

ALASKA STATE LEGISLATURE
HOUSE SPECIAL COMMITTEE ON FISHERIES

March 19, 2015

10:02 a.m.

MEMBERS PRESENT

Representative Louise Stutes, Chair
Representative Neal Foster
Representative Bob Herron
Representative Craig Johnson
Representative Jonathan Kreiss-Tomkins

MEMBERS ABSENT

Representative Charisse Millett
Representative Dan Ortiz

COMMITTEE CALENDAR

HOUSE BILL NO. 112

"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; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 112

SHORT TITLE: REPEAL CFEC; TRANSFER FUNCTIONS TO ADFG

SPONSOR(S): REPRESENTATIVE(S) STUTES

02/18/15	(H)	READ THE FIRST TIME - REFERRALS
02/18/15	(H)	FSH, RES
03/12/15	(H)	FSH AT 10:00 AM CAPITOL 120
03/12/15	(H)	<Bill Hearing Canceled>
03/19/15	(H)	FSH AT 10:00 AM CAPITOL 120

WITNESS REGISTER

REID HARRIS, Staff
Representative Louise Stutes
Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Presented HB 112 on behalf of the sponsor, Representative Stutes.

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

POSITION STATEMENT: Testified in regard to HB 112.

BENJAMIN BROWN, Commissioner
Commercial Fisheries Entry Commission (CFEC)
Alaska Department of Fish & Game (ADF&G)
Juneau, Alaska

POSITION STATEMENT: Testified in regard to HB 112.

VERNE RUPRIGHT, Commissioner
Commercial Fisheries Entry Commission (CFEC)
Alaska Department of Fish & Game (ADF&G)
Juneau, Alaska

POSITION STATEMENT: Testified in regard to HB 112.

KEVIN BROOKS, Deputy Commissioner
Alaska Department of Fish & Game (ADF&G)

POSITION STATEMENT: Testified in regard to HB 112.

ALPHEUS BULLARD, Attorney, Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Answered questions in regard to HB 112.

CHRIS KENNEDY, Deputy Chief Administrative Law Judge
Office of Administrative Hearings (OAH)
Department of Administration
Anchorage, Alaska

POSITION STATEMENT: Answered questions in regard to HB 112.

ACTION NARRATIVE

[10:02:25 AM](#)

CHAIR LOUISE STUTES called the House Special Committee on Fisheries meeting to order at 10:02 a.m. Representatives Foster, Herron, Johnson, and Stutes were present at the call to

order. Representative Kreiss-Tomkins arrived as the meeting was in progress.

HB 112-REPEAL CFEC; TRANSFER FUNCTIONS TO ADFG

10:03:07 AM

CHAIR STUTES announced that the only order of business is HOUSE BILL NO. 112, "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; and providing for an effective date."

10:04:14 AM

REID HARRIS, Staff, Representative Louise Stutes, Alaska State Legislature, presented HB 112 on behalf of Representative Stutes, sponsor. He said HB 112 would: repeal the Alaska Commercial Fisheries Entry Commission (CFEC); assign the commission's adjudicatory functions to the Office of Administrative Hearings [in the Department of Administration]; and transfer the commission's other duties, as well as employees, to a new commercial fishery entry division within the Alaska Department of Fish & Game (ADF&G). He noted that last year Representative Seaton introduced House Bill 386 with the same language as HB 112 and said a Legislative Budget and Audit Committee report on the commission is due out this spring.

MR. HARRIS provided a history of the CFEC, stating that in 1973 the Alaska State Legislature enacted the Limited Entry Act (AS 16.43), creating the first comprehensive limited entry program in the country. The Act created the CFEC as a regulatory body and quasi-judicial agency to implement and administer the program. Since its inception the CFEC has limited entry to 68 fisheries (now 67), considered approximately 23,000 applications, and issued over 29,000 fishing permits and vessel licenses annually. [Paraphrasing from a January 2015 report prepared by Tom Lawson, Special Projects Coordinator, ADF&G], Mr. Harris reported that the early period of the commission through the mid-2000s could be described as a triage situation. The workload was immense and the backlog of adjudications daunting and the commission rightly chose cases where the immediate right to fish was at stake. This could explain a delay of weeks or months, he said, but likely not the decades that have passed for some of these cases to be finalized. Since that time the workload has diminished along with the

commission's output. The commission averaged 115 final decisions per year from 1982-2006, but over the past two years the adjudication average dropped to three cases per year. Currently, there are 28 license applications remaining and few fisheries are being monitored for limited entry. He drew attention to a graph included in the CFEC's 2007 annual report depicting a steady decline in the commission's workload. Additionally, he noted, the last fishery to enter limited entry was in 2004.

[10:06:47 AM](#)

MR. HARRIS said HB 112 offers a significant cost savings to the state by deleting the three commissioner positions and creating a division director position within ADF&G. Section 122 of the bill provides that all remaining CFEC employees will become ADF&G employees upon the effective date of the Act. The fiscal note shows a savings of \$425,000 a year, but greater potential savings and operating costs could be determined as the functions between the two entities are reviewed and efficiencies identified given there would be some overlap in the research, licensing, and information technology sections of ADF&G and the commission. He drew attention to page 49 of the Lawson report which presents a table comparing the CFEC exempt positions to comparable classified service positions. He noted the salaries for most of the employees would remain essentially the same, with possibly a step-down of one or two points. He reported that a legal memorandum [from Alpheus Bullard, Legislative Legal and Research Services, 2/3/15] states that the moving of exempt employees into the classified service could be an issue. However, he continued, there is precedent for this because in 2009 House Bill 63 moved the Council of Domestic Violence from exempt service into classified service.

MR. HARRIS explained that Section 20 of HB 112 provides that adjudications currently handled by the commissioners would be conducted by the Office of Administrative Hearings (OAH), an independent office with the mission to "provide for the delivery of high quality adjudication services that ensure fair hearings conducted in a timely, efficient, and cost-effective manner." He said the Office of Administrative Hearings usually works with a timeline of 120 days from when it receives an application to holding a hearing. The OAH bills on an hourly cycle, while the CFEC works differently with three full-time commissioners with salaries. The OAH would bill whenever it is working on an actual adjudication; the Department of Administration's fiscal note shows the OAH billing at 375 hours at \$165 per hour for a

total of \$61,900. Over the years the CFEC's progress through a large caseload has produced a manageable situation. The sponsor has been assured by the OAH that it can wrap up the remaining cases in a timely manner and with a high degree of success.

10:09:10 AM

MR. HARRIS pointed out that CFEC revenue is generated by fees it collects from commercial fishing permits and vessel licenses. Total revenue for fiscal year 2014 was \$7.8 million, of which the commission used around \$4 million. Under HB 112, revenue collected from permit fees would go to the Division of Commercial Fisheries to benefit the resource and the fishermen who depend on it. Paraphrasing from the Lawson report, he said there is a clear direct relationship between the operations of the Division of Commercial Fisheries and the CFEC. The mission of the Division of Commercial Fisheries is to manage subsistence, commercial, and personal use fisheries in the interest of the economy and the wellbeing of the citizens of the state. The mission at CFEC is to control entry into Alaska's fishery resources and economic health of commercial fishing. He maintained that administering limited entry permits under the ADF&G umbrella would streamline the permitting and licensing process for fishermen - ADF&G could issue permits from its many offices around the state, whereas the CFEC issues permits from a centralized location in Juneau.

MR. HARRIS allowed a number of issues have been brought up with HB 112. One concern is that it would be like having the fox guarding the hen house, that there would be lack of separation between political will and fish policy. The sponsor's feeling is that the new Division of Commercial Entry would be able to maintain a high degree of political separation because its director would be exempt and the Office of Administrative Hearings would manage the adjudications. Another concern is brought by the United Fishermen of Alaska (UFA) and relates to pet capital projects. He stated that if all permits and license revenue are under the Division of Commercial Entry, all monies allocated would be for the direct benefit of the fishermen, whereas now ADF&G can allocate that money where ever it wishes. Also of concern is that this might affect the Fishermen's Fund. However, he explained, the Fishermen's Fund is administered through the Department of Labor & Workforce Development and funded through CFEC receipts and is unaffected by this bill.

MR. HARRIS summarized by stating that during times of limited budgetary resources a hard look must be taken at making cuts to

keep vital state services in place. He added that HB 112 would become effective 90 days after signed into law by the governor.

[10:11:57 AM](#)

REPRESENTATIVE JOHNSON moved to adopt Amendment 1, labeled 29-LS0485\A.1, Bullard, 3/18/15, which read:

Page 11, line 22:
Delete "and quasi-judicial"

Page 13, line 18:
Delete "**hearing procedures**"
Insert "**hearings**"

Page 13, lines 21 - 24:
Delete all material and insert:
"(b) An administrative hearing on a contested case under this chapter shall be conducted by the office of administrative hearings (AS 44.64.010). Notwithstanding AS 44.64.060(e), the office of administrative hearings shall render the final administrative decision."

Page 13, line 25, through page 14, line 7:
Delete all material.

Reletter the following subsection accordingly.

Page 14, lines 12 - 17:
Delete all material and insert:
"administrative adjudication procedures of AS 44.62 (Administrative Procedure Act) [DO NOT] apply to administrative hearings on contested cases conducted by [ADJUDICATORY PROCEEDINGS OF] the office of administrative hearings (AS 44.64.010) held under this chapter. Final [COMMISSION EXCEPT THAT FINAL] administrative determinations by the office of administrative hearings [COMMISSION] are subject to judicial review as provided in AS 44.62.560 - 44.62.570."

Page 32, lines 26 - 27:
Delete "regulations adopted by the department [COMMISSION] under AS 16.43.110."
Insert "AS 16.43.110(b) [REGULATIONS ADOPTED BY THE COMMISSION UNDER AS 16.43.110]."

Page 34, line 7:

Delete "department"

Insert "office of administrative hearings"

Page 34, line 16:

Delete "department"

Insert "office of administrative hearings"

Page 34, line 24:

Delete "department"

Insert "office of administrative hearings"

Page 34, lines 27 - 30:

Delete "The show cause hearing shall be [CONDUCTED BEFORE A QUORUM OF COMMISSIONERS AND SHALL BE] presided over by a hearing officer appointed by the office of administrative hearings [COMMISSION] who shall rule on the presentation of evidence and other procedural matters."

Insert "The show cause hearing shall be conducted and a decision shall be issued [BEFORE A QUORUM OF COMMISSIONERS AND SHALL BE PRESIDED OVER BY A HEARING OFFICER APPOINTED] by the office of administrative hearings under AS 16.43.110(b) [COMMISSION WHO SHALL RULE ON THE PRESENTATION OF EVIDENCE AND OTHER PROCEDURAL MATTERS]."

Page 35, line 13:

Delete "department"

Insert "office of administrative hearings"

Page 42, following line 16:

Insert a new bill section to read:

"* **Sec. 112.** AS 44.62.330(a)(27) is amended to read:

(27) the Department of Fish and Game as to functions relating to the protection of fish and game under AS 16.05.871 or commercial fisheries under AS 16.43;"

Renumber the following bill sections accordingly.

CHAIR STUTES objected for discussion purposes.

[10:12:12 AM](#)

MR. HARRIS explained Amendment 1 would change how the OAH makes a ruling on adjudications. Usually OAH reviews the case and issues a recommendation to the head of the department for a final ruling. For tax and revenue cases, however, OAH does actually issue a final decision. Amendment 1 would make a language change to empower the OAH itself to make a final decision on adjudications without the approval or oversight of the commissioner of ADF&G. Having OAH make the ruling is an additional step to removing departmental oversight of permit adjudications. However, having OAH make final decisions on cases could signal an increase in its workload and therefore a fiscal note could be required from the Department of Administration if Amendment 1 is accepted by the committee.

[10:13:15 AM](#)

CHAIR STUTES removed her objection. There being no further objection, Amendment 1 passed.

[10:14:01 AM](#)

BRUCE TWOMLEY, Chair and Commissioner, Commercial Fisheries Entry Commission (CFEC), Alaska Department of Fish & Game (ADF&G), called attention to the committee packet and CFEC's March 19, 2015, memorandum to Representative Stutes with the subject line "CFEC Specific Comments on HB 112 Repeal CFEC; Transfer Functions to ADF&G (29-LS0485\A)." He began by addressing the bill in general terms. Regarding the bill's assigning of duties within the department, he noted that duties are assigned to the commissioner, the division, and the department. But, in looking at the bill overall, there are some instances where the same duties are assigned to two different entities. Regarding the bill's discussion of a moratorium and authorization of the commissioner to request a moratorium from the Board of Fisheries, it is unclear whether the public has a part in that process and, if so, whether the public to take requests to the commissioner or to the board. A contrast is also presented because the commissioner seeking a moratorium is required to get the approval of the Board of Fisheries, but the commissioner himself has authority to impose full-bore limited entry for an indefinite period on a fishery. So, the question arises as to why the board's approval is needed for a temporary four-year moratorium. Another provision in the bill addresses the power to revoke limited entry permits, a power that the commission has had almost from the inception of the Limited Entry Act. The bill would assign that power to a single hearing officer at OAH. However, when creating the [Limited Entry Act]

the legislature thought that this kind of decision was too momentous to entrust to a single hearing officer and created a procedure whereby the three CFEC commissioners sit as a whole and participate in the evidentiary hearing and make the final decision. Additionally, the bill calls for all current hearings and proceedings to continue, but the question begged is how that is to happen. This is because there is no savings clause in the bill for commission regulations or the body of administrative law developed by the commission that applies to those proceedings. There are regulations and a number of decisions that serve fishermen, helping them get to what they are entitled to under the Act. It's unclear under this bill what's to become of that body of control, regulation, and precedent. Regarding CFEC employees going over to ADF&G, the questions are: Will they become part of the classified service? Will they be required to join a union? Will it be subject to a probationary period?

[10:18:05 AM](#)

MR. TWOMLEY then addressed what, in his opinion, will be lost if HB 112 is passed. Regarding Amendment 1, he said one must consider what happens if limited entry is put into the classified service and what happens if the final decision is entrusted to a single hearing officer at the Office of Administrative Hearings. One loss will be limited entry's flexibility as an exempt agency to absorb budget reductions. For example, there was the time the commission received a mid-year budget cut applied to all exempt personnel. With its flexibility, the commission was able to assign reductions in hours and reductions in salaries to all of its employees to get through that period. This was done by assigning the commissioners a 12 percent hit, with the hits reduced going down to the lower salary schedules. A remarkable thing about the commission is that, unlike other agencies, someone can be found at work at almost any time of any day of the week. Even with that budget crisis, most employees continued to work their normal hours without quibbling. Another element will be lost. Commissioners are the final decision makers in the limited entry commission and they are more than administrative law judges in the agency because they make the rules, they adopt regulations. That power to adopt regulations can be very helpful to fishermen. Fishermen have come before the CFEC to argue that some of the CFEC's regulations are unconstitutional or unfair. When commissioners have been persuaded of that, they had the power to change the CFEC's regulations. But the OAH doesn't have that power; the OAH doesn't have the authority to modify

the regulations of an agency whose hearing it conducts. Another loss will be the element of agency expertise; agency expertise actually serves efficiency. The commissioners know the issues and know the authority and can more efficiently resolve cases than can someone who is paid to learn all of this material. [The Alaska Supreme Court] has described the body of law governing limited entry as arcane. It is a very specialized area, few people are really functional in this area, and there is a lot to be learned to be able to make this work. Drawing attention to the committee packet, he said the "Bruno case" demonstrates the CFEC's expertise and is a companion case to the [Numamta Aulukesti v. State of Alaska, Sup. Ct S-14560/14579 (2015) of which Violet Willson was a party] which is the case about the grandmother threatened with the loss of some \$40,000 of her life savings. Those two cases illustrate the utility of agency expertise and the ability to step in, do something timely, and be responsive to the needs of the people before the commission. Mr. Twomley stated that a threat hangs over limited entry decisions; it comes from the [indiscernable] cases and the Cashen cases. If the agency is reversed by the Alaska Supreme Court, there is a risk that the reversal can be applied retroactively to re-open previously closed applications and to allow new applications in a limited fishery long after the deadline. This holds the possibility of undermining a fishery on which Alaskans depend for their livelihood. The CFEC has been able to successfully avoid this happening and the CFEC has a very good record before the [Alaska] Supreme Court over the last 20 years. The CFEC has a handle on how to avoid this happening and he thinks that is one of the reasons why Recommendation 19 in the Lawson Report states that the current structure be maintained until the commission can get through at least the remaining cases out of the 68 originally limited fisheries. Lastly, he continued, there is the question of speed in cases where the immediate right to fish is at stake. Those are the emergency transfers that come up on the eve of every season. The immediate right to fish is at stake - if those cannot be handled very quickly fishing time will be lost. When those cases are appealed to the CFEC, the CFEC can turnaround in a matter of days, not the 120 days allowed for in the Office of Administrative Hearings. The [Aulukesta] case is an example of the commission being able to intervene on very short notice and provide some timely relief, and to actually make relief available under the system. This system is complicated to penetrate, understand, and apply, but it is something that the CFEC is practiced in doing and the CFEC has been able to serve fishermen.

10:24:37 AM

BENJAMIN BROWN, Commissioner, Commercial Fisheries Entry Commission (CFEC), Alaska Department of Fish & Game (ADF&G), stated that HB 112 is a complex bill and Amendment 1 makes a very substantive change to the bill. As originally drafted, the largest ambiguity in the bill was who was making these final decisions. So, to the extent Amendment 1 assigns the maximum amount of decision-making power to the Office of Administrative Hearings, it clarifies what the proposed policy change is. A new conceptual fiscal note needs to come out for that, however, because Amendment 1 will massively increase the resources the OAH has to deploy in order to handle the maximum amount of decision-making capacity that the amendment seeks to transfer to that agency. Drawing attention to the current fiscal note, he pointed out that OAH had to rely on six or seven assumptions in the fiscal note and those are based on information that OAH was given by ADF&G about the least amount of decision-making capacity being transferred to OAH. The provision of Amendment 1 is basically a 180 degree turn from the original bill. The fiscal notes are very important. The fiscal notes for CFEC are easy to draft because the CFEC just gets zeroed out, but the fiscal notes from ADF&G and OAH are incredibly important and the policy change under Amendment 1 is something that should take a great deal of time and caution to look at.

MR. BROWN suggested it would be beneficial to everyone involved if a sectional analysis is provided that entails more than just a title of each section. He drew attention to an assumption in the OAH fiscal note that states ADF&G doesn't envision limiting entry to any new fisheries in the next five years. On its face that is inconsistent with the statutory duty to consider petitions to limit fisheries, he argued. Whether it is a division director or the current independent commission, the whole basis of the Limited Entry Act is that Alaskans, and non-Alaskans who are permit holders, have a right to come forward and say they think there is too much activity going on and it needs to be limited. So, it is of grave concern to him if a decision has been pre-judged by someone in ADF&G that the agency is not going to limit fisheries for five years.

MR. BROWN brought attention to a one-page statement by the CFEC, noting he has attempted to bring this statement to each committee member and answer questions one-on-one. He said the CFEC is an agency in transition. Like everyone else in state government, the CFEC is in a position where it must scrutinize how much is being spent on its operations and what value is

being delivered to Alaskans with those scarce funds. Even though the CFEC generates a significant excess in revenues, which [under HB 112] would be applied to the operations of the Division of Commercial Fisheries, that doesn't excuse the CFEC from the duty to spend those public funds as economically and cost-effectively as possible. Because the CFEC is an exempt agency, the commissioners are extremely committed to analyzing what the CFEC does, how it is done, how much is paid to do it, and every possible way for how it could be done better. During the interim, the CFEC will come up with a re-organization plan to present to the committee and the legislature. At that time the CFEC will continue to make the case that there is a reason the CFEC was created independently and that the benefits of the CFEC remaining independent outweigh the relative costs of that independence. If those in the agency to which the bill proposes to transfer the CFEC believe that they are going to be more efficient and more effective, it will be incumbent upon them to be very specific about what those efficiencies and "effectivenesses" will be. Paragraph 3 of the sponsor statement states that ADF&G can find efficiencies in the research, licensing, and information technology functions at the CFEC. That is an inchoate promise to save money, he argued. More specificity would make that a much more compelling argument and, if the wisdom of the legislature is to go forward and merge the CFEC in there, he would hope that it is on the basis of specific, tangible things and not vague visions of how things might be one day in the future. He said the CFEC's one-page statement offers a good synopsis of where the CFEC is at as an agency. The CFEC can do a lot of things on its own, given its existing structure, that will assuage many of the sponsor's concerns, and a look can be taken at how the CFEC can go forward and continue to provide great service to Alaskans as an independent agency in the future.

10:30:50 AM

CHAIR STUTES inquired why, if the CFEC knows that as an agency there are things that could be done more effectively and efficiently, this wasn't addressed when the bill came out last year. She said nothing has been done. Two cases were adjudicated last year and her question is why the CFEC is waiting.

MR. BROWN said that is a fair question and if he could go back and do things the way the CFEC has been doing them now over the past year, he would probably choose to do that. He stated he did expect this bill to be reintroduced and he met with

Representative Seaton who authored last year's bill and Representative Seaton did not characterize it as something that is necessarily a definitive answer to how to fix the problem, but is one way to go about doing it. He argued that the CFEC has done some things over the past year. A new website was launched a few weeks ago. Dialogues with staff have continued about optimum number studies and monitoring these fisheries that may be subject to potential limitation going forward. While that is not as far as long as it should be, he allowed, that work is something the CFEC has done since House Bill 386 was introduced at the end of last session. There are some technological efficiencies that the CFEC should try hard to implement, including the live-time ability to renew one's permit on line. There is a difference of views among staff about whether that is practical or a good idea. After hearing from commercial fishermen, he is now of the opinion that the CFEC cannot accept that the difficulties prevent it from doing that. The CFEC needs to have an easier, user-friendly on-line presence so that that renewal process isn't burdensome for fishermen. The bill sponsor has raised the question about why the CFEC cannot deliver these permit cards in remote locations as was previously done in Kodiak, and the CFEC needs to solve that problem. A recommendation in the Lawson Report is that the CFEC have an executive director because right now it has three quasi-judicial administrative law judge officers who are also managing personnel and this has led to a diffusion of decision making in a manner that has prevented some of these actions taking place. He said he owns up to this responsibility and should not have let that happen on his watch and he promises that that will not be what happens going forward. The CFEC has the capacity to make these changes and the CFEC needs to do it.

CHAIR STUTES commented she appreciates what Mr. Brown said, but that Talk is cheap and actions are what is seen.

MR. TWOMLEY stated the CFEC hopes to give action. He said that last year the CFEC adjudicated collectively 143 decisions, some of them were very significant, including [Aulukesti]. Two decisions were made on applications in 2014 and another was concluded in January 2015. Some interruptions crowded out some of the other cases that the CFEC could have gotten to, he added.

[10:34:43 AM](#)

VERNE RUPRIGHT, Commissioner, Commercial Fisheries Entry Commission (CFEC), Alaska Department of Fish & Game (ADF&G), stated that in regard to the CFEC he is a great believer in the

historical analysis of why things are, the focus, the what, the where, and what was the intent. Historically there was a tremendous crisis in the fisheries industry in the Territory of Alaska and early statehood, particularly with salmon which was one of the drivers of statehood. Every attempt to regulate met with failure due to the conflict with the federal constitution, such as challenges on the Commerce Clause. There were also equal protection problems and discrimination between residents and nonresidents when the state attempted to lock out nonresidents. In early 1972, in order to stabilize fisheries, the Alaska Constitution was put to the voters of the state and it passed 78 percent to modify Article VIII, Section 15, providing for the limited entry and the creation of AS 16.43, the law that governs the CFEC, and then promulgating the CFEC. On January 10, 1973, then-Governor Egan transmitted a 23-page letter to Senate President Terry Miller outlining the structure in the CFEC. The governor and the legislature understood that neither the state nor the federal constitution prohibited a state statutory program regulating the access to commercial fishery so long as the regulatory classifications establishing a permitting of some people to fish and to exclude others are reasonably related to valid legislative purpose and are fairly applied. The Alaska Constitution does not confer on its citizens a constitutional right to fish. Article VIII, Section 3, reserves fish, wildlife, and waters to the people for the common use. So, that it is something completely within "our" authority to do, but in no case prohibits legislative regulation of that use, nor does the federal constitution permit a regulatory program which discriminates unreasonably against non-residents. Close attention must be paid to the constraints imposed by the Commerce Clause under which a legally sound limited entry program cannot unreasonably burden or discriminate against interstate commerce. A regulatory program which disqualifies non-residents merely to secure an advantage for residents will fail, as will any clear discrimination. Interpreting the Commerce Clause in any given situation is a matter of degree or justification used. The court will look to the reasonableness of the regulation, which is a type of scrutiny applied by the federal court where the Alaska Supreme Court uses a sliding scale. It is a rationally related and reasonable basis test because it is not a "fundamental right" that is being dealt with. Prevention of the economic distress amongst fishermen is almost as certainly a valid purpose for this, in that the same standards applied for the qualification of fish in these waters, the regulation stands an excellent chance of being upheld. The rationale of the limited entry commission was to establish a regulatory, quasi-judicial

commission to administer a permit system. Moderating who is permitted to fish and who will be excluded [indisc. - coughing] legally and practically is a direct legislative function. However, a full-time regulatory commission can apply general legislative standards to each as to vessels and permits. Another advantage is that it is easier to defend legally as long as the statutory purpose and the standards are valid; any point of legal tact would be aimed at a particular regulation and not the statute itself, application of a statutory standard as by regulation, which the CFEC has the ability to modify and put into place. The loss of a point or action by the commission does not jeopardize the valid basic program. When attacks have come, it's on a regulation and not the entire statutory scheme, which could overturn the entire notion of limited entry, which potentially is a risk in the court. The standards of finding a fact of economic dependence and extent of past participation and ability and readiness to do so are weighted, transferability is allowed, permits stay in the hands of families who are dependent on the dollars derived, and the commission can also choose fisheries overburdened. Those are all ensconced in the duties of AS 16.43.100. The Alaska Department of Fish & Game and the Board of Fisheries have no authority to deal directly in the economic sense with a decision as to who receives the economic benefit of the resource. They serve three masters - subsistence, sports fish, and commercial fish. They do look at the economics to where the allocations are going to lie. Only the Commercial Fisheries Entry Commission actually deals with who, by the point system, by their merit in that point system, gets to derive the direct economic or dollar benefit out, "and it stands alone for one of those salient purposes because all of a sudden you find yourself in a ... department that has a broader mission and has to serve all the benefit for the maximum use of Alaskans, that resource." Then the question becomes, "Which masters do you serve?" These are all potential legal challenges. The CFEC is charged with that duty and by its duties of conservation and economic distress, not who gets the resource under the common use doctrine.

[10:41:05 AM](#)

MR. RUPRIGHT noted that a recent article written by U.S. Congressman Don Young mentions a re-write of the Magnuson-Stevens Act to ensure it is keeping up with its promise for making the commercial fisheries of the Alaskan waters economically viable and beneficial to Alaskans and that Alaskans can survive on that because it employs nearly 80,000 people in the state, Alaska is dependent upon it, and it is the biggest

employer in the state. To get to the point of reviewing an agency or writing an analysis on an agency, it must first be known why it was created, who created it, and what their purpose was. As evidenced by Governor Egan's 23-page letter, a lot of thought was given for the vital role it plays in Alaska. The legislature put AS 16.43 together and it went into law in 90 days and has been fairly successful so far because the CFEC has met those court challenges by its reasoned decisions. The CFEC has the unique ability to look at its regulations and modify them and avoid traps. This needs to be considered no matter which way things go and how the CFEC may be reorganized. The three commissioners and the administrative assistant have had several discussions in regard to the bill and getting things done.

[10:44:06 AM](#)

REPRESENTATIVE KREISS-TOMKINS inquired about the types of actions that are accounted for in the 143 cases mentioned, such as whether those were emergency transfers.

MR. TWOMLEY replied that the bulk are transfer cases, and transfer cases, particularly emergency transfer cases, are the CFEC's highest priority because the immediate right to fish is at stake. The CFEC has always considered transfers the highest priority and they do push aside application cases. The CFEC found some very significant cases there as the CFEC found that some of the notices going out of the agency were not telling fishermen everything they needed to know and weren't securing fishermen the rights they have under the CFEC's Act and regulations. So, a big part of it was that the CFEC had to do quite a bit of analysis to improve those notices and give direction to the staff who provides that notice. Another big part of it was the [Aulukesti] case wherein he received a call from a citizen in a village who said there is something wrong and the CFEC needs to look at it. The CFEC checked it out and intervened immediately; the effect of the case was that the CFEC saved \$40,000 of a grandmother's life savings in a village in Bristol Bay. That was significant to the CFEC and something the CFEC did by putting everything else aside to get it done. Other cases include Donald H. Carlson v. State of Alaska, Superior Ct. 3AN-84-5790 appeals, together with appeals from point determinations and suspensions in the salmon fisheries, and other transfer cases, as well as some application cases.

[10:46:18 AM](#)

REPRESENTATIVE KREISS-TOMKINS asked how many emergency transfers were included in the 143 cases.

MR. TWOMLEY said he estimated about 75 cases.

REPRESENTATIVE KREISS-TOMKINS stated that the question remains as to why the commission has not managed to bring the case backlog to zero. While the backlog is low, it doesn't seem to be getting smaller in recent years. He inquired as to why the backlog hasn't been worked through.

MR. TWOMLEY responded there have been some interruptions in the form of the Carlson case and also the CFEC spent time trying to work on the "quality one decision," which rises to the level of the Internal Revenue Service, and The CFEC got to a point in this last year where transfer cases took precedents. The CFEC is committed to using its best efforts to get through those remaining cases in 2016, he said, and he thinks the CFEC can do that. A means of doing that is a recommendation by Tom Lawson that CFEC hire an executive director to take those administrative responsibilities away. Long ago the CFEC eliminated its executive director in response to cost cutting. It was a situation that worked at a time when the CFEC had more staff. At this point the CFEC is substantially reduced - in 1986 the CFEC had 41 full-time authorized positions and today the CFEC has 28. For two years the CFEC went with two commissioners which spread the agency thin; the CFEC needed an appointment of a third commissioner to get a quorum to complete one of the application cases. The CFEC is committed to getting through the backlog and if an executive director could be had to take on the administrative responsibilities, he said he believes the CFEC can achieve final determinations in those cases. Generally, over the history of the program, he has been the recipient of a class action in the form of the Carlson case, for which he was one of the respondents. He has also represented plaintiffs in class actions suing the state and the federal government. Those class actions took 30 years at least to conclude. The work of the commission is more labor intensive, fact intensive, and complicated. There are different point systems for almost every fishery that has been limited. It is more demanding than the work going into those class actions. It is very labor intensive and takes a lot of time and blocks of time are needed to produce decisions. But, if the CFEC conducts the administrative responsibilities by hiring an executive director, then the blocks of time can be committed to get the decisions out and that is what the CFEC is pledged to do.

10:50:24 AM

REPRESENTATIVE KREISS-TOMKINS commented that from the testimony of the commissioners it appears one of the prime arguments for maintaining the status quo is legal risk associated with moving everything over to ADF&G and the Office of Administrative Hearings. He asked whether there are plans to have the Department of Law or some other outside perspective shed some light on this.

CHAIR STUTES replied she will have Mr. Harris address that [at a later time].

10:51:17 AM

CHAIR STUTES requested that the commissioners provide the committee with a breakdown of the 143 cases as to which type they were.

MR. TWOMLEY agreed to do so.

CHAIR STUTES inquired as to when the last fishery was limited.

MR. TWOMLEY answered it goes back to 2004.

10:52:18 AM

KEVIN BROOKS, Deputy Commissioner, offered his recognition for the sponsor's efforts in taking up such a substantive piece of legislation. He further recognized the significant work and contribution that the CFEC has made for more than 40 years on behalf of Alaskan fishermen and for keeping permits in the state. He said the CFEC seems to have changed and evolved over those 40 years and is now in a period of having gone from 900 cases to 28 and has not limited a fishery since 2004. Addressing the question of whether the current structure is appropriate for the current workload, he said the challenge before the committee in considering HB 112 is how to maintain that presence in the event another fishery needs limiting or continuing to do appeals and issuing licenses. How to maintain a core level to take on a future body of work? The last few months have been spent working through some pretty significant budget challenges given the \$3.85 billion deficit. All state agencies are looking hard at how to streamline, how to do things more efficiently or consolidate or fundamentally change how an agency has been doing things over many years. He said ADF&G and its divisions are actively engaged in that process and plans to

meet in May after the legislative session is over to map out the next three years because budgets will continue being cut in the coming years. The department must be strategizing on how to offer its programs with the least negative impact on the citizens who rely on what the ADF&G does and it is with that consideration the department will review HB 112 and what the legislature is trying to accomplish with it. He said ADF&G believes it could make this work without service degradation to commercial fishermen - issuing permits, doing emergency transfers, and so forth. It is complicated but ADF&G believes it can make it work, as well as find some improvements. On the administrative side of things, ADF&G pays bills, does budgets, has human resource issues, provides desktop support to employees, and these types of administrative functions could benefit from being part of a bigger team that could potentially enhance service delivery. A big part of what CFEC does is licensing, emergency transfers, and permit transfers, Mr. Brooks continued, but ADF&G has licensing experience due to the issuing of recreational hunting and fishing licenses to residents and non-residents. While that is a different type of licensing, ADF&G issues about 700,000 pieces of stock annually, generating about \$25 million. Additionally, ADF&G issues about 25,000 commercial crew licenses to crew members on vessels and does that effectively and efficiently. The CFEC issues about 25,000-30,000 licenses and permits and transfers. He agreed these are important and it is necessary to do whatever it takes to put fishermen in their boats and on the water making a living. The department will look to its current staff performing licensing functions and try to make as smooth a transition as possible. He concurred there would be no impact on the Fishermen's Fund. The fund has a statutory formula - the contribution is based on a percentage of the license fees and that is deposited into the fund. The department also makes a contribution to the Fishermen's Fund with its commercial crew license revenue, so that would be an easy thing to accommodate.

[10:57:58 AM](#)

REPRESENTATIVE JOHNSON asked whether current statute or contracting would prohibit the transfer of CFEC employees.

MR. BROOKS understood that the CFEC employees would transfer into the department and become classified employees. The movement from exempt status to classified status has been done before and even if it were to be complicated there is a process for doing it and a path forward for doing it.

REPRESENTATIVE JOHNSON understood it would be mandatory that [CFEC] employees became classified].

MR. BROOKS said he would look for a legal interpretation of that, but his understanding is that all the staff, with the exception of the executive director or division director, would be classified.

[10:59:29 AM](#)

REPRESENTATIVE KREISS-TOMKINS requested a legal opinion regarding the CFEC commissioners' concern about upsetting the "legal appletart" should a precedent be reversed and could be applied retroactively.

ALPHEUS BULLARD, Attorney, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency, Alaska State Legislature, replied he will review that and does not know what the likelihood is of that scenario.

[11:01:03 AM](#)

MR. HARRIS provided a wrap-up on the bill. Addressing Mr. Brown's statement that Amendment 1 would need a new and significantly larger fiscal note because the workload will be significantly higher than what OAH currently anticipates handling, he offered his belief that the [current] fiscal note is accurate. He read from page 2 of the Department of Administration's fiscal note for \$61,900 in fiscal year 2016, which states: "(1) Section 121 of the bill provides that litigation and hearings pending at the time the act becomes effective 'may be continued and completed.' OAH understands that that the continuing litigation and hearings pending would be completed under the jurisdiction of OAH and ADFG." He said he takes this to mean that OAH is already anticipating handling the adjudications on these cases. In the sponsor's talks with the department and with OAH, the sponsor has stated that is how it would be. He allowed the bill was a bit nebulous at first, which required the amendment as to who would truly be doing it: what ADF&G would have control over and what OAH would have control over. Amendment 1 makes it clear that OAH would be hearing the caseload. He deferred to Mr. Chris Kennedy to address this further.

[11:02:27 AM](#)

CHRIS KENNEDY, Deputy Chief Administrative Law Judge, Office of Administrative Hearings (OAH), Department of Administration, said the fiscal note was written on the assumption that the 28 initial, currently pending, permit cases will have reached the stage by the time of the transfer of litigation to the Office of Administrative Hearings that the remaining proceedings would take place in the Alaska Department of Fish & Game. As a result, OAH did not look closely at the process leading to a final decision on that class of cases. He offered his belief that the intent of Amendment 1 is probably to transfer final decision authority over those cases to OAH and he will have to go back and look at what that would entail as he is not in a position to comment on whether that will have an impact on OAH's fiscal note.

[11:03:45 AM](#)

Mr. HARRIS stated the sponsor will be ordering a fiscal note from the Department of Administration as soon as a copy of the amended bill is received. He added that he did a disservice to the commission by stating it adjudicated two cases last year; he meant to say that the commission handled two permit applications last year. He concurred that the commission did 143 total cases, including permit applications, transfer cases, and emergency transfer cases. It is understandable that emergency transfers can cause delays and create a spike in workload, he said, and that some are admittedly complicated. But, these cases have existed for 25-30 years and this begs the question as to why HB 112 is necessary to get the CFEC to finalize all of these cases. He directed attention to Section 121, page 46, lines 16-21, of the bill which state:

Certificates, orders, and regulations issued or adopted under authority of a law amended or repealed by the Act remain in effect for the term issued, or until revoked, vacated, or otherwise modified under the provisions of this Act. Contracts, rights, liabilities, and obligations created by or under a law amended or repealed by this Act, and in effect on the effective date of this Act, remain in effect notwithstanding this Act's taking effect.

MR. HARRIS continued, noting the concern offered by Mr. Rupright that changing the rules of how limited entry works could open a Pandora's box of back cases where possibly someone who 30 years ago did not get a permit could say that the rules for entry have changed and he/she now wants another shot at this. He related

that he ran this by Mr. Bullard, the drafting attorney, and was told this still holds - all of the rulings the commission has done since limited entry began would still stand up.

CHAIR STUTES requested Mr. Bullard to address whether the state would be opening itself to repercussions from previously resolved cases or determinations by the CFEC should HB 112 take effect.

MR. BULLARD answered he is unsure how that would happen. Things would be different than they were before if HB 112 were enacted, but he cannot imagine what avenue someone would have to claim that a previously adjudicated decision should be re-opened.

[11:07:34 AM](#)

REPRESENTATIVE KREISS-TOMKINS, in regard to the two permit applications resolved in 2014, inquired as to how that number has changed year by year over the last decade.

MR. HARRIS responded by bringing attention to a graph in the 2007 CFEC annual report which has a graph in this regard, depicting the number of total cases in 1997 at just under 600 and in 2007 at about 115. So, up to 2007 the cases were being kicked off at a relatively rate; but he doesn't have last year's report to know what the rate has been over the last decade.

[11:08:58 AM](#)

CHAIR STUTES held over HB 112. She announced that public testimony on the bill will be taken on March 26, 2015.

[11:09:20 AM](#)

ADJOURNMENT

There being no further business before the committee, the House Special Committee on Fisheries meeting was adjourned at 11:09 a.m.