

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

April 17, 2014

8:05 a.m.

**MEMBERS PRESENT**

Representative Paul Seaton, Chair  
Representative Eric Feige  
Representative Lynn Gattis  
Representative Bob Herron  
Representative Kurt Olson  
Representative Jonathan Kreiss-Tomkins

**MEMBERS ABSENT**

Representative Craig Johnson

**COMMITTEE CALENDAR**

HOUSE BILL NO. 386

"An Act repealing the Alaska Commercial Fisheries Entry Commission and transferring its duties to a commercial fisheries entry division established in the Department of Fish and Game and the office of administrative hearings."

- HEARD & HELD

**PREVIOUS COMMITTEE ACTION**

BILL: HB 386

SHORT TITLE: REPEAL CFEC; TRANSFER FUNCTIONS TO ADFG

SPONSOR(S): RULES BY REQUEST OF FISHERIES

04/16/14	(H)	READ THE FIRST TIME - REFERRALS
04/16/14	(H)	FSH, RES, FIN
04/17/14	(H)	FSH AT 8:00 AM CAPITOL 120

**WITNESS REGISTER**

LOUIE FLORA, Staff  
Representative Paul Seaton  
Alaska State Legislature  
Juneau, Alaska

**POSITION STATEMENT:** Presented HB 386, on behalf of Representative Seaton, prime sponsor.

BRUCE TWOMLEY, Chair  
Commercial Fisheries Entry Commission (CFEC)  
Alaska Department of Fish & Game (ADF&G)  
Juneau, Alaska

**POSITION STATEMENT:** Testified during the discussion of HB 386.

BEN BROWN, Commissioner  
Commercial Fisheries Entry Commission  
Alaska Department of Fish & Game  
Juneau, Alaska

**POSITION STATEMENT:** Testified during the discussion of HB 386.

KEVIN BROOKS, Deputy Commissioner  
Office of the Commissioner  
Alaska Department of Fish & Game  
Juneau, Alaska

**POSITION STATEMENT:** Testified during the discussion of HB 386.

ANDY HEMENWAY, Administrative Law Judge  
Office of Administrative Hearings (OAH)  
Department of Administration  
Juneau, Alaska

**POSITION STATEMENT:** Testified during the discussion of HB 386.

#### **ACTION NARRATIVE**

[8:05:23 AM](#)

**CHAIR PAUL SEATON** called the House Special Committee on Fisheries meeting to order at 8:05 a.m. Representatives Gattis, Herron, Feige, and Seaton were present at the call to order. Representatives Olson and Kreiss-Tomkins arrived as the meeting was in progress.

#### **HB 386-REPEAL CFEC; TRANSFER FUNCTIONS TO ADFG**

[8:05:49 AM](#)

CHAIR SEATON announced that the only order of business would be HOUSE BILL NO. 386, "An Act repealing the Alaska Commercial Fisheries Entry Commission and transferring its duties to a commercial fisheries entry division established in the Alaska Department of Fish and Game (ADF&G) and the Office of Administrative Hearings (OAH)."

[8:06:08 AM](#)

CHAIR SEATON pointed to budget constraints. He explained the purpose of HB 386 is as a consolidating, cost-saving measure, while at the same time continuing important, necessary services without harming the management of fisheries. He underscored that this bill is not an attempt to denigrate the work that is accomplished by the CFEC [Commercial Fisheries Entry Commission]. He acknowledged some parallel licensing occurs by the CFEC and the ADF&G. The proposed consolidation of services has not been predetermined and instead, the intent of HB 386 is to start the conversation and identify the ways, means, and probability for taking this proposed next step. There are two ways to approach this type of action, by legislative action or administrative reorganization. He hoped the committee will be able to review the myriad of changes and that this meeting will assist in setting the stage for integrating CFEC into a division within the ADF&G.

[8:11:32 AM](#)

LOUIE FLORA, Staff, Representative Paul Seaton, Alaska State Legislature, stated that the overarching theme of HB 386 is whether the state should maintain a separate commission, the Commercial Fisheries Entry Commission to handle limited entry into fisheries when no new limited entry fishery has been established in the past 10 years. The CFEC was established after the 1972 voter approval of the Limited Entry Act, which the legislature enacted in 1973, creating the limited entry fishery program and giving the CFEC the responsibility for administering the program. He reviewed some documents in members' packets, including the CFEC 2012 Annual Report. He read the duties of the commission, such that the CFEC serves as a regulatory and quasi-judicial agency of the state. Three commissioners are appointed by the governor and confirmed by the legislature. Commission staff is organized into five sections, including administration, adjudication, research and planning, licensing, and information technology.

MR. FLORA said the commission is charged with establishing the maximum number of permits for limited entry fisheries, processing limited entry permit applications, adjudicating claims, issuing annual reports in both limited and open access fisheries, processing requests for emergency and permanent transfers, as well as research and coordination with state and federal management agencies in developing fisheries policy.

MR. FLORA reported that between 1974-2013, limited entry fishery permits have been issued in 65 commercial fisheries, including

26 salmon fisheries, 19 herring fisheries, 9 crab fisheries, 5 sablefish fisheries, 3 shrimp fisheries, and 3 dive fisheries. To date, a total of 79 permit types have been issued for 65 limited entry fisheries. He said this summary provides an historic sweep of the Limited Entry Act and the act's effects on Alaska's fisheries.

[8:14:22 AM](#)

MR. FLORA directed attention to the document entitled, "Changes in Distribution of Alaska's Commercial Fisheries Entry Commission Permits, 1975-2013." He noted that since 1975 a large number of fisheries have been limited through the decades, ending in 2004. In 2004, the last fishery limited in Alaska was the Kodiak tanner bairdi pot fishery. He acknowledged future limited entry fisheries could occur; however, he anticipated that these would be relatively small fisheries with low participation numbers.

MR. FLORA reviewed the possibilities for limiting fisheries in the future, for example, he anticipated that the Togiak seine herring and some Pacific cod fisheries could become limited entry fisheries. He suggested one question would be to ask what staff levels would be required to research and administer any new fishery limitation. He further asked whether the commission is the best structure for today's fishery limitations in Alaska.

[8:16:32 AM](#)

MR. FLORA directed attention to page 1. In 1998, the CFEC adjudicated 105 permit cases, 42 transfer cases, and 10 miscellaneous cases. He contrasted this with the cases in 2013, in which the commissioners adjudicated a total of six cases, three entry permit applications, two permit transfers, and one remand from the adjudication section. He further reported that seven permit applications are pending before CFEC's hearing officers. After the hearing officer issues a decision on these seven cases, the cases will be passed to the commission for review so the commissioners' total future case load is approximately 30 cases. He compared these figures back to 1998 in which 227 cases were before the commissioners and 363 cases were before the adjudication staff.

MR. FLORA said the compelling argument is that the case load has been significantly diminished. In addition, the governor has not appointed a third commissioner, which has been vacant since 2012. He emphasized that the CFEC has done its job well and

argued its cases successfully. In fact, its cases are not being rejected by the Alaska Supreme Court. He emphasized that this demonstrates that the CFEC has succeeded in its mission.

[8:18:12 AM](#)

MR. FLORA directed attention to the sectional analysis for HB 386 in members' packets. He explained that a number of changes in the bill are conforming amendments. He offered to review each section, if the committee preferred him to do so.

REPRESENTATIVE HERRON asked why fix something that isn't broken.

[8:19:04 AM](#)

CHAIR SEATON, in response to Representative Herron, explained the genesis of the bill. He said that he served on the Alaska Department of Fish & Game House Finance subcommittee. He reported that the meetings revealed the need for cuts, consolidations, and efficiencies. He acknowledged that while the subcommittee did not propose any cuts to the CFEC, some of CFEC's funding stems from permits. With respect to the state's impending fiscal shortfalls, this bill would review whether the state is being efficient in accomplishing its issuance of permits and management of fisheries to fulfill its obligations under Article VIII of Alaska's Constitution. He underscored that he doesn't question CFEC's job, but given the declining caseload, the question is whether the CFEC's functions can be done more efficiently and effectively [by transferring the function to ADF&G]. He hoped the hearing would reveal whether the CFEC's hearings are significantly different enough to require separate hearing officers rather than using the Office of Administrative Hearings (OAH)'s [administrative law judges]. He offered his belief that tough budgetary decisions will need to be made next year. Therefore, this bill and today's hearing are necessary to identify the actual needs in this area. He envisioned that consolidation efforts such as this could be difficult to tackle during a legislative session without first having a thorough discussion in the interim.

[8:21:33 AM](#)

REPRESENTATIVE KREISS-TOMKINS concurred with Representative Herron's caution in changing a commission process that has worked well. He asked for any projected savings by integrating the CFEC into the ADF&G. Perhaps a downsizing of CFEC to better

represent the caseload needs would be more appropriate and allow efficiencies to be found in-house.

MR. FLORA deferred to representatives from CFEC and ADF&G who could better respond.

[8:22:31 AM](#)

CHAIR SEATON indicated that the lateness in introducing HB 386 is related to his intention to initiate discussions. He cautioned that this bill is not an effort to predetermine a transfer of the CFEC to ADF&G, but to hold discussions with all the parties to explore whether this would provide efficiencies and cost-savings and be in the best interests of the state.

REPRESENTATIVE OLSON asked whether he intends to hold hearings during the legislative interim.

CHAIR SEATON said he was unsure; it would depend on the progress the committee makes and responses by CFEC, ADF&G, and the Department of Law as to the feasibility of a transfer. He acknowledged that one outcome could be that it is obvious that it won't work and downsizing may be the best approach, but with the budget constraints on the horizon he felt it was important to begin outlining a means for addressing the situation.

[8:24:30 AM](#)

BRUCE TWOMLEY, Chair, Commercial Fisheries Entry Commission, Alaska Department of Fish & Game, appreciated that the sponsor considers HB 386 a conversation starter. He said that the CFEC and ADF&G each issue licenses and both are supported by information technology (IT) so he could understand considering combining the two functions; however, he offered his belief that the functions of these agencies are very different. He explained that HB 386 will set out standards for moving forward, but two questions need to be considered: first, if it would risk undermining statutory or constitutional functions. Second, if it is practical to combine the two agencies, and if it would save money to do so. He suggested that a comparison of the functions needs to be taken, but these functions may not be as parallel as they initially appear.

MR. TWOMLEY said it was suggested that the CFEC's case load in 2013 was reduced to six cases in the past few years. However, one case that took time in 2013 was the Carlson case [State, CFEC v. Carlson, 191 P.3d 137 (Alaska 2008)]. ("Carlson IV").

He pointed to the caseload, 41 cases from hearing officers and adjudication staff, with only six from the commissioners; however, he noted the commissioners have a duty to review each of the 41 cases and rule on them. Normally, these cases would have been completed by the end of the year, but extra time necessary for the Carlson case and his own personal travel interrupted this review. The result is that this means the 2013 cases will increase to about 40 cases.

MR. TWOMLEY remarked that the CFEC recently received a maintenance budget while the ADF&G was subject to budget cuts. He reviewed the CFEC's budget historically to provide a perspective. He explained that the CFEC is a small, exempt agency, which allows for creativity outside of union constraints. Throughout the CFEC's history, it has asked employees to take leave without pay and forego merit increases. He pointed out that the commissioners' salaries were initially set at a level equal to district court judges since the legislature recognized that the decisions the commission makes have as much impact as decisions that come from the district court. Certainly, people feel deeply about their fishing rights in Alaska. However, the district court judge salaries have increased over time but not the salaries for the CFEC commissioners. He provided an example to illustrate how the commissioner salaries have been held in place, without any merit increase for 25 years to contribute to a balanced budget.

MR. TWOMLEY noted the CFEC has made major contributions through employee cuts. The CFEC cut its executive director's position in order to meet budget cuts; however, such a cut meant the remaining 28 full-time positions had to absorb additional responsibility. The administrative functions have essentially been absorbed and distributed, he said. In 1986, the commission had 41 full-time positions, which have been reduced to 28 positions; hence, this represents a 30 percent reduction during that time. He suggested that the commission is performing more complex work with fewer people, which he compared to being reduced to all "muscle and bone." He suggested members should visit the agency to attain a visible understanding. He offered his belief that this agency may not be the best target for budget cutting. Adjudications also represent a source of efficiency within the state, with 68 limited fisheries and 86 Alaska Supreme Court cases addressing applicants for limited entry permits. For the sake of efficiency it is critical to win these cases in court. The Alaska Supreme Court held that when it reverses a commission rule, the reversal can be applied retroactively to require reopening previously closed

applications and to require the commission to accept new applications for those who did not apply during eligibility.

[8:35:22 AM](#)

MR. TWOMLEY elaborated that what this means is that with every decision made, the CFEC walks a tightrope. Thus, reversed decisions could undermine fisheries on which Alaskans rely. He reported that in the overall 3,000 decisions he has participated in, no retroactive decisions have occurred. He reported that of 32 appeals since 1996, only two partial reversals have occurred. In both instances, the CFEC avoided a retroactive application since the commission was careful to limit adjudications to the facts affecting the specific individuals. Of the 68 limited fisheries, only 30 cases are left to be decided. He characterized the CFEC as being "in the last lap of this process." He urged members to take great care in reviewing the adjudication functions. He cautioned against altering the adjudication process which could hand a cause of action to attorneys representing applicants. He further cautioned that it is late in the game for the state to be assuming risks. He acknowledged the commission has a finite number of cases, but recommended that the process that currently exists be allowed to continue forward until the CFEC can achieve final determinations in the remaining 30 cases. He suggested proceeding from that point before making any decisions.

[8:38:02 AM](#)

CHAIR SEATON asked how many CFEC hearing officers are on staff and if they are full-time positions.

MR. TWOMLEY answered that the CFEC has two full-time hearing officers.

[8:38:21 AM](#)

CHAIR SEATON suggested the committee will try to determine the speed in which those cases will be resolved. He understood the caseload and that CFEC's case law has developed over time through the Alaska Supreme Court cases. He asked if the adjudicatory hearings also have case law to assist in determinations.

MR. TWOMLEY answered that some of the cases have been resolved, but blind spots exist and the Alaska Supreme Court has reserved discretion in the area of limited entry fisheries. He reminded

members that CFEC must always be aware of the possibility of a retroactive application. The late Chief Justice Rabinowitz advised not to make unnecessary affirmative findings when deciding factual claims and instead confine holdings to whether the applicant has met the burden of proof. However, even employing that approach, the court has discretion, and as recent as the May case [May, v. State, CFEC, 168 P.3d 873 (Alaska 2007)], the high court can present surprises. He reviewed specific cases to provide an illustration of how the end results affect fisheries. For example, he previously shared a copy of the Kuzmin case with the committee [Kuzmin v. State, CFEC, M.O.J. No. 1165 (Alaska 2004)]. What was significant about the Kuzmin case was that while it only affected two applicants, it actually resolved an entire fishery. Another 13 applicants were simply pending awaiting the decision, which would determine whether they would be eligible for their permits. In addition, since Kuzmin did not appeal, it allowed CFEC to close out an entire fishery. He emphasized that CFEC is at a manageable point for the first time since 1990, that it can close out some fisheries and obtain an end result it can be confident about; however, the CFEC must still get past the appeals pending before the Alaska Supreme Court.

[8:41:31 AM](#)

BEN BROWN, Commissioner, Commercial Fisheries Entry Commission, Alaska Department of Fish & Game, hoped members had an opportunity to review the case Mr. Twomley distributed during his confirmation hearing. He emphasized the effort that these CFEC cases take and the thorough attention that is given to extensive evidence to produce a defensible result. He said reviewing the decision will better illustrate what [Mr.] Twomley is saying.

CHAIR SEATON responded that 30 cases are pending, so the question remains about the time these cases will take, since they could range from 5 to 30 years, depending on how many cases are being resolved each year. He said maintaining the budget to see these cases through may or may not be plausible. He appreciated the thoroughness CFEC takes and acknowledged the labor and difficulty involved in the aforementioned Carlson case. He commended the job CFEC has done, but cautioned that the legislature is trying to figure out the timeline and how to balance budget needs.

[8:43:46 AM](#)

MR. BROWN considered the big picture context, with a very busy ADF&G. He suggested that if the decision is made to have ADF&G perform licensing and information technology, but the legislature outsourced the hearing officer function to the Office of Administrative Hearings (OAH), it would still need an additional level of review after the [administrative law judge] determination. He wondered if this review would end up on Deputy Commissioner Brook's desk for a final review during this busy time. Thus, squeezing the balloon could cause a bulge elsewhere. He agreed that the committee is aware of the complexity, which is one reason for the discussion, noting there is not a wand to be waved to make the decisions go away.

CHAIR SEATON agreed, noting that the complexity will need a full review without any predetermination on behalf of the committee. He appreciated CFEC's participation today and hoped the remaining CFEC's cases will be resolved quickly without delays.

[8:46:18 AM](#)

CHAIR SEATON related CFEC's duties that would be transferred under the bill. He asked for a broad sense of whether it is feasible to absorb the commission. He said the structure in the bill may not be appropriate but is a starting point.

[8:47:33 AM](#)

KEVIN BROOKS, Deputy Commissioner, Office of the Commissioner, Alaska Department of Fish & Game, acknowledged the length and complexity of HB 386. This agency has performed great work. He recalled the length of time that the Carlson case has taken over the years. He acknowledged that the workload of the commission has evolved, but he would not be able to adequately assess how the functions would fit in ADF&G. He said it may take a fair amount of time to assess. He acknowledged the similarities in licensing functions, but the "devil is in the details" so it is difficult to determine how well this will fit in. He recalled receiving a call from the Legislative Auditor, Kris Curtis, and suggested it may be a good approach to have an unbiased third party ascertain function and whether the functions need to be changed. He supported having that type of analysis and research performed and acknowledged that a number of hearing officers have been consolidated into the OAH, and that the Office of Administrative Hearings handles a multitude of complex cases. He said he is interested in how that office views the CFEC and if the adjudications will fit. He recalled that a decade ago hearing officers were scattered throughout state agencies and

some inconsistencies existed. He offered his belief, in part, from the time spent in the Department of Administration that the consolidated OAH model has worked pretty well.

[8:51:07 AM](#)

CHAIR SEATON reiterated the purpose of HB 386 is to put the issue on the table for discussion. The bill will help provide a context for an independent third-party audit. He reiterated the bill does not criticize the CFEC's performance, but is a matter of budgetary concern. He recalled the adjudication question that was raised by Mr. Twomley and agreed that it wouldn't be appropriate to elevate adjudications to division directors; however, it may be more appropriate for OAH to handle the cases.

MR. BROOKS responded that all state agencies are subject to an audit and review of financial records, but an audit of the CFEC would be a functional review.

[8:54:24 AM](#)

ANDY HEMENWAY, Administrative Law Judge, Office of Administrative Hearings, Department of Administration, stated that the OAH has ten administrative law judges who conduct hearings for every department. Hearings range in complexity and include ones where hundreds of millions of dollars are at stake, like in the [State Assessment Review Board] hearings that will be going on soon, to cases that involve pensions; PERS; child support; Permanent Fund Dividends; procurement disputes; taxes; and recently it started hearings on the Department of Health and Human Services "fair hearings" caseload related to public benefits. Thus, the OAH covers a full gamut of subjects and has very diverse cases. Some are very straightforward and focused on matters with a simple set of rules, while other cases entail very complex statutory and regulatory matters with a great deal of factual complexity. The OAH does not make the final decision, except in a few narrow areas, and the vast majority of will have a final review by a commissioner of the department or to a board or commission that regulates a specific profession.

MR. HEMENWAY said from the discussions today, he understands one question will be who will make the final decision and how would that happen. The proposed legislation would effectively remove the three CFEC commissioners who are charged with oversight of all final decisions pertaining to the CFEC and transfer that function to a commissioner or deputy commissioner, although it is not specifically spelled out in the bill. He pointed out

this represents a significant policy decision as to how the final decision would be made and by whom. In the OAH process, the administrative law judge issues a proposed decision, the parties have an opportunity to respond in writing, and the proposed decision, along with attached comments are referred to the final decision-maker who issues the decision, sometimes in consultation with the administrative law judge, who will assist in writing the final decision. From a functional hearing standpoint, he anticipated that CFEC hearings would fall within the scope of the types of hearings the OAH currently conducts.

[8:58:15 AM](#)

CHAIR SEATON said there is not a procedure for a three-judge panel such as the one used by the 9th Circuit Court of Appeals.

MR. HEMENWAY answered no; that is correct. He highlighted the process, such that a single administrative law judge takes evidence, listens to any testimony, and writes the proposed decision. The proposed decision would then be referred to a board or commission - which would essentially be a panel - or to a commissioner, who will make the final decision, although a commissioner may delegate the final decision process to a deputy commissioner to exercise policy oversight.

CHAIR SEATON suggested that the ADF&G might create a model to delegate cases to a director or to the commissioner.

MR. HEMENWAY answered that it would be up to the legislature to decide. Typically, OAH cases are directed to the commissioner, but a commissioner would decide whether the matter will be delegated to a deputy commissioner. In some instances, the commissioner would delegate the final decision-making authority to the OAH, in particular, in instances in which the parties have not objected; however, the final process is determined by the commissioner.

[HB 386 was held over.]

[9:02:11 AM](#)

#### **ADJOURNMENT**

There being no further business before the committee, the House Special Committee on Fisheries meeting was adjourned at 9:02 a.m.