

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

February 24, 2015

10:03 a.m.

MEMBERS PRESENT

Representative Louise Stutes, Chair
Representative Neal Foster
Representative Bob Herron
Representative Charisse Millett
Representative Jonathan Kreiss-Tomkins
Representative Dan Ortiz

MEMBERS ABSENT

Representative Craig Johnson

OTHER MEMBERS PRESENT

Representative Bryce Edgmon

COMMITTEE CALENDAR

OVERVIEW: COMMERCIAL FISHERIES ENTRY COMMISSION (CFEC)

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

BRUCE TWOMLEY, Chairman/Commissioner
Commercial Fisheries Entry Commission (CFEC)
Juneau, Alaska

POSITION STATEMENT: Provided the overview on behalf of the
Commercial Fisheries Entry Commission (CFEC).

BENJAMIN BROWN, Commissioner
Commercial Fisheries Entry Commission (CFEC)
Juneau, Alaska

POSITION STATEMENT: Participated in the overview of the
Commercial Fisheries Entry Commission (CFEC).

ACTION NARRATIVE

10:03:36 AM

CHAIR LOUISE STUTES called the House Special Committee on Fisheries meeting to order at 10:03 a.m. Representatives Stutes, Herron, Millett, and Ortiz were present at the call to order. Representatives Kreiss-Tomkins and Foster arrived as the meeting was in progress.

OVERVIEW: COMMERCIAL FISHERIES ENTRY COMMISSION (CFEC)

10:04:00 AM

CHAIR STUTES announced that the only order of business would be an overview from the Commercial Fisheries Entry Commission (CFEC).

10:04:37 AM

BRUCE TWOMLEY, Chairman/Commissioner, Commercial Fisheries Entry Commission (CFEC), provided that the Limited Entry Commission was established in 1972, following a statewide vote that amended the Constitution of the State of Alaska, Article 8, Section 15. He paraphrased the amended section, which reads:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State. [Amended 1972]

MR. TWOMLEY stressed that limited entry is confined to these constitutional purposes and if it extends beyond these parameters, or operates to ensure the wealth of fisherman and the value of permits, the result may be an exclusive fishery and the value of the CFEC will have been breached. Thus, from the beginning, the commission has walked a constitutional tightrope in all of the decisions rendered. In 1973, the Alaska State Legislature enacted Alaska's Limited Entry Act (AS 16.43) for commercial fisheries. He described the act as extensive, complicated, and, in one judge's opinion, arcane. The act is an area of specialty law, only taken up by a few lawyers who represent fisherman before the court. The initial

implementation of the limited entry occurred from 1975-1980. The original 19 salmon fisheries were limited simultaneously, 1/1/73, causing thousands of applications to be received at one time. The first stage of review is to determine an applicant's dependency on the fishery and apply a point system to issue the permit; the higher dependency, the more points are scored. Although this initial review is relatively easy, following the paper trail of fish tickets, applicants have the right to appeal a decision following this initial determination. Unlike other legal offices, the CFEC receives a flood of cases whenever a fishery is limited, and it is necessary to choose which to take up at a given time. Interruptions in the process often occur. For example, Isakson v. Rickey, 550 P.2d 359 (1976) was a class action law suit that was filed early in the process, after the commission had set maximums for fisheries and decisions were being issued. The case resulted in the receipt of 1,327 new applicants, creating a major slowdown at the agency, and also causing the fishery to exceed the maximum number. Two other situations may also result in the established maximum number to be surpassed: First, the requirement in the Act to permit any fishermen who, under the point system, can show a significant hardship would result if denied. Second, a direct order to the commission to exceed the limit.

[10:11:21 AM](#)

MR. TWOMLEY said, when the commission received this flood of cases, it adopted the policy to first complete the hearings, for evidentiary purposes, prior to writing decisions. By the early 1980's over five hundred hearings had been held and hundreds of tapes logged, by five hearing officers. Unfortunately, these officers did not remain with the commission through the decision process. The incoming officers were met by an abundance of evidence tapes, and new information continuing to arrive. Additionally, the commission began to be effected by Supreme Court decisions. One principal case was Ostrosky v. State, 667 P.2d 1184 (1983) seeking to strike down free transferability of limited entry permits. Members of the Supreme Court considered this case as a possible vehicle to entirely eliminate the limited entry of fisheries. For that reason, the Supreme Court held all other limited entry cases in abeyance until a decision was issued on Ostrosky. The free transferability was upheld, primarily due to a declaration by the legislature that such action would allow the permits to be retained by family members and preserve community access to traditional fisheries. The decision has been important to the commission, as it continues to administer the limited entry act. Entire programs have been

supported, by the commission, to assist citizens to benefit from Ostrosky and ensuring that permits are retained by Alaskans. Following Ostrosky, the Supreme Court issued 28 decisions in two years, including significant cases that required additional CFEC adjudications. Two of these decisions, Byayuk v. Commercial Fisheries Entry Commission, 684 P.2d 114 (1984), and Cashen v. Commercial Fisheries Entry Commission, 686 P.2d 1219 (1984) have impacted all subsequent CFEC decisions. The Byayuk case held that when the Supreme Court reverses a rule of the commission, that reversal may be applied retroactively; effectively reopening previously closed cases. The Cashen case operated on a similar premise to allow new applications to be filed, long after the application period ended. Hence, it became apparent that quantity could not be sacrificed for quality regarding commission rulings, thus ensuring that CFEC decisions would hold if brought before the Supreme Court.

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MR. TWOMLEY said another class action suit, with wide reaching effects on the system, was the 1975 Wassillie v. Simon, Nl. 3AN 75-506 Civ. (1988) settlement. The case allowed people to apply who had been disadvantaged in the initial application process, primarily rural residents. He pointed out that priority consideration was given to applicants eligible under Wassillie, as well as transfer cases when the immediate right to fish was at stake and hinged on CFEC action; priorities that continue today. A new applicant, for a permanent permit, is allowed to fish indefinitely, as long as the application remains active. The ability to fish, during the application process, may appear to be a loophole, but the Supreme Court holds it as a windfall, and it is written into the Act. The commission has an affirmative, constitutional, duty to limit a fishery when a case can be demonstrated that limiting entry serves conservation purposes and prevents economic distress among fishermen. The commission has, since 1984, been charged with the duty to limit an additional 35 fisheries, resulting in the receipt of about 4,700 applications. Consequently, he said, the commission is a moving bus, with some people getting off but always others getting on, which has been the process since the inception. By 1990 the commission's case load had nearly doubled and become unmanageable, which resulted in the adoption of a triage approach for case selection. The choice was made to address the concerns which, at that time, were under the most pressure: all of the Prince William Sound fisheries, by virtue of the 1989 Exxon Valdez oil spill; the Cook Inlet salmon drift and set-net fisheries, because of Board of Fish limits being imposed; and

the Southeast salmon seine and troll fisheries, due to the effects of the treaty with Canada. During this time, Chignik, was a successful enough fishery that residents petitioned to have adjudication delayed. Similarly, the Bristol Bay salmon drift net fishery was robust and challenged the need for limited entry under the Kelly case. However, by 1997 it was clear that farmed salmon companies were competing vigorously for a share of the world fish market, undermining the cost of wild salmon, and thus caused a tremendous economic upset and collapse in the industry. The CFEC reordered the case priorities, turning its attention to Bristol Bay concerns, being the largest fishery.

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MR. TWOMLEY explained that from 1980 through 2015, the CFEC has faced a number of obstacles. One was the IRS attempting to seize and force the sale of limited entry permits; contrary to state law. The Alaska State Legislature declared the permits exempt from the claim of all predators, and for over 10 years the commission worked to resist the efforts of the IRS. He recalled that, in one instance the agents came to the CFEC office with demands and the commissioner felt personally, legally threatened. The IRS conducted a massive sale, demanded that a permit be transferred, the commission refused, and the result was the Carle (1996) decision. The commission is an independent agency and, as such, made the decision to resist the IRS. He stressed that the commission has been able to work in this way, because of its inherent independent authority, and not being bound to any political agenda, as held by other state agencies. The economic collapse of the salmon industry resulted in consolidation of the fleet in 1998, thus avoiding the buy-back option.

[10:28:52 AM](#)

REPRESENTATIVE MILLETT questioned the buy-back option, and the paper the commissioner wrote diminishing the effectiveness of such action.

MR. TWOMLEY explained that he wrote an outline regarding all of the possibilities, including permit buy-back, to explore the alternatives and understand the drawbacks of each option.

REPRESENTATIVE MILLETT pointed out that since 1998 buy-backs have been successful, and opined that this could be a good way to manage a fishery particular to a region. The Southeast seine fishermen have self-managed for some time employing the buy-back

system. Federal funding was initially used, and caps were established for the number of permits allowed for purchase. Given the six year history on the Southeast seiner fishery, she asked whether buy-back systems could now be considered feasible.

MR. TWOMLEY agreed, and said the commission supported the seiners when they sought information to take a vote and enter into the federal loan obligation. He stressed that the participation of the fishermen in making the decisions and setting-up the federal agreement was an important element to the success of the program.

[10:31:12 AM](#)

REPRESENTATIVE MILLETT observed that the Southeast seiner's success may stimulate other areas where latent permits and permit stacking is a factor. Regional fishermen could be provided the opportunity to vote a self-imposed tax in order to create/maintain a viable fishery. She asked whether the commission supports that type of management.

MR. TWOMLEY concurred that it is a viable option; however, a substantial initial investment is required, and the remaining fishermen do not receive an immediate benefit. State law has not been established to support the scenario and the federal government has been the funding source for Southeast seiners. The Bristol Bay fishermen met recently, November 2014, with the commission to explore the opportunity. He stressed that the large amount of initial cash is the major hurdle, and agreed that once established it can be a good management system.

[10:33:09 AM](#)

BENJAMIN BROWN, Commissioner, Commercial Fisheries Entry Commission (CFEC), added that the commission's research staff is finalizing a history of the Southeast buy-back, including the details involved to arrange the federal financing. It will be a helpful document, he opined, for understanding the complete process and the role of the CFEC. It will also include the aspects that effect the various regional fisheries and gear types, he said, and stressed that the one-size fits all approach is impossible.

REPRESENTATIVE MILLETT recalled the difficulty, at the time the Southeast buyback system was established, in obtaining the loan guarantee, and also working as a member of the legislature to address the issue. It is an excellent program, she said, and

opined that it doesn't necessarily need to be under the purview of the CFEC; many of the commercial fisheries have the ability to implement the system. She acknowledged that the CFEC has been a good advocate for the fisheries.

MR. TWOMLEY agreed that the CFEC is not integral to establishing a buy-back system, but the commission assists by sharing information and transferring the permits; no proprietary interest is held by the CFEC.

REPRESENTATIVE MILLETT suggested that the primary role of the CFEC was to provide fish ticket information. The commission, as an information gathering agency, provided this essential factor to assure the federal government of the assets behind the loan.

MR. TWOMLEY concurred that the informational facet was one element, and the other was to advocate for legislative action that would provide insurance for the buy-back program. The constitutional amendment requires that a fishery not become exclusive, and, when regarding a buy-back system, that must be considered. At the request of the seiners, the commission assisted in lobbying for appropriate legislation. He provided a theoretical situation that would result in testing the governing constitutional amendment, as it applies to permit buy-backs.

REPRESENTATIVE MILLETT recalled limits being placed in statute to govern permit buy-backs.

MR. TWOMLEY offered that the CFEC holds a letter of intent to that effect; however, the determination was not made. A negotiation occurred between the fishermen and the processors to establish limits, but state statute was not created.

[10:39:27 AM](#)

REPRESENTATIVE ORTIZ asked whether the constitutional mandate restricting a fishery from becoming exclusive is a subjective decision on the part of the CFEC or a statistically based decision.

MR. TWOMLEY responded that it involves as little subjectivity as possible. Three optimum number studies have been undertaken, and criteria is applied that include the terms of the constitutional amendment, such as conservation of the fishery, and the economic distress of the fishermen. An elaborate economic study is one means to approach the question, which is what occurred in Bristol Bay where estimates were assumed and a

working model was created to forecast the fishery. Individual tax returns required review, which can be intrusive. The legislature assisted by allowing a range to be considered versus a single number and eventually an optimal range was reached following two years of data gathering and deliberations. Certainly, world markets have since evolved and the conclusions are now out of date. In contrast, a subsequent claim was put before the CFEC that a fishery was becoming exclusive, and an optimum number study was again undertaken. Expert testimony upheld that low numbers were needed to conserve the challenged fishery, and the commission wrote an optimum number rational based only on that testimony, which was upheld in court. He pointed out that this was possible, due to the careful attention given to the constitutional premises being served. Should another buy-back arise, he said this type of compact approach could again be successful, but managers with solid information will be necessary and conservation concerns need to be covered.

[10:45:35 AM](#)

MR. TWOMLEY introduced another interruption from the 1980's, class action suit Carlson v. Commercial Fisheries Entry Commission 798 P.2d 1269 (1990). The action was brought by out-of-state fishermen seeking to strike down the 3:1 permit fee differential that is charged; a ration held in regulation at the time and now under statute. The case upheld that the ratio represented a form of discrimination; however, a formula was devised to address the question of non-resident versus resident fees. The class action effected 95,000 individuals, but only 4,700 recovered damages. The remaining 90,000 could have appealed, save for the effort put in by the commission to respond to inquiries and deflect a large number of hearings. The last of the appeals were heard in 2014. He opined on the volume, complexity, and labor intensive work that is being handled by the commission today. Considering the point system, the multitude of fisheries, and the fact intensive adjudications, he said today's appeals are as complex and difficult as Carlson.

[10:48:47 AM](#)

MR. TWOMLEY said other obstacles that the commission has faced include budget cuts, which have taken a toll on the agency, including: elimination of the executive director, salary freezes, leave without pay, and having 41 fulltime positions reduced to 28. The commissioners have taken up managing the office. As an exempt agency, not subject to human resource laws

that govern bargaining units, he said it has been possible for the commission to unilaterally freeze salaries and take other cost saving measures. He pointed out that the 30 percent decrease in positions has required other staff members to absorb the necessary functions.

[10:50:27 AM](#)

REPRESENTATIVE MILLETT asked when the budget cuts occurred.

MR. TWOMLEY answered that cuts were made in the 1980's and early 1990.

REPRESENTATIVE MILLETT inquired how many cases have been adjudicated since 2013.

MR. TWOMLEY responded that in 2014, 143 adjudications were handled; none on appeal, at this time.

[10:52:06 AM](#)

MR. TWOMLEY said that the 900 cases presented in 1990, have been appropriately managed and the commission now has a rational, manageable caseload of 28. The goal is to complete these cases in 2016; appeals and remands notwithstanding. Transfer cases remain a top priority and, as included in the committee packet, the case of Lisa M. Williams for Permanent Transfer of Entry Permit S04T 65633 to John B. Roehl, CFEC# 14-053-P, provides one example of how serious and complicated transfers can become; often as involved as an initial application. He urged the committee to take time to look at this case in which an elderly woman nearly lost her life savings in the transaction. It became necessary for the commission to intervene in order to see the transfer through to completion when the transferor refused to cooperate after money had exchanged hands. Thus, he stressed, transfers cannot be dismissed as minimal [administrative procedures]; the stakes can be high.

[10:54:07 AM](#)

REPRESENTATIVE MILLETT asked how a typical application is handled and the expected timeline for processing.

MR. TWOMLEY explained that there is first a limitation, followed by the adaptation of a point system under which the application is made. Then a paralegal performs a review of the fish ticket documents to determine sufficiency for support of the claim.

Permits are granted or denied at this point in the process, and denied claims are allowed to appeal to a hearing officer. To a follow-up he said denial is based on the application of the point system that measures criteria based on past participation and the level of economic dependency. The fish ticket information provides the historical data to support the application.

REPRESENTATIVE MILLETT questioned how a new person to the state, without experience, would gain access to participate in a fishery.

MR. TWOMLEY answered that, in order to be permit eligible, an individual would need to have fished with a gear license or interim use permit before the qualification date for the fishery. To a follow-up question, he said acting as a deck hand, without an interim use permit to a fishery, would not be sufficient. The initial decision to limit a fishery, he mentioned, is the decision to call out a maximum number. He said,

... and by law the maximum number has to be the highest number of units of gear in one of the four years leading up to the limitation. That's where the maximum number comes in.

REPRESENTATIVE MILLETT surmised that if criteria is not met and the application is rejected, an appeal can be made.

MR. TWOMLEY agreed, and said an appeal to a hearing officer would occur, and a decision is issued based on a thorough review. As the last level of appeal, the CFEC then receives the application to consider, prior to a court case being filed.

REPRESENTATIVE MILLETT recalling the 143 cases recently adjudicated, she confirmed that it represents the number of cases decided at the hearing officer level.

[10:57:46 AM](#)

CHAIR STUTES inquired what the timeframe is for deciding eligibility.

MR. TWOMLEY answered that a hearing could occur in two days. For example, an application for a transfer that has been denied by licensing staff, is top priority for turn-around, as the immediate right to fish could be at stake. He suggested that

the response time may surpass any other state agency, in an effort to allow a fisherman access to a fishery. He clarified that this refers to transfers of permit ownership.

[10:59:10 AM](#)

REPRESENTATIVE MILLETT asked for an estimate of the number of new applications received in a year.

MR. TWOMLEY said, "We're at a point of closing out fisheries, ... so at this point we're not getting new applications." The applications on hand are being finished, and if a new limitation were imposed on a fishery, that would generate new applications.

REPRESENTATIVE MILLETT maintained her interest in knowing about any new applications.

MR. TWOMLEY responded that, in 2014, there were three new applications for transfer, concluded by the CFEC; cases that came-up through the system.

CHAIR STUTES restated the question, to ascertain the number of new permits that were not appeals or transfers.

MR. TWOMLEY said there were none, in 2014, as fisheries are being closed out and the commission is working to exhaust the existing caseload.

MR. BROWN elaborated on the complexity of closing out the existing cases. Two components are being applied in addition to the past participation and economic dependency criteria, which are: extraordinary, and unavoidable circumstances. Reviewing the old hearings and paper records to ascertain these two facets is primarily what the final cases, under adjudication, are hinged upon.

[11:01:56 AM](#)

CHAIR STUTES asked how many cases were closed out in 2014.

MR. TWOMLEY responded that three were adjudicated in the last twelve months; 2 in 2014, and 1 in 2015.

REPRESENTATIVE MILLETT concluded that 60 cases remain.

MR. TWOMLEY said the remaining number is 28, and the goal is to have these final cases finished in 2016. He qualified the goal,

stating that the commission may be faced with appeals, after these cases are decided.

[11:02:56 AM](#)

MR. TWOMLEY said that the commission's other undertakings, along with adjudication efforts, include the Gowen, Inc., v. F/V Quality One, 244 F.3d 64 (1st Cir. 2001), case, which holds that a maritime lien can be applied to take a limited entry permit. The CFEC has guarded Alaskan permits from being claimed, but it presents an issue as law allows maritime liens to precede all other liens. Similarly, two state authorized loan programs are at issue, which use permits as collateral. A maritime lien could be applied and defeat the state loan program, he pointed out, creating the need to lobby for federal legislation to clarify that limited entry permits are not subject to maritime liens. In the last year, with only two commissioners available, the CFEC was not able to pursue this issue as ardently as is called for, he said.

[11:05:13 AM](#)

MR. TWOMLEY called attention to the committee packet handout titled, "Commercial Fisheries Entry Commission Overview; House Fisheries Committee; February 24, 2015," page 10 to review the cost and revenues generated by the CFEC. The agency is basically supported via receipts from fisherman, which generates more than is necessary for the agency to operate; indicated by the bar graph. The excess receipts, are paid into the fisherman's fund, as well as a percentage paid to the Alaska Department of Fish & Game to apply to management issues. Additionally, the commission typically spends below the appropriation levels, as indicated by the line graph on page 11. On the theme of savings, he stressed that the ultimate savings is realized by ensuring that appeals cases can be won in court. The page 12 bar graph presents the court activity by year. The commission won 21 of the 23 cases challenged, and the two that were lost resulted in only partial reversals. The reversal of a case results in a quick loss of money that could be financially enormous. He suggested that through the commission's diligence and expertise, and with a success rate that exceeds 90 percent over its 20 year history, this is a savings area for the state.

[11:08:00 AM](#)

MR. TWOMLEY called attention to the Kuzmin v. State Commercial Fisheries Entry Commission, No. S-13115. (2009), contained in

the committee packet, and said these two applicants were denied by the commission, and chose not to appeal. He explained that, because of a series of somewhat lucky circumstances, and a legislative policy ruling, the fishery case was dispatched and the fishery closed in a relatively short time, with little contest. Although more fisheries will soon be closed out, he said it is a critical time for the commission. Should a severe, retroactive, reversal occur at this time, it would present a worst case scenario to be handled and have negative effects on the fishermen as well as the state. Any change of structure in what has been adjudicated, would cause a retroactive reworking of the previously denied applicants and create a divided situation. He suggested that the legislature maintain the status quo until the case load has been exhausted to best avoid such a situation.

[11:12:13 AM](#)

REPRESENTATIVE KREISS-TOMKINS asked for an outline of the role the CFEC plays outside of the adjudicatory duties.

MR. TWOMLEY said that the commissioners act as administrative law judges; rule makers adopting regulations; and supervising managers of the agency. He clarified that four parts exist under the CFEC: adjudications; licensing; research; and data processing.

[11:14:20 AM](#)

REPRESENTATIVE ORTIZ asked for an explanation of the term "closing out."

MR. TWOMLEY responded that this applies when a fishery has been limited, based on the history of a fishery to allow a certain number of fishermen to participate. Not everyone who applies can receive a permit, and when the maximum number is attained the fishery is closed. Transfers can occur but no additional permits are considered.

[11:16:02 AM](#)

CHAIR STUTES thanked the day's participants and announced the next meeting agenda.

[11:17:00 AM](#)

ADJOURNMENT

There being no further business before the committee, the House Special Committee on Fisheries meeting was adjourned at 11:17 a.m.