

HB

364



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 15, 1988

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to penalties for commercial fishing violations. This bill addresses penalty provisions for both noncriminal strict liability violations and for criminal misdemeanors, and is intended to bring commercial fisheries penalty provisions into conformity with present economic conditions in the fishing industry.

The bill has three main components: (1) clarification of existing penalty provisions regarding license forfeiture and suspension; (2) increasing noncriminal strict liability penalties; and (3) increasing criminal misdemeanor penalties.

With respect to the first component, sec. 1 of the bill amends AS 16.05.710, regarding license forfeiture and suspension for commercial fishing violations, to clarify that commercial fishing licenses may be suspended only after conviction for a criminal violation. Due to the somewhat different status of interim use and limited entry permits, the proposed amendments of AS 16.05.710 also clarify the treatment of a license that is an interim use or entry permit by specifically referring to those permits. In Beran v. State, 705 P.2d 1280 (Alaska App. 1985), the court strongly implied that it would invalidate as unconstitutional any fish or game law that provided for a jail sentence or forfeiture of a commercial fishing license unless the offense is defined in a way that requires proof of a culpable mental state.

Section 2 of the bill makes clear that, for purposes of forfeiture and suspension, a commercial fishing license includes a crewmember license.

The second component of the bill is dealt with in sec. 3. Proposed AS 16.05.722 establishes penalties for noncriminal, strict liability violations, providing for a maximum fine of \$6,000 and mandatory forfeiture of any illegally taken or retained fish. The new statute would create a rebuttable

presumption, patterned after a provision of the Magnuson Fishery Conservation and Management Act (16 U.S.C. sec. 1860(e)) that all fish found on board the vessel or at the fishing site were taken or retained illegally. It is often impossible to prove which individual fish on board a vessel, or at a fishing site, were the fish actually taken or retained illegally. Establishing the rebuttable presumption that all fish on board or at a site were taken or retained illegally will avoid the often impossible burden on the state to prove which specific fish were so taken or retained and will prevent a violator from keeping unlawfully taken fish, while at the same time allowing the violator the opportunity to prove that fish on board the vessel or at the site were actually taken and retained lawfully.

It is widely agreed in the commercial fishing community that the maximum \$300 fine for strict liability offenses established by the court in Constantine v. State, 739 P.2d 188 (Alaska App. 1987) is an insufficient deterrent for commercial fisheries violations. In the Bristol Bay commercial salmon fishery, for example, it is possible to net \$10,000 to \$15,000 worth of fish in one single illegal set. Accordingly, ever since the Constantine decision was issued prosecutors have found it necessary to file virtually all commercial fisheries cases as criminal misdemeanors in order to obtain a realistic fine. This in turn requires the state to prove at least the culpable mental state of negligence, which can be difficult to do in commercial fisheries cases where there are often no witnesses and often the violations occur in remote areas. In addition, it is expensive to try all fisheries cases as criminal misdemeanors, particularly in the bush, since the defendant is entitled to a trial by jury rather than a court trial.

Several lower courts found, after Beran was decided but before the Constantine decision, that AS 16.05.720(a)'s fine of \$5,000 plus AS 16.05.720(c)'s fine of an amount equal to the value of all fish on board, plus AS 16.05.190 -- 16.05.195's forfeiture of gear such as nets, pots, and tackle, was authorized by the legislature for strict liability violations, and was constitutionally permissible even though no jury trial was provided and no public defender appointed.

Moreover, as Court of Appeals Judge James Singleton pointed out in his dissenting opinion in Constantine, at the time the Alaska legislature first established the penalties for commercial fishing violations in 1959 (\$5,000 or one year, in jail, or both), all commercial fishing violations were treated as strict liability offenses.

In Constantine, however, the majority court held that the legislature only intended a \$300 fine and forfeiture of illegally taken fish for strict liability violations. The court has never ruled, however, on the question of what fines, forfeitures, or license penalties can constitutionally be imposed for strict liability violations.

Although proposed AS 16.05.722 raises the maximum fine to \$6,000 for strict liability violations, and retains the provision for mandatory forfeiture of illegally taken fish, it eliminates the possibility of forfeiture of gear. Forfeiture of gear is often a cumbersome process that is not cost effective and does not necessarily deter illegal conduct if the gear can be readily replaced. The increased fine of \$6,000 takes into account the fact that forfeiture of gear is no longer provided, and reflects the pre-Constantine combined fine and gear forfeiture strict liability penalties. It provides a reasonable range of penalties that the trial court can tailor to the individual circumstances of each case and each fishery.

In summary, sec. 3 of the bill will bring treatment of most commercial fisheries cases as strict liability offenses back to the situation that existed before the Beran and Constantine decisions. The section also sets out the rule already established by the court in Beran and in AS 11.81.900(56) that a "violation" is a noncriminal offense and that a person charged with a violation is not entitled to a trial by jury or to representation at public expense. It also specifies that in a noncriminal violation the state bears the burden of proving the violation "by a preponderance of the evidence."

The third component of the bill is also dealt with in sec. 3. Proposed AS 16.05.723 changes the penalties for misdemeanor commercial fisheries violations to more accurately reflect current economic conditions in Alaska's commercial fisheries. The existing maximum fine in AS 16.05.720 for commercial fisheries violations is \$5,000, a figure established under territorial law in 1924, enacted as AS 16.05.720 in 1959, and not amended since then. Commercial fishing in Alaska has evolved into a highly regulated, competitive industry with, for example, limited entry permits for the Bristol Bay salmon fishery selling for in excess of \$100,000 and potential profits in several fisheries in the six digit range. A \$5,000 fine for a violation of the state's commercial fisheries laws and regulations is an inadequate penalty. Proposed AS 16.05.723(a) increases the

maximum fine to \$15,000, which more accurately reflects current economic conditions in the fishing industry.

Proposed AS 16.05.723(a) also specifies that the court shall order forfeiture of all illegally taken or retained fish found on board the vessel or at the fishing site at the time of the violation. The proposed statute creates a rebuttable presumption that all fish found on board the vessel or at the fishing site were taken or retained illegally. As explained above, this provision is necessary to avoid allowing a person convicted of a fishing violation to retain illegally taken fish.

Proposed AS 16.05.723(b) and (c) continue the mandatory penalty provisions of current AS 16.05.720 for certain particularly serious offenses. For the crimes specified, proposed AS 16.05.723(b) and (c) mandate, in addition to the other penalties in the section, imposition of a fine equal to the gross value of the fish found on board or at the site at the time of the violation, with the fine increasing to three times the value of the fish, or a fine of \$10,000, whichever is greater, for a third or subsequent conviction within a 10-year period. Violation convictions and misdemeanor convictions both count toward the enhanced penalty.

Proposed AS 16.05.723(a) also makes it clear that once fish are forfeited under that section, the court cannot additionally order forfeiture of the fish or their fair market value under AS 16.05.195. However, it also is the intent of this bill that imposition of a penalty under AS 16.05.722 or 16.05.723 is not a bar to other remedies such as a civil damages action or a civil in rem forfeiture action under AS 16.05.195. Furthermore, it is not the intent of this bill that the penalties in AS 16.05.710, 16.05.722, and 16.05.723 would supersede or affect penalties under limited entry law in AS 16.43.

The existing commercial fisheries penalty section, AS 16.05.720, is repealed by sec. 5 of the bill.

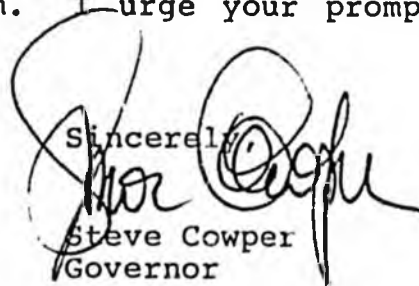
Because of the need to have this important legislation operative in time for the 1988 commercial fishing season, the bill includes an immediate effective date.

Drafts of this bill have been discussed extensively with the Department of Public Safety, division of fish and wildlife

The Honorable Ben Grussendorf

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protection, the Department of Fish and Game, district attorneys, and other attorneys in the Department of Law, and is strongly supported by them. I urge your prompt action on this bill.

Sincerely,

Steve Cowper
Governor

SENATE COMMITTEE REPORT

FURTHER

DATE TURNED INTO OFFICE _____

4/29/88

Mr. President:

Resources _____ Committee considered Sc CSHB 364 (JUD)

commercial fishing violations; efd

and recommended

replace with Sen CS For CS For HB 364) same title
 or adopt _____ CS _____) new title

attached amendment(s) and

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

letter of intent adopted _____

Committee attached or adopted fiscal note(s)

new updated or previous

zero fiscal impact

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

[Signature]
Paul Gruber
[Signature]
[Signature]

[Signature]
Chairman signature and recommendation

Committee Backup attached



STATE OF ALASKA
OFFICE OF THE GOVERNOR

BILL ANALYSIS

DEPARTMENT Fish and Game	DIVISION Commercial Fish	BILL NUMBER CSHB 364(JUD)	SPONSOR House Rules
SHORT TITLE OF BILL An act relating to commercial fishing violations			
DEPARTMENT POSITION Support			
PREPARED BY <i>Robert C. Clasky</i> ROBERT C. CLASKY	DATE 5/3/88	COMMISSIONER'S SIGNATURE <i>[Signature]</i>	DATE 5/3/88

SUMMARY

OTHER AGENCIES AFFECTED BY BILL Public Safety Law	CONSTITUENT GROUP(S) AFFECTED BY BILL Commercial Fishermen
ORGANIZATIONAL SUPPORT FOR BILL Unknown	ORGANIZATIONAL OPPOSITION TO BILL Unknown

FISCAL IMPACT: NONE FISCAL NOTE ATTACHED

BACKGROUND/LEGISLATIVE INTENT

Recent court action has reduced the maximum fine for strict liability violations of commercial fishing violations to \$300. The department did not feel that level of fine was adequate to deter violations, and therefore requested introduction of legislation so the problem could be addressed.

ANALYSIS OF BILL/PROGRAM EFFECTS

The department believes that the committee substitute most likely achieves a balance between the concerns of the public and the state. The fines and other punishments should provide a level of deterrent that will cause fishermen to seriously consider their actions, while not being heavy handed to those that make an honest mistake.

AMENDMENTS PROPOSED

None

PLEASE ATTACH A SEPARATE SHEET FOR ADDITIONAL COMMENTS OR ANALYSIS.

STATE OF ALASKA
1988 LEGISLATIVE SESSIONBill Version: HB 364
Publish Date: HOUSE 1/15/88

FISCAL NOTE

REQUEST

Revision Date: _____
Title: An act relating to commercial
fishing and providing for an effective
dateAgency Affected: Public Safety
BRU: Fish & Wildlife ProtectionSponsor: Rules - Governor's Request
Requestor: _____

Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTS						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING:: (Thousands of Dollars)

GENERAL FUNDS	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Colonel Jack Jordan
Division: Fish & Wildlife ProtectionPhone: 269-5532
Date: 01/07/88Approved by Commissioner: *Wayne H. ...*
Agency: Public SafetyDate: 01/07/88Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 364
PUBLISH DATE: HOUSE 1/15/88

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: ADF&G
Title: An Act relating to commercial fishing violations and providing for an effective date. BRU: _____
Sponsor: Rules Committee Components: _____
Requestor: Governor

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

[Empty box for analysis]

Prepared by: Roland Shanks Phone: 465-4100
Division: Commissioner's Office Date: 1/11/88
Approved by Commissioner: Bill Colman Date: 1-11-88
Agency: Fish and Game

- Distribution (by preparer):
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management and Budget
 - Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 364 (Jud)
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: 5/3/88
Title: "An Act relating to commercial fishing violations..."
Sponsor: Rules/Governor's Request
Requestor: Senate Resources

Agency Affected: Public Safety
BRU: Fish & Wildlife Protection
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL		-0-	-0-	-0-	-0-	-0-
REVENUE		-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME		0	0	0	0	0
PART-TIME		0	0	0	0	0
TEMPORARY		0	0	0	0	0

ANALYSIS : (Attach a separate page if necessary)

No fiscal impact is anticipated.

Prepared by: Colonel Jack Jordan/dp Phone: 269-5532
Division: Fish & Wildlife Protection Date: 5/3/88
Approved by Commissioner: *J.A.H.* Arthur English Date: 5/3/88
Agency: Public Safety

Distribution (by preparer):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act relating to commercial fishing violations
Sponsor: House Rules
Requestor: Senator Coghill

Agency Affected: Fish and Game
BRU: Commercial Fisheries
Components: Commercial Fisheries

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Robert C. Clasby Phone: 465-4210
Division: Commercial Fisheries Date: 5/3/88
Approved by Commissioner: [Signature] Date: 5/3/88
Agency: Fish and Game

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

May 3, 1988

STEVE COWPER, GOVERNOR

REPLY TO:

1031 W 4th AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550

1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701-4679

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

The Honorable John B. (Jack) Coghill
Chairman, Senate Resources Committee
Members, Senate Resources Committee
P.O. Box V
Juneau, Alaska 99811

Re: CS for HB 364 (Jud.)
(Commercial fisheries penalties)

Dear Senators:

This letter confirms the Departments of Law, Public Safety, and Fish and Game's support for CS for HB 364 (Jud.), which your committee has scheduled for hearing on Wednesday, May 4 at 1:30 p.m. We believe that the bill as amended in the House provides a workable program for enforcement of commercial fisheries laws and regulations and we urge your committee's and the full Senate's approval of the bill.

The concerns addressed in our previous letters, including the April 22, 1988, letter to the House Judiciary committee have been for the most part resolved by the House Judiciary Committee substitute and we do not recommend any additional amendments. We view the bill as expressing the very reasonable legislative conclusion that a fine of up to \$3,000 for a first offense and up to \$6,000 for a subsequent offense represents, in the context of commercial fisheries, a fine that is not "criminal in nature." This provision tracks past approaches to commercial fisheries fines and is consistent with testimony from fishermen presented to the Board of Fisheries during a hearing on this bill.

We urge the expeditious approval of this bill so that we will have a law in place for the 1988 fishing season.

Thank you.

Very truly yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: *Sarah E. McCracken*
Sarah E. McCracken
Assistant Attorney General

SEM:jem

go0288hX

Hein

5/6/88

Original sponsor: Rules/Governor

1 IN THE HOUSE

BY THE RESOURCES COMMITTEE

2 SENATE CS FOR CS FOR HOUSE BILL NO. 364 (Resources)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to commercial fishing violations;
7 and providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 16.05.710(a) is repealed and reenacted to read:

0 (a) A person convicted of a misdemeanor for violating AS 16.05.-
1 440 - 16.05.690 or a federal or state commercial fishing statute or
2 regulation is, in addition to other penalties provided by law, subject
3 to the following penalties:

4 (1) upon a first or second conviction the court may sus-
5 pend, for a period of not more than one year,

6 (A) the person's commercial fishing license and the
7 right to obtain a limited entry permit; or

8 (B) one or more of the person's limited entry permits
9 and the person's right to obtain a commercial fishing license;
10 and

11 (2) upon a third or subsequent conviction the court shall
12 suspend, for a period of not more than three years,

13 (A) the person's commercial fishing license and the
14 right to obtain a limited entry permit; or

15 (B) one or more of the person's limited entry permits
16 and the person's right to obtain a commercial fishing license.

17 * Sec. 2. AS 16.05.710 is amended by adding new subsections to read:

18 (c) During the period for which a limited entry permit is sus-
19 pended under (a) of this section a permit card may not be issued and

1 the permit may not be transferred or sold.

2 (d) In this section

3 (1) "commercial fishing license" includes a crew member
4 license;

5 (2) "limited entry permit" includes an interim use permit.

6 * Sec. 3. AS 16.05 is amended by adding new sections to read:

7 Sec. 16.05.722. STRICT LIABILITY COMMERCIAL FISHING PENALTIES.

8 (a) A person who without any culpable mental state violates AS 16.-
9 05.440 - 16.05.690, or a regulation of the Board of Fisheries or the
0 department governing commercial fishing, is guilty of a violation and
1 upon conviction is punishable by a fine of not more than

2 (1) \$3,000 for a first conviction; and

3 (2) \$6,000 for a second or subsequent conviction.

4 (b) In addition, the court shall order forfeiture of any fish,
5 or its fair market value, taken or retained as a result of the commis-
6 sion of the violation. For purposes of this subsection, it is a
7 rebuttable presumption that all fish found on board a fishing vessel
8 used in or in aid of a violation, or found at the fishing site, were
9 taken or retained in violation of AS 16.05.440 - 16.05.690 or a com-
0 mercial fisheries regulation of the Board of Fisheries or the depart-
1 ment. It is the defendant's burden to show by a preponderance of the
2 evidence that fish on board or at the site were lawfully taken and
3 retained.

4 (c) A person charged with a violation under this section is
5 entitled to a trial by court but not by jury, and is not entitled to
6 representation at public expense.

7 Sec. 16.05.723. MISDEMEANOR COMMERCIAL FISHING PENALTIES. (a)

8 A person who negligently violates AS 16.05.440 - 16.05.690, or a
9 regulation of the board of fisheries or the department governing

1 commercial fishing, is guilty of a misdemeanor and in addition to
2 punishment under other provisions in this title, including AS 16.05.-
3 195 and 16.05.710, is punishable upon conviction by a fine of not more
4 than \$15,000 or by imprisonment for not more than one year, or by
5 both. In addition, the court shall order forfeiture of any fish, or
6 its fair market value, taken or retained as a result of the commission
7 of the violation, and the court may forfeit any vessel and any fishing
8 gear, including any net, pot, tackle, or other device designed or
9 employed to take fish commercially, that was used in or in aid of the
0 violation. Any fish, or its fair market value, forfeited under this
1 subsection may not also be forfeited under AS 16.05.195. For purposes
2 of this subsection, it is a rebuttable presumption that all fish found
3 on board a fishing vessel used in or in aid of a violation, or found
4 at the fishing site, were taken or retained in violation of AS 16.05.-
5 440 - 16.05.690 or a commercial fisheries regulation of the board of
6 fisheries or the department, and it is the defendant's burden to show
7 by a preponderance of the evidence that fish on board or at the site
8 were lawfully taken and retained.

9 (b) If a person is convicted under this section of one of the
10 following offenses, then, in addition to the penalties imposed under
11 (a) of this section, the court may impose a fine equal to the gross
12 value of the fish found on board or at the fishing site at the time of
13 the violation:

14 (1) commercial fishing in closed waters;
15 (2) commercial fishing during a closed period or season;
16 (3) commercial fishing with unlawful gear, including a net,
17 pot, tackle, or other device designed or employed to take fish commier-
18 cially; or

19 (4) commercial fishing without a limited entry permit

holder on board if the holder is required by law or regulation to be present.

(c) Upon a third misdemeanor conviction within a period of 10 years for an offense listed in (b) of this section or any combination of offenses listed in (b) of this section, the court shall impose, in addition to any penalties imposed under (a) of this section, a fine equal to three times the gross value of the fish found on board or at the fishing site at the time of the offense, or a fine equal to \$10,000, whichever is greater.

* Sec. 4. AS 16.05.925 is amended to read:

Sec. 16.05.925. PENALTY FOR VIOLATIONS. Except as provided in AS 16.05.430, 16.05.722, 16.05.723, [16.05.720,] 16.05.831, and 16.05.860, a person who violates AS 16.05.920, or a regulation adopted under this chapter or AS 16.20, is guilty of a class A misdemeanor.

* Sec. 5. AS 16.05.720 is repealed.

* Sec. 6. Notwithstanding the provisions of this Act, in a case pending on the effective date of this Act involving a commercial fishing violation that occurred before the effective date of this Act, the court shall apply the law that was in effect on the date the violation occurred.

* Sec. 7. This Act takes effect immediately under AS 01.10.070(c).

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Hein
5/4/88

Original sponsor: Rules/Governor

1 IN THE HOUSE

BY THE RESOURCES COMMITTEE

2 SENATE CS FOR CS FOR HOUSE BILL NO. 364 (Resources)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

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11 440 - 16.05.690 or a federal or state commercial fishing statute or
12 regulation is, in addition to other penalties provided by law, subject
13 to the following penalties:

14 (1) upon a first or second conviction the court may sus-
15 pend, for a period of not more than one year,

16 (A) the person's commercial fishing license and the
17 right to obtain a limited entry permit; or

18 (B) one or more of the person's limited entry permits
19 and the person's right to obtain a commercial fishing license;
20 and

21 (2) upon a third or subsequent conviction the court shall
22 suspend, for a period of not more than three years,

23 (A) the person's commercial fishing license and the
24 right to obtain a limited entry permit; or

25 (B) one or more of the person's limited entry permits
26 and the person's right to obtain a commercial fishing license.

27 * Sec. 2. AS 16.05.710 is amended by adding new subsections to read:

28 (c) During the period for which a limited entry permit is sus-
29 pended under (a) of this section a permit card may not be issued and

1 the permit may not be transferred or sold.

2 (d) In this section

3 (1) "commercial fishing license" includes a crew member
4 license;

5 (2) "limited entry permit" includes an interim use permit.

6 * Sec. 3. AS 16.05 is amended by adding new sections to read:

7 Sec. 16.05.722. STRICT LIABILITY COMMERCIAL FISHING PENALTIES.

8 (a) A person who without any culpable mental state violates AS 16.-
9 05.440 - 16.05.690, or a regulation of the Board of Fisheries or the
10 department governing commercial fishing, is guilty of a violation and
11 upon conviction is punishable by a fine of not more than

12 (1) \$3,000 for a first conviction; and

13 (2) \$6,000 for a second or subsequent conviction.

14 (b) In addition, the court shall order forfeiture of any fish,
15 or its fair market value, taken or retained as a result of the commis-
16 sion of the violation. For purposes of this subsection, it is a
17 rebuttable presumption that all fish found on board a fishing vessel
18 used in or in aid of a violation, or found at the fishing site, were
19 taken or retained in violation of AS 16.05.440 - 16.05.690 or a com-
20 mercial fisheries regulation of the Board of Fisheries or the depart-
21 ment. It is the defendant's burden to show by a preponderance of the
22 evidence that fish on board or at the site were lawfully taken and
23 retained.

24 (c) A person charged with a violation under this section is
25 entitled to a trial by court but not by jury, and is not entitled to
26 representation at public expense.

27 Sec. 16.05.723. MISDEMEANOR COMMERCIAL FISHING PENALTIES. (a)

28 A person who negligently violates AS 16.05.440 - 16.05.690, or a
29 regulation of the board of fisheries or the department governing

1 commercial fishing, is guilty of a misdemeanor and in addition to
2 punishment under other provisions in this title, including AS 16.05.-
3 195 and 16.05.710, is punishable upon conviction by a fine of not more
4 than \$15,000 or by imprisonment for not more than one year, or by
5 both. In addition, the court shall order forfeiture of any fish, or
6 its fair market value, taken or retained as a result of the commission
7 of the violation, and the court may forfeit any vessel and any fishing
8 gear, including any net, pot, tackle, or other device designed or
9 employed to take fish commercially, that was used in or in aid of the
10 violation. Any fish, or its fair market value, forfeited under this
11 subsection may not also be forfeited under AS 16.05.195. For purposes
12 of this subsection, it is a rebuttable presumption that all fish found
13 on board a fishing vessel used in or in aid of a violation, or found
14 at the fishing site, were taken or retained in violation of AS 16.05.-
15 440 - 16.05.690 or a commercial fisheries regulation of the board of
16 fisheries or the department, and it is the defendant's burden to show
17 by a preponderance of the evidence that fish on board or at the site
18 were lawfully taken and retained.

19 (b) If a person is convicted under this section of one of the
20 following offenses, then, in addition to the penalties imposed under
21 (a) of this section, the court may impose a fine equal to the gross
22 value of the fish found on board or at the fishing site at the time of
23 the violation:

- 24 (1) commercial fishing in closed waters;
25 (2) commercial fishing during a closed period or season;
26 (3) commercial fishing with unlawful gear, including a net,
27 pot, tackle, or other device designed or employed to take fish commer-
28 cially; or
29 (4) commercial fishing without a limited entry permit

1 holder on board if the holder is required by law or regulation to be
2 present.

3 (c) If, within the 10 years preceding an offense, a person has
4 been convicted two or more times of a misdemeanor offense listed in
5 (b) of this section or under former AS 16.05.720, then, upon a con-
6 viction of that person under this section for an offense listed in (b)
7 of this section, and in addition to the penalties imposed under (a) of
8 this section, the court shall impose a fine equal to three times the
9 gross value of the fish found on board or at the fishing site at the
10 time of the offense, or a fine equal to \$10,000, whichever is greater.

11 * Sec. 4. AS 16.05.925 is amended to read:

12 Sec. 16.05.925. PENALTY FOR VIOLATIONS. Except as provided in
13 AS 16.05.430, 16.05.722, 16.05.723, [16.05.720,] 16.05.831, and 16.-
14 05.860, a person who violates AS 16.05.920, or a regulation adopted
15 under this chapter or AS 16.20, is guilty of a class A misdemeanor.

16 * Sec. 5. AS 16.05.720 is repealed.

17 * Sec. 6. The provisions of this Act do not apply to commercial fishing
18 violations that occurred before the effective date of this Act.

19 * Sec. 7. This Act takes effect immediately under AS 01.10.070(c).
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PRESENT LAW

AS 16.05.720:

All violations of AS 16.05.480-16.05.690 are misdemeanors punishable by:

- a) fine up to \$5000
- b) up to 1 year in prison

Additional penalties:

AS 16.05.710:
forfeiture of commercial fishing license for up to one year (1st & 2nd conviction);
up to three years (3rd conviction)

AS 16.05.190:
equipment used in violation of F & G statutes and regulations may be seized and may be forfeited after conviction in a criminal case under AS 16.05.195 (a)(1) or in a civil proceeding under AS 16.05.195(a)(2).

HB 364

AS 16.05.720 is repealed.

New sec. 16.05.723, provides that one who negligently violates 16.05.44-16.05.690 is guilty of a misdemeanor and is punishable by:

- a) a fine up to \$15,000
- b) up to 1 year in prison

Additional penalties:

AS 16.05.710:
amended to include possible forfeiture of limited entry permits and interim use permits. Only misdemeanor convictions subject offender to possible forfeiture of licenses & permits.

AS 16.05.190: no change.
(Note: this section makes reference to forfeiture upon conviction for a violation of F & G statutes and regulations. This presumably means that the forfeiture applies regardless

CSHB 364

AS 16.05.720 is repealed.

Same as HB 364

Same as HB 364

Same as HB 364

Additional penalties:

Same as HB 364, except 3-year license suspension/forfeiture kicks in at second conviction.

Same as HB 364

Under AS 16.05.190, fish may be seized under a valid search. Upon conviction, the fish are forfeited, according to the statute.

Under AS 16.05.195, fish taken, transported or possessed in violation of Title 16 or F & G regulations may be forfeited after conviction in a criminal case or in a civil proceeding.

If convicted of one of the "BIG 4" violations, in addition to all other penalties, the violator is punishable by a fine of not less than the gross value to the fisherman of the fish found on the vessel or at the fishing site at the time of the violation. If it's a 3rd conviction, in addition to the possible license forfeiture under AS 16.05.710, the fine is not less than three times the gross value of the fish or \$10,000., whichever is greater.

of the offender's mental state.)

AS 16.05.195: no change. (Note: 16.05.723 itself requires the court to forfeit any fish taken in connection with the violation (or its fair market value). There is a rebuttable presumption that fish found on board or at the site were taken in violation of the law. The Court may not use both .195 and .723 to make a double forfeiture

If convicted of one of the "Big 4" offenses prosecuted as a misdemeanor, the additional fine for gross value of the fish remains as in existing law.

AS 16.05.195 not amended, but 16.05.723 gives Court discretion to forfeit fish.

Same as HB 364, except that "gross value" fines are discretionary with the Court.

The Court of Appeals has ruled that, absent authorization from the Legislature, the penalties for any offenses prosecuted under a strict liability theory may not include imprisonment, and that fines may not exceed \$300.

New section 16.05.722 provides that that a person who offends with no culpable mental state is guilty of a violation and is punishable by:

- a) a fine of up to \$6,000
- b) mandatory forfeiture of fish taken in connection with the violation.

There is no jury trial and no public representation.

Same as HB 364, except Court may impose the following:

- a) \$3,000 fine for 1st conviction
\$6,000 fine for 2nd and subsequent convictions.
- b) additional fine of 50% of value of fish on board or at site at time of violation. (1st conviction)
additional fine of full value of fish (2nd and subsequent convictions)

COMPARISON - existing law v. CSHB 364 (Judiciary)		
	Violation	Misdemeanor
standard	now: strict liability HB364: same	negligence same
jury	now: no HB364: same	yes same
public defender	now: no HB364: same	yes same
jail	now: no HB364: same	up to one year same
finest (maximum)	now: \$ 300 HB364: \$ 3,000 1st offense \$ 6,000 2nd or subsequent offense	\$ 5,000 \$ 15,000 * larger potential fine in "big 4" cases and/or for 3-time offenders
forfeiture and suspension	<p>now: AS.16.05.190 calls for discretionary forfeiture of gear, mandatory forfeiture of fish in violation or misdemeanor cases. AS 16.05.195 calls for discretionary forfeiture in misdemeanor cases.</p> <p>AS 16.05.710(a) allows for forfeiture & suspension of "licenses". it's unclear as to whether this means crewmember licenses OR limited entry permits, also unclears as to whether a CRIMINAL conviction is required for forfeiture of these licenses. (this subsection was written in 1960, long before limited entry permits existed)</p> <p>HB 364: FISH: Upon conviction, fish are forfeited in either strict liability or misdemeanor cases. However, bill establishes rebuttable presumption that fish were taken illegally. If defendant can prove some or all of the fish were not taken illegally, they can get them (or their fair market value) back. The defendant must prove this by a preponderance of the evidence.</p>	
	EQUIPMENT: vessel or gear CANNOT be forfeited	Vessel or gear MAY be forfeited by court
	LICENSE OR PERMIT: CANNOT be suspended.	License and/or permit MAY be suspended for up to 1 year for a first or second misdemeanor conviction, SHALL be suspended for up to 3 years for a third or subsequent conviction. Cannot be transferred or sold while suspended.

The reason for HB 364 is this: recent court of appeals decisions have seriously reduced the deterrent effect of penalties for commercial fishing offenses. The pertinent court cases are:

Reynolds v. State (1982)
Beran v. State (1985)
Constantine v. State (1987)

In Reynolds v. State, the court refused to hold a commercial fisherman "strictly liable" for his conduct, requiring the state to prove at least a culpable mental state of negligence to establish a criminal offense. The court did suggest, indirectly, that the legislature could enact a "strict liability" violation category if it wished.

Subsequently, the Board of Fish adopted regulations establishing strict liability as an applicable mental state for commercial fishing violations.

In Beran v. State, the court affirmed that the legislature had authorized the Board to make the breach of commercial fishing regulations a "violation", but that this strict liability offense could not lead to "criminal penalties". In this particular case, "criminal penalties" was defined as a jail sentence. The court indicated it would uphold the fine of \$2500.

In Constantine v. State, because they lacked other legislative definition, the court concluded that a "violation" in a commercial fishing case would also fall under the definition of "violation" for criminal procedure, and applied AS 12.55.035(b)(5), which limits fines to \$300. If the state wished to impose a larger fine, it would have to prove negligence mens rea, and prosecute the case as a criminal offense, rather than relying on the strict liability.

Through all these cases, the court did not address, or else they upheld, forfeiture of the fish taken as a result of the offense.

CS HB 364 (Judiciary) accomplishes the following:

Bill Sec 1.

Revised AS 16.05.170 (a): Clarifies that the court may suspend a commercial fishing license and/or limited entry permit for a criminal conviction (not a strict liability conviction).

Bill Sec. 2.

Revised AS 16.05.710: Clarifies that while a permit is suspended, a

card may not be issued and the permit may not be transferred or sold, also clarifies the definition of licenses and permits.

Bill Sec. 3.

New AS 16.05.722: Establishes strict liability offenses as violations, and sets penalties. Clarifies existing law that upon conviction, forfeiture of illegally taken fish (or their fair market value) is mandatory.

Note: it is a "rebuttable presumption" that the fish on board or at the site were taken illegally. If the defendant can prove the contrary by a preponderance of the evidence, they can reclaim all or part of the fish (or their fair market value).

Also, it makes it clear that for a strict liability offense, the defendant is not allowed a jury trial or public defender (the same as a "violation" under criminal code).

New AS 16.05.722: Raises the maximum fine for a criminal commercial fishing conviction from \$5,000 (established in 1924) to \$15,000, more accurately reflecting the current value of commercial fishing offenses. Also states that forfeiture of fish is mandatory upon conviction, and allows for the same "rebuttable presumption" as in strict liability offenses. As in existing law, forfeiture of gear or vessels is up to the discretion of the court.

If the conviction is for one of the following (referred to as the "big four"), the court MAY impose an additional fine equal to the gross value of the fish:

1. Commercial fishing in closed waters,
2. Commercial fishing during a closed period or season,
3. Commercial fishing with illegal gear,
4. Commercial fishing without a limited entry permit or the permit holder present, if required by law or regulation.

Additionally, if it is the defendant's THIRD criminal conviction of one of the "big four" listed above, the court SHALL impose a fine equal to three times the gross value of the fish, or \$10,000, whichever is greater.

Bill Sec.'s 4 and 5 make the proper technical amendments to existing statutes.

Bill Sec. 6 is the effective date clause.