more acute problem. Therefore, it behooves the legislature to ensure that the department has the funding necessary to do the job and the mandate to do the job.

[9:02:55 AM](#)

LANCE NELSON, Senior Assistant Attorney General, Natural Resources Section, Civil Division (Anchorage), Department of Law, noted that he has been the primary advisor to the BOF for about 10 years. In fact, since 1988 he said he has spent all of his time involved in commercial fisheries regulation or enforcement work. With regard to the sustainable salmon fisheries management policy in regulation, Mr. Nelson pointed out that no one has found any fault with the substance of that regulation. The only objection has come in the proposal put forward by the United Fisherman of Alaska, which suggested that it be put forward in policy as opposed to regulation. The BOF

recently considered the aforementioned and unanimously rejected it. Mr. Nelson clarified that there hasn't been an issue regarding whether the policy should be eliminated but rather if it should continue as policy or as regulation. The arguments that it remain as a policy is that most of the sustainable salmon fishery management policy isn't what's defined as regulation as it sets goals and ideals for fisheries management, but it doesn't regulate the public. Furthermore, the policy sets up a process that the board and the department use to approach issues with sustainable salmon fisheries. He related that although DOL has concerns with the policy being in regulation, those can most likely be addressed. Mr. Nelson then paraphrased from his written statement, which read as follows [original punctuation provided]:

Generally, this bill would tend to micromanage and also sets very difficult or impossible standards, and will result in increased litigation. Here are the primary specific concerns we have with the language of the bill:

1. Under paragraph (a)(1), does "comprehensive policy" means that every regulatory plan has to be comprehensive? That will be an unrealistic standard for many stocks.

2. Under paragraph (a)(2), almost all plans are designed to achieve "maximum or optimum salmon production." What other objective would they have? So the department would have to affirmatively supply data on each of the listed criteria and the board would have to formally consider all the criteria, regardless of whether each was an important factor in the particular proposal before the board. In such cases, consideration tends to be a formal, rote recitation of the criteria without translating to a better, more informed decision; however, failure to expressly address any of the criteria could result in successful legal challenges against Board regulations.

MR. NELSON mentioned that the state has been sued by the Cordova District Fishermen United, which claimed that the regulatory plan wasn't consistent with the sustainable salmon fisheries policy. The state has also been sued by the Kenai Peninsula Fisherman's Association on the grounds that regulations were inconsistent with escapement goal policy, which is a companion regulation to the sustainable salmon fisheries policy. Mr.

Nelson opined that it would be more difficult to defend if this policy was in statute. Mr. Nelson continued to paraphrase from his written testimony [original punctuation provided]:

3. Under subsection (b), the phrase "must ensure" sets an impossible standard for salmon management. "Ensure" means to guarantee a result, which is impossible given the way salmon return and the limits on the state's ability to control their entire lifecycle. Certainly, the Board has very limited control over the marine habitat of salmon, and no power to ensure the "sustained economic health of Alaska."

4. In subsection (c), the term "shall" imposes new, difficult standards.

5. For example, in J(C)(1), even in the sustained yield provision of the Alaska Constitution (section 4, article VIII) there is no mandate that salmon stocks be maintained to "ensure sustained yields." The constitutional provision says: "Fish ... shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses." That language has been interpreted with flexibility in light of the record of the constitutional convention, which states, in pertinent part: As to forests, timber volume, rate of growth, and acreage of timber type can be determined with some degree of accuracy. For fish, for wildlife, and for some other replenishable resources, it is difficult or even impossible to measure accurately the factors by which a calculated sustained yield could be determined. Yet the term, "sustained yield principle" is used in connection with management of such resources. When so used it denotes conscious application insofar as practicable of principles of management intended to sustain the yield of the resource being managed. That broad meaning is the meaning of the term as used in the Article. Papers of Alaska Constitutional Convention, 1955-1956, Folde 210, Terms quoted in *Native Village of Elim v. State*, 990 P.2d 1,7 (Alaska 1999). The Supreme court went on to elaborate as follows in the *Elim* case: (T)he primary emphasis of the framers' discussions and the glossary's definitions of sustained yield is on the flexibility of the sustained yield requirement and its

status as a guiding principle rather than a concrete, predefined process. *Id.* at 7-8. The language in the bill, on the other hand, imposes a standard of strict guarantees.

6. Under (c)(2), the directive "shall be managed to allow escapement within ranges necessary to conserve and sustain wild salmon production and maintain normal ecosystem functioning" is also problematic. It does not recognize the variables at work in salmon management. As noted by the Alaska Supreme Court: The salmon in these waters are subject to numerous pressures, any one of which could account for a population decrease in a given year. A short and incomplete list of these factor includes weather, natural predators, competition with other fish, international fishing efforts, water pollution, and improved efficiency of fleets and fishing methods. Moreover, several different species of salmon travel through the False Pass fishery, thus creating a mixed stock that increases challenges of management. The record also shows that the salmon operate on a fluctuating cycle that makes estimating returns from year to year difficult even under the best conditions. *Id.* at

7. Use of mandatory terms like "shall" and "ensure" in salmon management statutes sets up unrealistic expectations and invites legal challenges, which are much more likely to be successful with mandatory language. Provision (c)(4) could be interpreted to require the Board to shut down any mixed stock fishery that involves take of a depleted salmon stock regardless of consequences to other fisheries or other escapement objectives. Thus, a relatively low rate of interception of a depleted stock could result in closure of a fishery causing significant over escapement and possibly harming production of another stock, even while providing little benefit to the depleted stock. The failure to define the terms "depleted" and "actively restored" also raises concerns. Other paragraphs of subsection (c) also contain problematic language such as "to the maximum extent possible," and "priority." Similar language in a regulation can be addressed by qualifying language in another regulation, such as by adding a "notwithstanding" provision, and further, the Board

receives great deference in interpreting its own regulations, however if this type of language is put in statute, the Board will not have any discretion to do anything but follow the letter of statutory language.

8. In subsection (d), the language "best available information" could be problematic because it might be construed to require the department and board to seek out and review all possible information rather than what they deem to be the most critical. Anyone could argue that there was better information available and the Board did not hear or consider it. The Board normally relies upon a short report from the Department and consideration of all public comments submitted to it in adoption of its regulatory decisions. Similarly, the Department normally relies principally upon fish ticket and escapement information collected by the department in development of its reports and recommendations to the Board. While this information is often extensive, other information is available from the internet, scientific journals, and other sources, and it could certainly be argued that some of this information may be "better" regarding discrete issues. This bill could be interpreted to require the Department and Board to actively gather and review this information even if not presented by a member of the public. thus, if this bill were enacted, Department recommendations and Board decisions would be vulnerable to potentially successful legal challenges unless the Department commits significant new resources to doing a [thorough] scientific review of all potentially relevant background information, and presents the resulting information to the Board for consideration with regard to each of the several hundred proposals considered by the Board each year. This would require increased staffing of biologists and economists and would significantly extend the time necessary for Board meetings, possibly to the extent that Board members would be precluded from effectively engaging in other occupations.

9. In (d)(1) the language applies to "human activities that affect salmon," but the statutory authority of the Board extends generally to fishing activities and not many other activities that affect

salmon, some of which are more specifically regulated by other state agencies, such as salmon stream activity permitting under AS 41.14.870.

10. Under (d)(2), every management plan would have to contain "goals and measurable objectives." This connotes a formulaic, equation\*type approach to management plans that works in some fisheries, but there are probably current plans that do not specifically express goals and measurable objectives because of the nature of those fisheries or the lack of information. They would be subject to challenge under this provision.

11. Paragraph (d)(3) has the same kind of language that sets the Board and Department up for easy challenges to regulations and department actions. The language on habitat restoration and protection measure is largely outside the authority of the Board or Department.

MR. NELSON pointed out that under subsections (c) and (d) there could be situations in which small, less valuable depleted runs, would be mandated for recovery. Therefore, the harvest of more valuable stocks would likely be foregone. He then emphasized that this proposed statute would subject regulatory action to challenge as well as every departmental decision related to salmon management, including preparation of reports for consideration by the board and other in-season decisions. Mr. Nelson expressed concern that HB 189 appears to make the agency vulnerable in its decision-making process.

[9:18:27 AM](#)

CHAIR SEATON inquired as to the impact of placing this policy in statute on the commissioner's emergency order (EO) authority.

MR. NELSON related his belief that all of these provisions apply to the department as well as the board. He highlighted that proposed AS 16.05.247(c)(4) says, "depleted salmon stocks shall be allowed to recover or, where appropriate, be actively restored;". The commissioner, he explained, would have to decide whether an EO allowing a fishery with an abundant stock would be consistent with the aforementioned provision if a minor stock might be depleted. Therefore, the commissioner may decide to allow a lot less fishing on a more abundant stock. Mr. Nelson pointed out that the constitutional provision relating to

sustained yield includes the following qualifying language, "subject to preferences among beneficial uses". The board and the department have to constantly make judgment calls. He mentioned that the decision is sometimes that the more valuable stock is given preference while the less valuable stock suffers. Mr. Nelson opined that this legislation could have a major impact with regard to the decisions of the commissioner and his designees on EOs and other management matters.

[9:21:10 AM](#)

CHAIR SEATON recalled testimony from a previous hearing regarding the genetic difference between king salmon that return at eight years versus six years. He then directed attention to page 2, lines 12-13 of the legislation, which read "(3) diversity shall be maintained to the maximum extent possible at the genetic, population, species, and ecosystem levels;". He asked if, in a situation in which there isn't an adequate population of 8-year-old returning king salmon, that would be the basis for a group to file a challenge against king salmon fishing on the river in order to maintain an adequate population of the 8-year-old stock.

MR. NELSON recalled that the person testifying believed that in such a situation [the requirement would be to stop fishing for king salmon on the river in order to maintain an adequate population of 8-year-old king salmon]. Furthermore, a lawsuit would be the basis for such. Certainly, if this provision was in place, the board and department would need to spend more time on those regulations.

[9:24:01 AM](#)

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

[9:24:09 AM](#)

CHAIR SEATON opined that a number of significant issues have been raised, such as the concern that this legislation could change the entire intent of the constitution from flexible management under sustained yield to a strict mandate. Therefore, Chair Seaton announced that HB 189 would be sent to a subcommittee consisting of the following members: Representative Wilson, Chair, and Representatives LeDoux and Edgmon.

9:25:17 AM

**ADJOURNMENT**

There being no further business before the committee, the House Special Committee on Fisheries meeting was adjourned at 9:25 a.m.