

SB

527

COMMITTEE REPORT

SENATE

17/19/76

Mr. President:

Date

5/12/76

The Committee on RESOURCES has had SB 527
relating to the efficient administration of fish and game
under consideration. A Majority of the members of the Committee

- recommends it ~~DO~~ PASS
- recommends it DO NOT PASS
- recommends it DO PASS WITH ATTACHED AMENDMENT(S)
- recommends it BE REPLACED WITH CS FOR SB 527 AND THAT
CS FOR SB 527 DO PASS
- "and" recommends it BE REFERRED TO THE _____
COMMITTEE
- reports it back WITHOUT RECOMMENDATION
- "other"

Members signing the Majority report:

Members NOT concurring in the Majority report:

_____ recommends:
_____ recommends:
_____ recommends:
_____ recommends:
_____ recommends:

H. Foland Chairman

ANALYSIS OF CHANGES IN CS FOR SB 527
BY
JOHN FARLEIGH, ADMINISTRATIVE ASSISTANT
SENATE RESOURCES COMMITTEE

SECTION 3: This change is in section 3, paragraph (13), line 25, after "reduce" remove the words "predation or". This is to prevent the commissioner to initiate a wolf control program without board approval but to still allow him to conduct stickleback control, for example, without board consent.

SECTION 4: This section is redrafted to actually tighten up the emergency order powers of the commissioner. The amended language on page 2, lines 8 and 9, defines the circumstances required and since an emergency order is not subject to the Administrative Procedure Act, lines 17 through 27, would establish a due process for the department to go through to implement an emergency order.

SECTION 10: This section was rewritten so as not to appear to put the department above regulation by the boards, but to allow them to perform their duties without special exemptions from board regulations.

SECTION 21: Paragraph (C) was eliminated from this section which would have given the commissioner the power to promulgate regulations without a delegation by the board in the event that he could not contact a quorum of board members.

SECTION 35: (In the original bill) This section was removed in it's entirety, mainly due to the strong objections of the United Fishermen of Alaska.

SECTION 38: This change is self-explanatory. Under the present language, the appropriate board must address each and every case at a board meeting, but under the proposed language, the board may address the issue once and set the policy accordingly.

SECTION 39: In this repealer section a typographical error (16.35.080 is changed to 16.35.180) is corrected and 16.05.210 is eliminated so that it remains unlawful for a department employee or a hunter employed by the department to receive a bounty.

Farleigh

The Honorable Chancy Croft
President of the Senate
Alaska State Legislature
Juneau, Alaska 99811

Dear Mr. President:

In accordance with AS 24.30.060(b) and the Uniform Rules of the Alaska State Legislature, I am transmitting a bill relating to the efficient administration of Title 16 of the Alaska Statutes and the responsibilities regarding conservation and management of fish and game. Some of the changes proposed are purely technical and non-substantive in nature; others are more than that, so this is somewhat more than just a "housekeeping" bill. On the other hand, the substantive changes which do appear are not intended to implement anything resembling major changes in policy; rather, they are aimed at maximizing the efficiency of State government in managing fish and game resources so that the citizens of Alaska may obtain the greatest return for programs and activities funded by their taxes.

Since this bill concerns itself with the administration of fish and game generally, it necessarily pertains to the operations of the Boards of Fisheries and Game as well as to the Department. Therefore, it was considered highly important to obtain the views of the respective boards on this proposed legislation before its submission to the legislature. At their first joint session, in December, 1975, the boards spent nearly four hours reviewing and discussing its provisions with the assistance of the Departments of Law and Fish and Game. They then voted 13-0 to endorse these proposals.

This bill is necessary because: Considering the frequency with which AS 16 is amended and the interrelationship of provisions throughout that title, it is inevitable that some inconsistencies, oversights, and ambiguities will accumulate. Periodic revision of the fish and game laws to rectify these problems is desirable to facilitate administration by the executive branch, to avoid litigations over interpretation matters, and to reduce the likelihood of confusion with regard to future amendments by the legislature. Ambiguities, anachronisms, or inconsistencies in AS 16 may serve as the basis for lawsuits which otherwise would never be

filed. They may lead to board meetings which need not have been called, or meetings and lengthy deliberations by fish and game officials which would otherwise be unnecessary. In all of these cases, the State must spend a great deal of money for matters leading to no benefit for fish and game management. We would estimate that, based on the experience of the past year and the various lawsuits, meetings, and procedures which have taken place because of problems in Title 16, the State would save the taxpayers up to \$100,000 per year if this bill were enacted.

Members of the executive branch who administer the laws daily and must interpret legislative directives in the context of particular situations become intimately familiar with the actual language employed. Consequently, they are in an excellent position to recommend changes which either improve the manner in which a legislative concept is to be implemented, or more accurately carry out the original legislative intent.

Problems of this nature in a complicated set of resource management laws are unavoidable. However, we believe that the necessary amendments must be implemented as soon as possible, and we offer the following to aid in your deliberations:

Section-By-Section Analysis of the Bill

Section 1. This updates existing language to reflect reorganizations of federal agencies and departments.

Section 2. This is the first of a number of instances in the bill where the word "chapter" is changed to "title" to allow applicability of a provision to the entire title. This is done only where it is evident that the particular section should so apply because of its general nature. In this case, the power of the Commissioner to collect and disseminate information should be present with respect to any duty vested in him since it is a necessary general function of a resource management agency.

Section 3. Adds to the powers and duties of the Commissioner the ability to perform research. This is already understood and has been implied from other powers, but it is so basic that it should be specifically mentioned.

This section also adds to the powers and duties of the Commissioner regarding fish and game diseases. This power already exists with regard to private nonprofit salmon hatcheries. The respective boards have this power under AS 16.05.251 and 255, but since this is an administrative ?

rather than a rulemaking function, it is properly housed in the Department.

Section 3 also pertains to powers of the Commissioner regarding cooperative agreements. The Commissioner already has these capabilities in a number of specific instances in Title 16, but the public interest of the State dictates that this power should be general since it is a routine administrative function. Inclusion of this section also permits a redraft of AS 16.05.251 and 255 (powers of the boards) separating administrative and rulemaking functions regarding cooperative agreements, the latter function being retained by the boards.

Finally, Section 3 adds the equivalent of a necessary and proper clause to the powers of the Commissioner regarding the general responsibilities vested in AS 16.05.020.

Section 4. This section would accomplish several changes in the emergency powers of the Commissioner. Only one of these, however, is a substantive addition to his authority.

Pressures from competing users of fish and game resources in Alaska is steadily increasing, leading to the need for more refined management techniques which respond as quickly as possible to changes in conditions. This necessarily reduces the margin of error available to fish and game managers. It is virtually impossible for the boards to assess with complete accuracy anticipated resource availability at board meetings, which are usually far in advance of season openings. The ability of the Commissioner to be able to open or close seasons or weekly periods on fish or game by emergency order is an important administrative tool, and it is often used to implement board policy or intent where unexpected changes in conditions require changes to regulations. In many cases, however, season closure may be an unnecessarily harsh measure to protect a resource; necessary safeguards may involve only a reduction of harvest levels or bag limits. Concurrently, while greater than anticipated resource numbers may not justify a season opening if this is the only avenue available, opening of a season might be satisfactory if bag limits or quotas could be reduced at the same time. Therefore, it would seem to be of benefit to the public if the power to change quotas, bag limits, or harvest levels were added to the emergency powers of the Commissioner.

From a strictly legal standpoint, there is some question as to the validity of sec. 60 in the context of due process because of the absence of (1) standards for when emergency orders may be issued and (2) the procedure to be followed in

promulgating the orders. Several additions are made to insure that adequate notice is given to interested persons so that any due process questions are eliminated. This process is also made applicable to Commissioner's announcements.

Finally, the boards frequently include in the text of their regulations that a particular season or weekly period will open or close by emergency order. As a legal safeguard, a sentence is added to sec. 60 specifically authorizing this procedure.

Section 5. AS 16.05.065 permits the Department to extend registration or licensing deadlines for particular individuals upon a showing of "excusable neglect". Since Departmental policy and decisions of courts have resulted in the evolution of a customary definition of this rather ambiguous term, it is advisable to incorporate this definition into the statutes.

Section 6. This section has been redrafted to more accurately reflect the types of actions which should be admitted as evidence of rulemaking activities in courts of law.

Section 7. This section is self-explanatory. It would permit disbursements to be made without the delay normally caused by seasonal fluctuations in receipts accruing to the Fish and Game Fund.

Section 8. "Chapter" is changed to "title" so that uniform enforcement procedures may apply to all of Title 16. In addition, the requirement that offenders be brought before a magistrate immediately is dropped, removing an unnecessary burden on protection officers.

Section 9. "Chapter" is changed to "title" for the same reason expressed regarding section 8.

Section 10. Some confusion has developed as to exactly what the respective powers and relationships are between the boards and the Department. In section 241, the legislature has recognized that the boards are entities of rulemaking and that the Departmental responsibilities are administrative. The relationship is therefore very similar to the distinctions between a legislative and executive branch. It is important to note that section 241 specifies that the boards "do not have administrative, budgeting or fiscal powers". (Emphasis added.) Since the legislature has organized the boards and the Department with this division in mind, it is highly important that this division be preserved in all of the statutes within Title 16; otherwise, it becomes very difficult to determine who is supposed to make the rules and who is supposed to carry them out.

That this distinction is not always clear became evident in a case litigated in 1975 entitled Cordano v. Brooks, in which a Departmental wolf control program in Game Management Subunit 20A was challenged. Imprecise language in the statutes (which was carried over into the split-board law) relating to the powers of the Board of Fish and Game caused the court to determine that the board had to adopt a regulation allowing department employees to engage in predator control. This result was not in keeping with the board/department relationship established by the legislature, since it declared that not only must the Department carry out regulations of the board, but it must also observe those regulations as though they were private persons even when performing official duties. This directive, if applied universally, would prohibit the Department from engaging in any research involving harvesting of resources unless the season were open and appropriate methods and means, bag limits, size restrictions, closed waters, gear restrictions, and quotas, etc., were observed by Departmental employees which is obviously contrary to legislative intent. Therefore, section 241 is amended to indicate that regulations of the boards apply to the public, and not to Departmental employees engaged in activities already authorized by statute.

In succeeding sections of this bill, various sections of Title 16 are rewritten to insure that board functions are limited to rulemaking and Departmental functions are restricted to administration.

Section 11. No specific authorizations exist for harvest levels, sex, and size limitations, even though regulations of this nature are and have been promulgated. Although authority can be implied from other board powers, it should be made express as a legal safeguard.

Section 12. The board does not engage in biological research, which is an administrative function. Consequently, this paragraph is rewritten to more accurately reflect the nature of board regulations in this area. In addition, a reference to the economy or general welfare as justification for regulations is added to expressly support regulations which constitute allocations among users and are not strictly for conservation (e.g., subsistence regulations, regulations pertaining to types of gear or particular methods and means). Note that this language parallels that under the powers of the Commissioner in AS 16.05.020(2).

Section 13. The board does not adopt regulations regarding investigation of predators, which is an administrative

function. It does, however, establish methods and means and harvest levels for the taking of predators through regulation. This paragraph is redrafted to reflect this fact.

Section 14. Entering into cooperative agreements does not necessitate the promulgation of regulations by the board. However, if such a cooperative agreement necessitates assent to the applicability of federal regulations, this is tantamount to a regulation-making function, since it governs the terms under which fish or game will be taken by the public. Therefore, this aspect of cooperative agreements should involve action by the board.

Section 15. Three additions are made to the powers of the board.

Paragraph (13) would authorize the board to adopt regulations limiting utilization and disposition of fish where necessary for protection of the resource. For example, the board could prohibit the use of salmon for bait if this were causing undesirable harvesting pressures on salmon and it was decided that bait utilization was not a high-value use.

Paragraph (14) would allow limiting routes of access or modes of transportation into an area to facilitate conservation and management. The primary purpose of this amendment is to assist the Board of Game with regard to hunting practices in particular areas (e.g., subsistence areas). However, it was felt that an identical section should be added under powers of the Board of Fisheries so that the powers of the respective boards would remain as identical as possible. Both (13) and (14) can probably be implied from existing board authorizations, but specific mention is desirable as a legal safeguard.

Paragraph (15) would formalize a procedure whereby the board decides it to be in the public interest for a regulatory action to be taken by the Commissioner. Usually this occurs where the board does not have sufficient information at its meeting to adopt a specific date for season opening or closure, and provides that it shall be done by emergency order. Again, this is primarily to insure that there is express legal authority for what is already a customary practice.

Section 16. Same justification as for Section 11.

Section 17. Same justification as for Section 13.

Section 18. Same justification as for Section 12.

Section 19. Same justification as for Section 14.

Section 20. Same justification as for Section 15.

Section 21. The Board of Fish and Game customarily met only twice a year. If the Boards of Fisheries and Game follow past practice, the former will meet twice and the latter once per year. During the interim periods, the boards are not in session and their members are scattered throughout the State, often out of contact with each other. Consequently, when a need suddenly arises for regulatory action in order to protect the fish or game resources of Alaska, delegations of the authority of the boards to the Commissioner become a highly important statutory capability. Consequently, Section 21 would make several amendments to AS 16.05.270 in order to clarify procedures for delegations and facilitate the delegation process where a board wishes to transmit its authority to the Commissioner.

Although AS 16.05.251 and 255 recite the basic powers of the Boards of Fisheries and Game, there are a number of other sections in Title 16 where regulatory powers are assigned to a board without specific authorization for delegation. From the standpoint of governmental efficiency, the boards should have the option to delegate their authority for any of their responsibilities if they so desire, especially since convening boards is expensive and may involve only a routine matter out of proportion to the expense. Therefore, subsection (a) would permit them to do so rather than limiting delegations to the powers included in secs. 251 and 255.

In addition, there is a significant legal question as to whether a board must meet in one geographical location in order to accomplish a delegation. It is presumed that the intent of the legislature was otherwise; if the board is able to so meet, there is no purpose in making a delegation, since the board may act on its own. Therefore, subsection (a) would also formalize the procedure often utilized in the past whereby a delegation may be accomplished through a mail or telephone poll of the members by the Commissioner. This is particularly important where there is not time to convene a board meeting (which usually requires at least 30 days advance notice) before action must be taken.

During the course of a year, members of the Department invariably run across ambiguities or inconsistencies in the fish and game regulations which were not discovered at board meetings. Often, they arise where criminal prosecutions are dismissed because a court considers a regulation to be defective. Subsection (b) would establish a standing delegation of the authority from the boards to the Commissioner to make minor technical corrections to regulations. Since such changes do not alter the substance of a regulation, there would not seem to be any need to go to the expense of contacting all of the members of a board for what is necessarily a routine action. The requirement that the intent of the board be retained precludes abuse.

Many members of the boards hold occupations (e.g., fishermen, guides, etc.) which require them to be in remote areas of the State and out of contact for lengthy periods of time. If a situation arises where regulatory action is necessary and a quorum of board members cannot be contacted, the State is essentially out of the regulatory business for that period of time. This could be highly damaging to the welfare of Alaska's fish and game resources if, for example, an entire set of regulations were invalidated by a court for constitutional or procedural defects. Therefore, subsection (c) would allow the Commissioner to take necessary regulatory action under these conditions if, and only if, he is unable to contact a quorum of board members within the time available to act. Moreover, the Commissioner would not be permitted to change the policy of the board as represented by its regulations unless to do otherwise would be patently impossible.

Subsection (d) is self-explanatory.

It is very important to note that this section would not increase the powers of the Commissioner relative to those of the boards. Rather, it would insure that the regulatory policies of the boards could be carried out in response to changing conditions even when the boards were not formally in session by allowing the Commissioner to act as the agent of the boards. As in the case of Hjelle v. Brooks, where a 1974 challenge by nonresident shellfish fishermen to State regulations succeeded in invalidating the board's management system and necessitating their redrafting when the board was not in session, a delegation of authority may result in the savings of tens of thousands of dollars and the continued full protection of the welfare and interests of the citizens of Alaska.

Section 22. This section makes a minor change in AS 16.-05.290 to allow board members to receive expenses and per diem for attending functions which are not strictly meetings or conferences, such as inspections of facilities.

Section 23. This section constitutes a grammatical improvement for AS 16.05.330 (b).

Section 24. Section 24 would require the Department to issue identification cards to persons who are exempt from license requirements, and require them to have the cards in their possession while hunting, fishing, or trapping. Otherwise, there is little, if any, deterrent to falsifying applications for exemptions and enforcement is impossible.

Section 25. An oversight in Title 16 results in there being no requirement that vessel licenses must be in the possession of the licensee, which is required for other licenses. Section 25 would require actual possession.

Section 26. AS 16.05.680 does not prohibit employing a fisherman or purchasing fish from a fisherman who does not possess the proper licenses except for commercial licenses. This addition would prohibit purchases from fishermen who do not possess all licenses required by Title 16.

Section 27. This section reflects changes in commercial shellfish regulations. The Bering Sea and Western Aleutians are now expressly designated as registration areas.

Section 28. A misunderstanding arose during this past season regarding the burden of proof statute. Under the existing law, the burden of proof is on the holder of the fish and game only after ten days beyond a season closure (three days for crab). However, while this section does allocate the burden of proof, it does not make possession legal even when the burden of proof is on the State (during the first ten days following closure (three days for crab)). Subsection (b) would clarify this point.

Section 29. The existing law regarding confidential reports on fish products does not permit release to the Department of Public Safety. Considering that Department's enforcement responsibilities, such release should be permitted.

A serious defect in the present law concerns the fact that, while the Department of Fish and Game may not release confidential reports to the public without a court order, there is no restriction on such release by the Department of

Revenue and the Commercial Fisheries Entry Commission, which may receive the records from ADF&G. Therefore, this section has been redrafted so that the reports may be exchanged among the four named agencies, but may not be released elsewhere without a court order.

Section 30. This section updates existing law to reflect reorganizations of federal agencies.

Section 31. During the last legislature, a law was adopted prohibiting the waste of salmon. During the deliberations on the bill, however, what was apparently an innocent editorial change resulted in the introduction of an ambiguity in the law which may well nullify its effectiveness. Section 31 would utilize the language employed in the original bill but clear up the ambiguity.

Section 32. The basic prohibition contained in Title 16 is that it is unlawful to possess fish and game unless permitted by statute or a regulation of the boards. This prohibition is contained in AS 16.05.920(a). However, an apparent oversight has limited this prohibition to Chapter 05 only. Therefore, the word "chapter" is changed to "title".

Section 33. AS 16.05.940 is intended to be the basic definitions section for Title 16. However, these definitions apply technically only to Chapter 05, as a result of an apparent oversight. Therefore, Section 33 would change "chapter" to "title".

Section 33 would also change the definition of "resident". There have been many questions by persons who were unsure as to whether or not they were entitled to resident status. In addition, there are considerable loopholes present which allow persons who leave the State or never become bona fide residents to obtain resident licenses.

First, the words "the preceding" are added before "12 consecutive months". Without this, any person who has at any time resided in the State for 12 consecutive months meets the qualification contained in this phrase.

Second, under the new language residents would be required to maintain "their permanent and principal place of abode" in the State to qualify for residency. This would eliminate as a resident the type of person who brings a few belongings to Alaska and shares an apartment in order to avoid non-resident tax fees, but in actuality lives elsewhere. The new language would permit an Alaska resident to have an

additional house in another state (such as a winter home) provided the principal residence and abode was still in Alaska. However, a person who took all his belongings and left the State for eight months out of the year would not be entitled to resident status, even if he owned a home in Alaska. Many cases would have to be judged on their circumstances, but a determination would be possible which reflects the actual situation.

Third, the reference to voting residency is eliminated. It is not an accurate indicator of residence, and such a requirement may be unconstitutional because it requires persons to register in order to enjoy residency privileges, and it disqualifies from residency any person under 18 years of age.

Similar changes are made regarding military personnel and aliens.

Paragraph (6) of the definitions is amended to specify that "fish" includes parts of the fish. This would have applicability, for example, to fish for which the parts are sold individually, such as salmon roe.

Section 34. During the Bristol Bay price dispute last year, the department's role in setting up mediation was hampered by the need to actually certify that 1/3 of the registered fishermen were involved in a price dispute. Given the information available, this is not always possible. Consequently, this section is amended to make the burden on the Department a practical one.

Section 35. This section would make two changes in the private nonprofit salmon hatchery law. First, there should be some limit on the expenditures made from surplus hatchery funds, since "other fisheries activities" includes anything remotely related to fish. Therefore, such expenditures would have to be approved by the Department.

Second, the directive of the last sentence in sec. 450 is not always possible, since salmon sold by hatcheries may not be in a condition comparable to salmon sold commercially through normal channels. Therefore, this requirement would apply only to the extent possible to insure practicality and still prevent abuse.

Section 36-38. Although the legislature has established game refuges, sanctuaries, and critical habitats, required notification for developmental activities, and provided for restrictions in the form of board regulations, there do not

exist any penalties for violating these directives. Therefore, these sections would establish violations as misdemeanors and provide for penalties.

Section 39. Presently, this section requires consent in writing from the board for deployment of poisons. Written consent is an administrative rather than regulation-making function, and belongs with the Department. The amendment would so provide. Additional changes are made so that the restrictions more accurately reflect the objectives of a prohibition of this nature.

Section 40. This section would repeal several existing sections.

AS 16.05.280 provides that members of a board may be removed by the Governor for cause. However, AS 39.05.060 states that members of the boards serve at the pleasure of the Governor. This conflict was not resolved by the legislature in the split board act. However, AS 39.05.060 was amended by that law and the language stipulating that members serve at the Governor's pleasure was not changed, which would seem to indicate the legislature's preference for that approach. Therefore, AS 16.05.280 would be repealed to remove the inconsistency.

AS 16.05.450(c) was intended in the first place to apply to salmon net gear only, although it does not say so. With the advent of limited entry, there does not appear to be any purpose in retaining it, since it is an inconvenience to fishermen.

AS 16.15 is an anachronism, since the laboratory in question no longer exists.

AS 16.35.010-080 pertain in part to bounties which are no longer paid. The bounties on seals are in conflict with the Marine Mammal Protection Act of 1972. Moreover, AS 16.05.255 provides that the Board of Game may establish bounties through the promulgation of regulations. Therefore, these sections should be repealed. Also within these sections are provisions regarding employment of trappers and hunters for predator control which are archaic and should be repealed.

Repeal of the sections pertaining to bounties should also result in repeal of AS 16.05.210, which makes a reference to special hunters of the Department.

Sincerely,

Jay E. Hammond
Governor