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REPRESENTATIVE ALAN AUSTERMAN Alaska State Legislature

P.O. Box 2368, Kodiak, Alaska 99615 (907) 486-5930 • Session: State Capitol, Juneau, Alaska 99801 465-2487

Sponsor Statement HB 542

**"An Act relating to participation in matters before the Board of Fisheries
by members of the board."**

March 19, 1996

This legislation was introduced because of a growing frustration among fishing Alaskans. Alaskans involved in fisheries have witnessed an erosion in their Board of Fisheries process in recent years. The cause is the reinterpretation and consequent increased interference of the Executive Ethics Act by the Attorney General's Office.

HB 542 adjusts the conflict of interest laws in the Executive Ethics Act as they apply to the Board of Fisheries. It stipulates that all members will vote, after disclosure, despite their financial or personal interest. Historically, this is how the board functioned - with full participation after conflict of interest disclosure. It has only been in the last few years that a conflict has disqualified participation on a vote.

You have in your backup a memorandum from myself to Speaker Phillips which refers to a meeting a month ago that I arranged which was attended by six Board of Fisheries chairmen. Three of these chairmen came from a commercial background, three from a sportfish background. Their foremost recommendation was for a legislative fix to the conflict of interest of the Executive Ethics Act.

The chairmen unanimously emphasized a conflict of interest adjustment was necessary to minimize attorney interference in the board process and to require board members to vote. Furthermore, they asserted that members of the industry are necessary to and inherent in a successful lay board process. Today, under the current AG opinions, any financial involvement disqualifies a member from voting, thereby discouraging expertise on the board. Meanwhile, a personal interest has yet to disqualify any member from voting.

This bill will bring the Board process back to the people who know the industries and who know fish. Our Board of Fisheries is a model in resource management, longstanding in its successful track record and public involvement. HB 542 will let the Board of Fish function like it should, like it did, and how it was intended to work.

(2) people who serve as public officers retain their rights to interests of a personal or financial nature; and

(3) standards of ethical conduct for members of the executive branch need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interests that are substantial and material.

(b) Unethical conduct is prohibited, but there is no substantial impropriety if, as to a specific matter, a public officer's

(1) personal or financial interest in the matter is insignificant, or of a type that is possessed generally by the public or a large class of persons to which the public officer belongs; or

(2) action or influence would have insignificant or conjectural effect on the matter.

(c) The attorney general, designated supervisors, hearing officers, and the personnel board must be guided by this section when issuing opinions and reaching decisions. (§ 1 ch 87 SLA 1986)

NOTES TO DECISIONS

Significance of personal or financial interest. — Substantial evidence supported the hearing officer's findings that Department of Corrections' official had neither a personal nor a financial interest in the awarding of a contract concerning

the housing of minimum security prisoners to a bidder for whom she had served as vice-president of operations. *Kila, Inc. v. State*, 875 P.2d 1102 (Alaska 1994).

Cited in *Gates v. City of Tenakee Springs*, 822 P.2d 455 (Alaska 1991).

Sec. 39.52.120. Misuse of official position. (a) A public officer may not use, or attempt to use, an official position for personal gain, and may not intentionally secure or grant unwarranted benefits or treatment for any person.

(b) A public officer may not

(1) seek other employment or contracts through the use or attempted use of official position;

(2) accept, receive, or solicit compensation for the performance of official duties or responsibilities from a person other than the state;

(3) use state time, property, equipment, or other facilities to benefit personal or financial interests;

(4) take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest; or

(5) attempt to benefit a personal or financial interest through coercion of a subordinate.

(c) In addition to other provisions of this section, a public officer who is a member of the Board of Fisheries or the Board of Game may not act on a matter before the board if the public officer has not disclosed in the manner set out in AS 39.52.220 all personal or financial interests in a business or organization relating to fish or game resources. (§ 1 ch 87 SLA 1986; am § 5 ch 121 SLA 1992)

Sec. 39.52.210. Declaration of potential violations by public employees. (a) A public employee who is involved in a matter that may result in a violation of AS 39.52.110 — 39.52.190 shall

(1) refrain from taking any official action relating to the matter until a determination is made under this section; and

(2) immediately disclose the matter in writing to the designated supervisor.

(b) A public employee's designated supervisor shall make a written determination whether an employee's involvement violates AS 39.52.110 — 39.52.190. If the supervisor determines that a violation could exist or will occur, the supervisor shall,

(1) reassign duties to cure the employee's potential violation, if feasible; or

(2) direct the divestiture or removal by the employee of the personal or financial interests that give rise to the potential violation.

(c) A designated supervisor may request guidance from the attorney general, in accordance with AS 39.52.240, when determining whether a public employee is involved in a matter that may result in a violation of AS 39.52.110 — 39.52.190. (§ 1 ch 87 SLA 1986)

Sec. 39.52.220. Declaration of potential violations by members of boards or commissions. (a) A member of a board or commission who is involved in a matter that may result in a violation of AS 39.52.110 — 39.52.190 shall disclose the matter on the public record and in writing to the designated supervisor. The supervisor shall determine whether the member's involvement violates AS 39.52.110 — 39.52.190. If a member of the board or commission objects to the ruling of the supervisor, or if the supervisor discloses an involvement requiring a determination, the members present at a meeting, excluding the involved member, shall vote on the matter. If the supervisor or a majority of the members voting determine that a violation will exist if the member continues to participate, the member shall refrain from voting, deliberating, or participating in the matter.

(b) The designated supervisor or the board or commission may request guidance from the attorney general, in accordance with AS 39.52.240, when determining whether a member of a board or commission is involved in a matter that may result in a violation of AS 39.52.110 — 39.52.190. (§ 1 ch 87 SLA 1986)

Sec. 39.52.230. Reporting of potential violations. A person may report to a public officer's designated supervisor, under oath and in writing, a potential violation of AS 39.52.110 — 39.52.190 by the public officer. The supervisor shall provide a copy of the report to the officer who is the subject of the report, and shall review the report to determine whether a violation may exist. The supervisor shall act in accordance with AS 39.52.210 or 39.52.220 if the supervisor deter-

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Sec. 39.52.240. Advisory opinions. (a) Upon the written request of a designated supervisor or a board or commission, the attorney general shall issue opinions interpreting this chapter. The requester must supply any additional information requested by the attorney general in order to issue the opinion. Within 60 days after receiving a complete request, the attorney general shall issue an advisory opinion on the question.

(b) The attorney general may offer oral advice if delay would cause substantial inconvenience or detriment to the requesting party.

(c) The designated supervisor or a board or commission shall make a written determination based on the advice of the attorney general. If the advice of the attorney general provides more than one way for a public officer to avoid or correct a problem found under AS 39.52.110 — 39.52.190, the designated supervisor or the board or commission shall, after consultation with the officer, determine the alternative that is most appropriate and advise the officer of any action required of the officer to avoid or correct the problem.

(d) A public officer is not liable under this chapter for any action carried out in accordance with a determination made under AS 39.52.210 — 39.52.240 if the officer fully disclosed all relevant facts reasonably necessary to the determination.

(e) The attorney general may reconsider, revoke, or modify an advisory opinion at any time, including upon a showing that material facts were omitted or misstated in the request for the opinion.

(f) A person may rely on an advisory opinion that is currently in effect.

(g) A request for advice made under (a) of this section is confidential.

(h) The attorney general shall publish in the Alaska Administrative Journal, with sufficient deletions to prevent disclosure of the persons whose identities are confidential under (g) of this section, the advisory opinions issued under this section that the attorney general determines to be of major import because of their general applicability to executive branch officers. (§ 1 ch 87 SLA 1986)

NOTES TO DECISIONS

Opinion not required. — In the absence of any personal or financial interest in the contested contract, and given the fact that state official did not participate in or influence the contract award process,

official was not required to contact the Attorney General regarding the alleged conflict of interest. *Kila, Inc. v. State*, 875 P.2d 1102 (Alaska 1994).



REPRESENTATIVE ALAN AUSTERMAN Alaska State Legislature

P.O. Box 2368, Kodiak, Alaska 99615 (907) 486-5930 • Session: State Capitol, Juneau, Alaska 99801 465-2487

MEMORANDUM

DATE: February 28, 1996

TO: Representative Gail Phillips, Speaker
House of Representatives

FROM: Representative Alan Austerman, Chairman
House Special Committee on Fisheries

RE: Board of Fisheries Chairmen's Meeting

Our Board of Fish chairman's meeting met in Anchorage on February 15th and 16th and was a great success. Thank you for the opportunity to assemble five prior Board of Fisheries chairmen and the current chairman for this meeting. The meeting was designed as an informal roundtable discussion. The only request on my part was to look at the outline of concerns I supplied for the meeting.

As I know you are aware, these are turbulent times for our fisheries and the board process which governs it. I know you share my thoughts that we need to identify and address some of the current trends regarding commercial fisheries.

The chairmen voiced concern about the current level of politics prevalent in Board of Fisheries appointments and in the legislative confirmation process in general. While some of it is inherent in the process, the level of questionably intended appointments and political motives abound at unprecedented levels.

The chairmen were unanimous that the Board of Fisheries remain a lay board. They felt it would be a great loss to the state if this process gave way to a professional board as other states have done. The resistance to the professional board primarily rests with the loss of varied experience to the board, public accessibility to the board and the longstanding successful track record of our Board of Fisheries.

It was also unanimous that a professional board be seriously considered only if the political interference continued and the conflict of interest could not be adjusted to be "workable" to foster the present lay board process. There was suggestion that establishment of a professional board would require careful implementation of specific guidelines for appointment and procedures which, the group felt, they could devise if the lay board changes could not be attained.

Specifically, in order to assist the lay board, the chairmen suggested (1) modification of the conflict of interest law, (2) adoption of a better appointment time frame, as in CSHB 141, and (3) provide Board staff support.

Conflict of Interest

The topic of conflict of interest took center stage at the meeting. The chairmen said that the application of the executive branch's conflict of interest laws and the recent interpretation of these laws, did the board a great disservice and rendered it nearly ineffective. There was concern that this law removes industry participants from participating in the process (which, they felt, is the biggest benefit of having a lay board). There was consensus that lawyers are clogging the system in order to promote their own political agendas. It was pointed out that, in the past, as long as the individual board members admit their conflict on the record and could justify their vote, the board functioned well. At the outset of the meeting the chairmen recommended possible application of the Legislative Ethics Act to the Board.

Change Board Appointment and Term Dates

Of all the legislation introduced on these subjects, the group preferred HB 141, a bill I sponsored which sets the appointment date closer to the confirmation date thereby minimizing the opportunity for new members to vote at board meetings held prior to legislative confirmation hearings. The bill also sets the beginning date of terms to July 1, so that new members are not thrown into a board meeting several days after appointment. That legislation is awaiting scheduling on the Senate Floor. Passage of HB 141 would be a major step in remedying some of the problems associated with the Board of Fish appointment process.

The chairmen stressed that individuals with high levels of integrity need to be appointed to the Board. There was some discussion suggesting a point system be established by statute. This point system would assist the Governor's adherence to certain criteria when deciding between given candidates. If appointments were not made in accordance to this criteria, justification would need to be established on record.

Staff Support

There was consensus that the Board is in dire need of some staff, separate from the Department of Fish and Game staff. It was suggested that a legal position is needed to assist with mediating issues, before they reach the board, and to help with preparation of findings, the legal justification of individual votes. There was also substantial support for the board to access biological and economic information, independent of the department, for obvious reasons. Positions specifically designated to the Board, or funding with RSA capabilities, would lighten the excessive demands on the lay board at a fraction of the cost of a professional board.

Two chairmen felt if the two major problem areas in fisheries, False Pass and Cook Inlet were addressed and resolved, the politics of the process would lessen and the board could better function. They recommended that this group make specific recommendations on these two areas to the board to most effectively get the Board on track.

Update on Conflict of Interest

Since the meeting in Anchorage I have had staff contact Mary McDowell in the Governor's Office and various attorneys in the AG's office. While Mary McDowell has indicated a willingness to work with us on an adjustment of conflict of interest laws for the Board of Fisheries, Neil Slotnick has indicated a reluctance to amend the conflict of interest solely for this board and not all boards at one time. Another attorney, Steven Daugherty (no relation to Amy), supports amending the financial conflict to any interest above 20 percent. That means a commercial fisherman could vote on issues regarding a fishery which composed 20 percent or less of his income. Steve White of the Attorney General's Office suggested that a loosening of the conflict of interest laws undermines public confidence in the Board.

Steven Daugherty also reviewed the Legislative Ethics Act to see if this could apply to the Board of Fisheries. This is not a quick fix because much of AS 24.60 does not or could not apply to the Board of Fish. I am still evaluating which sections should and could apply.

The chairmen's general request was that the Board members be able to vote despite financial ties and an adjustment was needed to relax the financial conflict of interest to more equalize it with the personal conflict of interest criteria.

Speaker Phillips - February 28, 1996
Page Four

My staff is pursuing this topic as a priority item. It is my plan to have legislation drafted in the very near future to address the conflict of interest. I feel that these past and present chairmen are a very valuable information resource that we should continue to draw them together and listen to their input.

Attn:
Amy

HOUSE FISHERIES COMMITTEE 3/20/96 @ 5:00 PM

HOUSE RESOURCES COMMITTEE 3/22/96 @ 8:00 AM

MY NAME IS NICK SZABO, I WAS A MEMBER OF THE BOARD OF FISHERIES FROM 1975-1982 AND I'VE BEEN INVOLVED WITH ALASKA'S FISHING INDUSTRY FOR THE LAST THIRTY YEARS. I SUPPORT HB 542. I RECENTLY ATTENDED A MEETING OF THE PRESENT AND PAST FISHERIES BOARD CHAIRMEN CALLED BY REP. AUSTERMAN. THOSE ATTENDING SPANNED A 20 YEAR PERIOD OF BOARD SERVICE AND ALL WERE IN FULL AGREEMENT THAT THIS CHANGE WAS MOST NEEDED.

FISHERIES MANAGEMENT AND ALLOCATION DECISIONS ARE VERY IMPORTANT TO ALASKA'S ECONOMY. WE NEED THE FULL PARTICIPATION OF MEMBERS WHO ARE HIGHLY KNOWLEDGEABLE AND WIDELY EXPERIENCED IN A VARIETY OF DIFFERENT FISHERY USES. THE ISSUES ARE TOO COMPLEX AND TOO IMPORTANT TO RISK DECISIONS BY A BOARD THAT DOESN'T FULLY UNDERSTAND ALL THE IMPLICATIONS OF THEIR DECISIONS.

PEOPLE WITH A LOT OF KNOWLEDGE AND EXPERIENCE ARE LIKELY TO HAVE BOTH A FINANCIAL AND A PERSONAL INTEREST IN AN ISSUE. HOWEVER, THE EXECUTIVE BRANCH ETHICS ACT PROHIBITS PARTICIPATION BY A MEMBER WITH A PERSONAL OR FINANCIAL INTEREST AND THUS FRUSTRATES THE INTENT OF HAVING A BOARD COMPOSED OF MEMBERS WITH KNOWLEDGE AND EXPERIENCE. THE 7 MEMBER FISHERIES BOARD REQUIRES 4 VOTES TO PASS AN ACTION REGARDLESS OF HOW MANY MEMBERS ARE ACTUALLY PARTICIPATING. AT ONE TIME THE BOARD HAD 4 MEMBERS WHO HELD BRISTOL BAY SALMON PERMITS. UNDER THE PRESENT LEGAL OPINIONS, THAT BOARD COULDN'T FUNCTION ON ANY ACTION THAT DEALT WITH BRISTOL BAY. THERE HAVE BEEN OTHER SITUATIONS WHERE ONLY 4 OR 5 MEMBERS HAVE BEEN RULED ELIGIBLE TO PARTICIPATE. AN ACTION TO CHANGE THE STATUS QUO FAILED 3-2, YET A MOTION TO APPROVE FINDINGS IN SUPPORT OF THAT VOTE ALSO FAILED BECAUSE ONLY A PORTION OF THE MEMBERSHIP WAS ALLOWED TO VOTE. THE BOARD'S ACTION TO MAINTAIN THE STATUS QUO WAS NULLIFIED BY ITS INABILITY TO APPROVE FINDINGS.

YOU MAY HAVE MISGIVINGS ABOUT EXEMPTING THE BOARD FROM THE ETHICS ACT BECAUSE YOU FEEL IT MAY VIOLATE THE PUBLIC TRUST. THERE ARE OTHER WAYS TO PROTECT THE PUBLIC'S INTEREST WHILE STILL ALLOWING PARTICIPATION BY MEMBERS WHO ARE INVOLVED WITH THE ISSUE. THE PUBLIC WOULDN'T BE CONCERNED ABOUT BOARD MEMBER'S FINANCIAL OR PERSONAL INTERESTS IF THEY WERE CONFIDENT THAT THE BOARD MEMBER'S VOTE WAS IN THE PUBLIC INTEREST AND BASED ON THE FACTS ON THE RECORD. BY REQUIRING THE BOARD TO DOCUMENT THE REASONS FOR AN ACTION BY FINDINGS OF FACT, THE PUBLIC CAN BE ASSURED THAT BOARD MEMBERS ARE VOTING BASED ON THEIR EXPERTISE RATHER THAN THEIR CONFLICTS. THESE FINDINGS WOULD GIVE THE PUBLIC A WRITTEN BASIS FOR CONTROVERSIAL BOARD DECISIONS. POSSIBLY EACH BOARD MEMBER COULD ADDITIONALLY BE REQUIRED TO PRODUCE PERSONAL FINDINGS, EXPLAINING TO THE PUBLIC THEIR INDIVIDUAL REASONS FOR A PARTICULAR VOTE.

THESE ADDITIONAL OBLIGATIONS WOULD REQUIRE INCREASED STAFF SUPPORT, BUT IF THE BOARD IS TO REGAIN THE CONFIDENCE OF THE PUBLIC, THEN THEY ARE VERY MUCH NEEDED AND LONG OVERDUE.

Alaska State House of Representatives
Nineteenth Legislature
Second Session

RCS# 276
Item 6

03-27-96
10:59:48

CSHB 542(FSH)
Third Reading
Final Passage

Yeas: 35 Austerman, Barnes, Brice, Brown, Bunde,
Davies, B.Davis, G.Davis, Elton,
Finkelstein, Foster, Green, Grussendorf,
Hanley, Ivan, Kelly, Kott, Kubina, Long,
Mackie, Martin, Moses, Mulder, Navarre,
Nicholia, Parnell, Phillips, Porter,
Robinson, Rokeberg, Therriault, Toohey,
Vezey, Williams, Willis

Nays: 2 Kohring, Ogan

Excused: 1 James

Absent: 2 Masek, Sanders

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

FC/B
March 28, 1996

SUBJECT: Participation by members of the Board of Fisheries in board meetings
(CSHB 542(FSH))

TO: Representative Alan Austerman
Attn: Amy Daugherty

FROM: Teresa B. Cramer *TBC*
Legislative Counsel

You have asked for an interpretation of the requirement contained in CSHB 542(FSH) that members of the board of Fisheries "must participate in matters before the board even if the member has a personal or financial interest in the matter." Sec. 39.52.120(d), added by sec. 3 of CSHB 542(FSH). The language means that if a member of the board is present at a meeting, he or she may not abstain for any reason. The subsection requires the board member to disclose a personal or financial interest before participating but does not allow abstention for any reason. If the member were absent from the meeting, the member would be unable to participate. I do not know whether the procedures of the Board of Fisheries include any mechanism for compelling the attendance of members.

Please let me know if you have additional questions or if you would like an amendment prepared for your review.

TC:pl
96-098.plm

9-LS1770\K~
Cramer
4/1/96

SENATE CS FOR CS FOR HOUSE BILL NO. 542()
IN THE LEGISLATURE OF THE STATE OF ALASKA
NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): HOUSE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to participation in matters before the Board of Fisheries by
2 members of the board."

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

4 * Section 1. PURPOSE. The purpose of this Act is to preserve and enhance the ability
5 of the Board of Fisheries to act as a lay board. To accomplish this goal, this Act requires
6 members of the board to disclose conflicts concerning issues that come before the board in
7 which the members have a personal or financial interest and to request permission to abstain
8 from voting on the matter.

9 * Sec. 2. AS 39.52.120(c) is amended to read:

10 (c) In addition to other provisions of this section, a public officer who is a
11 member of the [BOARD OF FISHERIES OR THE] Board of Game may not act on
12 a matter before the board if the public officer has not disclosed in the manner set out
13 in AS 39.52.220 all personal or financial interests in a business or organization relating
14 to fish or game resources.

1 * Sec. 3. AS 39.52.120 is amended by adding a new subsection to read:

2 (d) Notwithstanding any other provision of this chapter, a public officer who
3 is a member of the Board of Fisheries who is present at a meeting may participate in
4 a discussion concerning all matters to come before the board. The member shall vote
5 on all matters to come before the board unless the member is excused from voting
6 under this subsection. A member who has a personal or financial interest in a matter
7 before the board shall disclose the interest on the record and request permission to
8 abstain from voting. A member may abstain from voting only if all other members
9 of the board who are present at the meeting agree to the abstention. Disclosure under
10 this subsection is not subject to AS 39.52.220. Participation in a matter before the
11 board after disclosure and, if required, voting on the matter is not considered to be a
12 use of state facilities to benefit personal or financial interests under (b)(3) of this
13 section. AS 39.52.240 does not apply to matters related to this subsection.

9-LS1770\G
Cramer
3/20/96

CS FOR HOUSE BILL NO. 542(FSH)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE SPECIAL COMMITTEE ON FISHERIES

Offered:

Referred:

Sponsor(s): HOUSE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

A BILL

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7 members have a personal or financial interest in the matter by virtue of their participation in
8 a fishery.

9 * **Sec. 2.** AS 39.52.120(c) is amended to read:

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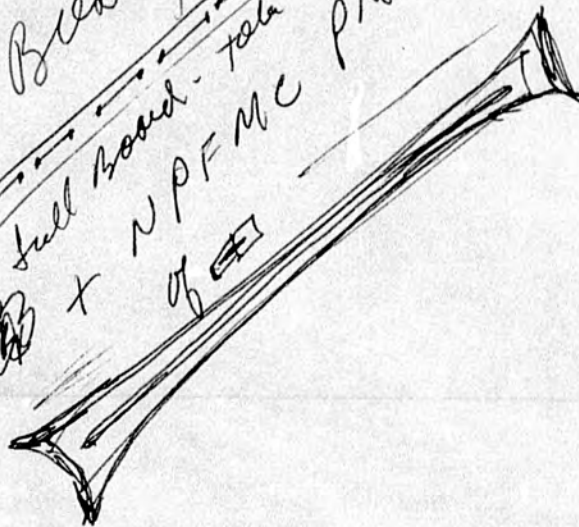
2 (d) Notwithstanding any other provision of this chapter, a public officer who
3 is a member of the Board of Fisheries must participate in matters before the board
4 even if the member has a personal or financial interest in the matter. Before
5 participating, the member shall disclose the interest on the record. Disclosure under
6 this subsection is not subject to AS 39.52.220. Participation in a matter before the
7 board after disclosure is not considered to be a use of state facilities to benefit personal
8 or financial interests under (b)(3) of this section. AS 39.52.240 does not apply to
9 matters related to this subsection.

NPF

Conflicted
beginning

participate + DELIBERATE

400 Breaking
full board - take a vote
+ NPFMC process



HOUSE BILL NO.**IN THE LEGISLATURE OF THE STATE OF ALASKA****NINETEENTH LEGISLATURE - SECOND SESSION****BY THE HOUSE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE****Introduced:****Referred:****A BILL****FOR AN ACT ENTITLED**

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13 in AS 39.52.220 all personal or financial interests in a business or organization relating
14 to fish or game resources.

1 * Sec. 3. AS 39.52.120 is amended by adding a new subsection to read:

2 (d) Notwithstanding the prohibition against taking or withholding official
3 action in (b)(4) of this section, a public officer who is a member of the Board of
4 Fisheries must participate in matters before the board even if the member has a
5 personal or financial interest in the matter. Before participating, the member shall
6 disclose the interest on the record. Disclosure under this subsection is not subject to
7 AS 39.52.220. Participation in a matter before the board after disclosure is not
8 considered to be a use of state facilities to benefit personal or financial interests under
9 (b)(3) of this section. AS 39.52.240 does not apply to matters related to this
10 subsection.