

SCOMM

102:5

Sponsor Statement

HB 27

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

February 7, 1997

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 27 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 that I arranged last year 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.

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. HB 27 will let the Board of Fish function like it should, like it did, and how it was intended to work.

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 involved in Resource issues suggested 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.

State board meeting to discuss management of Cook Inlet fish

Chairmen urge liberalization of Fish Board ethics

The Associated Press

Five past and present state fisheries board chairmen urged a lawmaker Friday to liberalize an ethics code which they say now limits debate and voting rights for members of the Alaska Board of Fisheries.

The group met at the request of Rep. Alan Austerman, R-Kodiak, chairman of the House special committee on fisheries. They said they felt the future of the board governing state fisheries was in jeopardy under the present ethics code.

They recommended that ethics standards governing the board be amended to allow those with financial interests in specific fisheries to deliberate and vote on related issues.

Legislators, by contrast, adhere to rules that allow all lawmakers to vote unless that body permits the member to abstain.

The group also backed passage of legislation that would begin board terms on July 1, rather than Feb. 1.

That legislation, sponsored by Austerman, has sat inactive in the

Senate finance committee since last May.

"The problem now is when terms expire at the end of January, the board is right in the middle of a round of meetings, and it's disruptive to the board," said Nick Szabo, who chaired the board from 1977-82.

When fisheries board members are excluded from voting because of a conflict of interest, the seven-member body may be unable to garner the four votes required to pass any issue.

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Senate Community and Regional Affairs Committee
John Torgerson-Chair

Senate State Affairs Committee
Bert Sharp, Chair

Senate Resources Committee
Loren Leman, Chair

Senate Finance Committee
Steve Frank, Chair

DATE: April 10, 1996

SUBJECT: HB 542

Dear Honorable Chairmen,

I am writing to you about HB 542. HB 542 pertains to the Board of Fisheries voting ethics. The bill must be passed if the board process is to work to the benefit of all user groups as was originally intended when Governor Hammond signed the bill in 1974.

The bill was referred to the Senate Community and Regional Affairs Committee, and then the State Affairs Committee, and then the Resources Committee and finally the Finance Committee after passing overwhelmingly on the floor of the House.

I was appointed to the Board of Fisheries by Governor Wally Hickel in February 1, 1992. I was reappointed to the board by Governor Tony Knowles in February 1, 1995.

During my first term on the board, Attorney General Charlie Cole reviewed my ethics disclosure and determined that I could participate in deliberations on the Area M/AYK chum issue because my level of financial interest was insignificant. I participated in the 1/93 chum meeting and was a full participant in all aspects of the deliberations.

When a new AG took office, he determined that under the current ethics law, because my family and I hold limited entry permits for the Bristol Bay fishery, I could no longer participate in the Area M/AYK chum cap issue. He felt that my family and I could possibly materially benefit if the chum cap was lowered.

Lowering the cap could result in Area M fishermen not being able to harvest their full allotment of Bristol Bay sockeye as provided by the June Management Plan because they could reach the chum cap before they reached the 8.3% of the Bristol Bay run allotted to them.

Because four votes are needed to change any regulation, I feel the Area M/AYK issue will never be resolved as long as I or any

future board member from Bristol Bay sits on the board of fisheries because they will be conflicted out under the current interpretation of the ethics law.

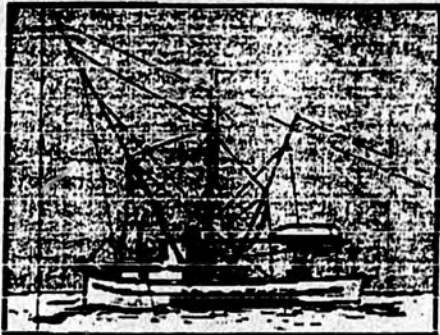
The current law states that members can participate as long as there is no significant or substantial personal or financial interest on the issues before the board.

In summary, the problem with the current ethics law is that because there is no standard of measurement of what constitutes a significant or substantial financial or personal interest, any benefit no matter how minuscule, will be ruled as a conflict of interest, thus a conflict is declared and that board member will be excluded from deliberations.

Sincerely,

Trefon Angasan

Public member, Board of Fisheries



Alaska Trollers Association

130 Seward St., No. 505
Juneau, Alaska 99801
(907) 586-9400
(907) 586-4473 Fax

File

March 29, 1996

Representative Joe Green
Alaska State Legislature
Juneau, AK 99811

Dear Representative Green:

I have been informed that members of the House and Senate Resources Committees may meet next week to discuss several issues including HB 542, which ATA supports.

HB 542 amends the Ethics Act to allow Board of Fisheries members to participate in all issues that come before the board after disclosing any personal or financial interest they may have in a fishery.

Conflicting attorney general opinions have confounded the Board's voting procedure for years. The current attorney general opinion disqualifies any member with a financial interest, yet allows those with personal conflicts to vote. ATA believes a lay board with expertise in Alaska fisheries is extremely important to the regulatory process that governs our industry. We support a recusal process which allows the Board members themselves to determine who has a significant conflict of interest and hope you agree.

For your information I have attached to this letter an updated version of ATA's positions on current legislation. If I can provide additional information on these or other industry issues, please don't hesitate to contact me.

Sincerely,

Dale A. Kelley
Executive Director



United Fishermen's Marketing Association, Inc.

P.O. Box 1035 Kodiak, Alaska 99615

Telephone 486-3453



HB 542

**An Act Relating to Participation In Matters Before The Board Of Fisheries By Members Of
the Board**

Testimony

Jeffrey R. Stephan

United Fishermen's Marketing Association, Inc.

Kodiak, Alaska

to the

Committee on Resources

Alaska House of Representatives

Nineteenth Legislature - Second Session

March 22, 1996

Mr. Chairman, members of the Committee, my name is Jeff Stephan. I am here today representing the United Fishermen's Marketing Association, Inc. (UFMA), which is based in Kodiak, AK. UFMA is a multi-species, multi-gear-type commercial fishermen's association. Our membership includes seiners, pot fishermen, longliners and trawlers who harvest, salmon, herring, halibut, black cod, king crab, tanner crab, opilio crab, dungeness crab, pacific cod, pollock, and flatfish throughout the Gulf of Alaska and the Bering Sea/Aleutian Islands. UFMA members are interested in, and affected by the activities of the Alaska Board of Fisheries (Board). I have represented UFMA at Board meetings since 1978. We appreciate the opportunity to provide testimony on HB 542.

UFMA supports HB 542. We applaud the efforts of Representative Austerman and other members of the House Resources Committee and the Legislature who have taken the initiative to address this issue.

Generally, we hope that the Governor and the Legislature are careful in the appointment and confirmation of Board members. We hope that the Board is made up of persons

HB 542, UFMA Testimony; 3/22/96;
Resources Committee, Alaska House of Representatives. Page 2/5

who are capable of conducting the public business in a manner that does not exercise any personal or financial conflict of interest that they may have, or any prejudice that they may hold. It has been both frightening and disappointing to observe several past Board meetings when it has been wholly obvious that a Board member held an unmistakable predetermined bias with regard to a particular regulatory matter, and was not open to a fair and objective reasoning and consideration of the facts relative to such regulatory matter. We note, however, that these predetermined attitudes, prejudices and biases are frequently not based on a financial conflict of interest.

We agree that the Board has been hamstrung because of the current status and exercise of Ethics Act determinations under AS 39.52 by the Alaska Attorney General (Attorney General). Additionally, we have serious concern that the current process opens the door for any administration to direct, control and otherwise influence the policy and regulatory autonomy of the Board through the offices of the Attorney General by virtue of the authority that is held by the Attorney General to disqualify Board members from voting. The Administration and the Attorney General hold de facto control over the regulatory process of the Board through the power that they possess to disqualify Board members from voting. Currently, the possibility exists for the Administration (i.e., Governor, Attorney General, Commissioner of the Alaska Department of Fish and Game (ADF&G), etc.) to influence the regulatory and policy actions of the Board for political or other reasons through the exercise of this authority to disqualify Board members from voting.

While you may take action through HB 542 to modify the Ethics Act determination relative to the Board, or otherwise take action through other legislation to make drastic changes to the structure¹ of the Board, we respectfully submit that you are not getting to the root of the problem. We fully support the much needed action to improve the operational autonomy of the Board that is embodied by HB 542. Nevertheless, we respectfully submit that the Legislature should immediately address several elements relative to the underlying operational and administrative process of the Board. We respectfully recommend that the Legislature adopt legislation that will ensure that before

¹ i.e., regional Boards, multiple Boards, regional or otherwise designated seats, increasing the size of the Board, etc

HB 542, UFMA Testimony; 3/22/96;

Resources Committee, Alaska House of Representatives Page 3/5.

the Board adopts, amends or repeals a regulation, the Board shall be required to:

1 Substantively and reasonably consider and analyze several significant subject areas as a basis for any regulatory action that the Board may take, and specifically with regard to any regulatory action where the Board employs the Allocation Criteria², the Mixed Stock Policy³, or acts upon an Agenda Change Request⁴. Such Consideration and analysis should include, and not be limited to, the following:

- (a) alternative regulatory options.
- (b) costs and benefits of the regulatory action,
- (c) economic impacts on those who are affected by the regulatory action,
- (d) environmental impacts of the regulatory action,
- (e) conservation impacts of the regulatory action,
- (f) other relevant facts and considerations;

2 Produce written findings with regard to significant regulatory issues that the Board addresses, specifically with regard to any regulatory action where the Board employs the Allocation Criteria, the Mixed Stock Policy, or acts upon an Agenda Change Request. Such written findings should :

- (a) include a summary, analysis and enumeration of the significant facts that were considered by the Board as part of a Board action to adopt, amend or repeal a regulation, or to adopt an Agenda Change Request,
- (b) include a summary, analysis and enumeration of the deliberation of the Board relative to a Board action to adopt, amend or repeal a regulation, or to adopt an Agenda Change Request,
- (c) include a summary and enumeration of the

² AS 16.05.251(e), REGULATIONS OF THE BOARD OF FISHERIES.; and 5 AAC 39.205. CRITERIA FOR THE ALLOCATION OF FISHERY RESOURCES AMONG PERSONAL USE, SPORT, AND COMMERCIAL FISHERIES.

³ 5 AAC 39.220. POLICY FOR THE MANAGEMENT OF MIXED STOCK SALMON FISHERIES.

⁴ 5 AAC 39.999. POLICY FOR CHANGING BOARD AGENDA.

HB 542, UFMA Testimony; 3/22/96;

Resources Committee, Alaska House of Representatives; Page 4/5

reasoning, analysis, logic and justification that the Board applied when they acted to adopt, amend or repeal a regulation, or to adopt an Agenda Change Request,

(d) prove that the Board substantively, reasonably and rationally considered, analyzed and deliberated relative to the required analyses and considerations that are suggested in "1" above,

3 Produce oral individual findings on the record that:

(a) itemize the facts and elements of deliberation that were considered by the individual Board member in making her/his decision,

(b) permit the public to evaluate the individual reasons, analysis, logic and justification that an individual Board member applied to her/his decision making,

(c) prove that an individual Board member who influenced a decision to adopt, amend or repeal a regulation, or to adopt an Agenda Change Request through debate, deliberation and the exercise of a vote did reasonably and rationally consider and analyze the required considerations and analyses that are suggested in "1" above

We respectfully suggest that the Legislature should act to impose necessary regulatory reform upon the Board process. The Legislature should also act to address the administrative operation of the Board.⁵ The complexities of fisheries conservation, management and allocation are certain to expand and increase in the future. The

⁵ Several aspects of the administrative operation of the Board are in great need of improvement and modification [i.e., precise and rigorous adherence to the legal requirements of handling Agenda Change Requests (5 AAC 39.999, POLICY FOR CHANGING BOARD AGENDA), and all associated and supportive background information; complete and timely response to information requests from the public; complete and timely dissemination of information to the public that is relevant to Board deliberations and action; adequate and reasonable notice to the public; etc.]

HB 542, UFMA Testimony; 3/22/96;
Resources Committee, Alaska House of Representatives Page 5/5

Legislature must take action to insure that the Board process will serve the public and will protect the resource that the Board is statutorily required to manage and conserve. Without such legislative action, the Board has wide latitude to operate in an arbitrary and capricious manner. Without such legislative action, and depending to a large extent on the ability of the Attorney General to disqualify Board members from voting and on the influence that is exercised in the appointment and confirmation of persons to the Board, the Administration has wide latitude to influence the autonomy and decision making of the Board.

We support HB 542 as a first important step toward improving the Board process. We respectfully suggest that the structure of the Board is not so much in need of attention and fixing as is the underlying process by which the Board administers, operates and regulates under their statutory authority.

Thank you for the opportunity to testify to you today.

Respectfully Submitted By:

Jeffrey R. Stephan

United Fishermen's Marketing Association, Inc.

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Kodiak, AK 99615

telephone 907-486-3453

fax 907-486-8362

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.

REPORT TO THE GOVERNOR
ON THE BOARD OF FISHERIES

Board of Fisheries Review Committee
February 23, 1988

STATE OF ALASKA

OFFICE OF THE GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET
DIVISION OF AUDIT & MANAGEMENT SERVICES

STEVE COWPER, GOVERNOR

P.O. BOX AM
JUNEAU, ALASKA 99811-0199
PHONE: (907) 465-3568

February 22, 1988

The Honorable Steve Cowper
Governor of Alaska
Pouch A
Juneau, Alaska 99811

Dear Governor Cowper:

As Chairperson of the Board of Fisheries Review Committee, I have the pleasure of submitting to you our report with its recommendations. In choosing committee members, you succeeded in selecting persons who are highly knowledgeable of the fishing industry in the State of Alaska and with a great concern to improve its regulatory processes. I believe that the given recommendations represent sound advice which will eliminate many of the problems currently associated with operations of the Fisheries Board.

Sincerely,

s/c A. Mathisen
Ole A. Mathisen, Chairman
Board of Fisheries Review
Committee

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TABLE OF CONTENTS

<u>Topic</u>	<u>Page</u>
1. INTRODUCTION	3
2. IDENTIFICATION OF PROBLEMS	5
3. RECOMMENDATIONS OF THE COMMITTEE	7
3.1 Policy	7
3.2 Regulatory Process	7
3.3 Appointment to the Board	8
3.4 Structure and Composition of the Board	10
3.5 Ex parte Communications	10
3.6 Documentation	10
3.7 Support Staff	11
3.8 Criteria and Policy for Allocation	11
3.9 Future Actions	13
4. DISCUSSION	14
4.1 Policy	14
4.2 Regulatory Process	14
4.3 Appointment to the Board	19
4.4 Structure and Composition of the Board	20
4.5 Ex parte Communication	22
4.6 Documentation	23
4.7 Support Staff	23
4.8 Criteria and Policy for Allocation	24
5. HISTORY AND BACKGROUND OF THE BOARD	26
6. MINORITY REPORT	30

1. INTRODUCTION

The effective management of Alaska's fisheries resources is a matter of considerable public concern. Many state residents depend on the harvest of fish stocks for subsistence needs, while commercial fishing is one of the most important segments of the Alaskan economy.

The regulatory system designed and implemented by the Alaska Legislature upon statehood was purposely crafted to provide substantial opportunities for fishermen and other interested members of the public to participate in the regulatory process. This was largely in response to a legacy of federal management, resource depletion, and special-interest bias during the territorial period.

Over the years this commitment to open participation has become an integral part of the regulatory process which the public strongly supports. To quote from the 1987 Senate Advisory Council report on fisheries management:

"It is difficult to emphasize just how strongly many believe that 'participatory democracy' is the essence of Alaska's fisheries management regime. They speak very critically of other systems, such as Canada's Department of Fisheries and Oceans and of the management agencies in California and Washington as bureaucracies which limit or essentially exclude public involvement. The legacy of territorial days during which Congress and federal regulators routinely ignored the concerns of local fishermen is strong."

While public participation is an essential part of the regulatory process, in recent years the virtually unlimited opportunity for such participation, combined with ever-increasing complexity of fisheries issues, has created an almost impossible working situation for the board. To again quote from the Senate Advisory Committee report:

"...many fishermen, past and present board members, and others expressed the conviction that some action to either control the agenda or to enhance the ability to cope with the workload was necessary. They referred to the present system as verging on chaos."

In response to public concern, Governor Cowper appointed a nine-member review committee in October 1987 to evaluate the structure and procedures of the Board of

Fisheries and to recommend changes necessary to facilitate effective management. Members of this committee are:

Ole Mathisen (Chair)	Pete Schaeffer
John Garner	Larry Edfelt
John White	Hank Pennington
Cheryl Sutton	Don Mitchell
Dick Jacobson	

Staff Assistance and support from the Office of the Governor was provided by John Halterman and Sam Stoker. This report was drafted by Sam Stoker based on the committee's deliberations.

In his charge to the committee, the governor instructed the members to address the following questions:

- a. Is the present system of fisheries regulations well suited to meet the challenges posed by an increasing complex utilization of valuable resources?
- b. Is the current Board of Fisheries regulatory process fair, efficient, and responsive? If not, what changes should be made to make it so?
- c. Does the current process integrate all available data, including the most recent biological information, economic considerations, and state fisheries policy, in considering regulatory decisions? If not, what changes are required?
- d. How should board members be selected? Should they represent different gear groups, geographic areas, or knowledge and expertise? What other qualifications should be considered? Should membership to the board require divestiture of a personal economic interest in fisheries regulations? Should membership be a full-time paid occupation?
- e. Does the current process provide for sufficient input from all user groups and regions without discrimination or bias, and does the process promote orderly and efficient review of regulatory proposals? If not, what improvements can be made?

On November 6-13, 1987, the committee met in Anchorage for initial deliberation and for receipt of public testimony through a statewide teleconference. On February 4-5 the committee reconvened in Juneau to finalize its discussion and recommendations. The content of these hearings and deliberations are summarized in the following report.

2. IDENTIFICATION OF PROBLEMS

The number and diversity of problems, real or perceived, which have been attributed to the board and its processes over the years are myriad and nearly all-inclusive. Many of the present problems with the board derive from the increasing value of the resource, consequent competition for that resource, acknowledgement and definition of competitive user-groups, and better organization and lobbying pressure on the board from these user groups.

The following outline of problems and suggestions relating to the board is summarized from written comments received by the Governor's Office, a recent public teleconference in Anchorage, deliberations of this committee, and recent reports from the Board of Fisheries and the Senate Advisory Council.

a. Policy:

- o Inadequacy of statewide fisheries policy, resource assessment documents and area management plans for use by the board.

b. Regulatory Process:

- o Relationship of the board to relevant agencies.
 - (1) ADF&G
 - (2) Local advisory committees and regional councils
- o Accountability and documentation.
- o Criteria and guidelines for regulatory decisions.
- o Reliability, applicability and consistency of information supplied to the board.

c. Structure of and appointment to the board:

- o Full-time "professional" versus part-time "lay" board concept.
- o Creation of regional boards.
- o Division of boards by resource category.
- o Process of and criteria for appointment to the board.

- o Conflict of interest and special interest bias by board members.
 - (1) divestiture of financial interests
 - (2) disclosure of financial and other interests
- d. Staff support for the board.
- e. Proposal submittal and review.
 - o Length of board meeting.
 - o Criteria for submittal and screening of proposals.
 - o Role of advisory committees and regional councils.
 - o Public access to the regulatory process
 - o Level of autonomy and authority of advisory committees and regional councils.

3. RECOMMENDATIONS OF THE COMMITTEE

The following were approved by the committee as recommendations to the governor. Many of these recommendations may also apply to or affect the Board of Game.

3.1 Policy:

(a) To a large extent the Board of Fisheries has been delegated the task of regulating the take of fish stocks without specific guidance in the form of comprehensive fisheries policy adopted by the legislature, which has the authority and responsibility to provide such guidance, pursuant to Article 8, Section 2 of the Alaska Constitution. The committee recommends therefore that the legislature and the governor develop more specific fisheries policy in order to direct and assist the Board of Fisheries in its decision making process.

(b) Objectives of the board should be to prepare, in cooperation with staff of the Department of Fish and Game, resource assessment documents (RADs) and develop and implement area management plans (MPs) for geographic areas which represent ecological systems or entities in so far as such can be defined by available data. The timing and priority for development of these RADs and MPs should be consistent with state fishery policy as defined by the legislature and/or the governor. Biological data contained in the RADs and MPs should have confidence limits or at least degrees of reliability clearly delineated so that all parties understand the biological risks associated with particular management and allocation decisions by the board. Ultimately, all regulatory proposals should be offered as amendments or revisions to management plans and considered against the objectives of those plans.

RADs and MPs should be updated on a biannual basis to incorporate new information, and should be made available to all segments of the regulatory system. Management plans should be promulgated for the purpose of developing both short-term and long-term sustained harvest and allocation policy addressing subsistence, commercial, sport and personal use needs as well as incidental catch.

The authorship of RADs and MPs and amendments to them should be noted and dated.

3.2 Regulatory Process

(a) The committee supports the board's return to a two-year cycle for proposal submittal and review, by alternate area, except as otherwise provided for.

(b) The board should address each section of the regulations as advertised, and should provide timely and public notification in the event of reconsideration or change of schedule.

(c) The location of board meetings should be determined by the board, based upon considerations of cost and efficiency, with the provision that adequate and timely notification of such decisions be made public.

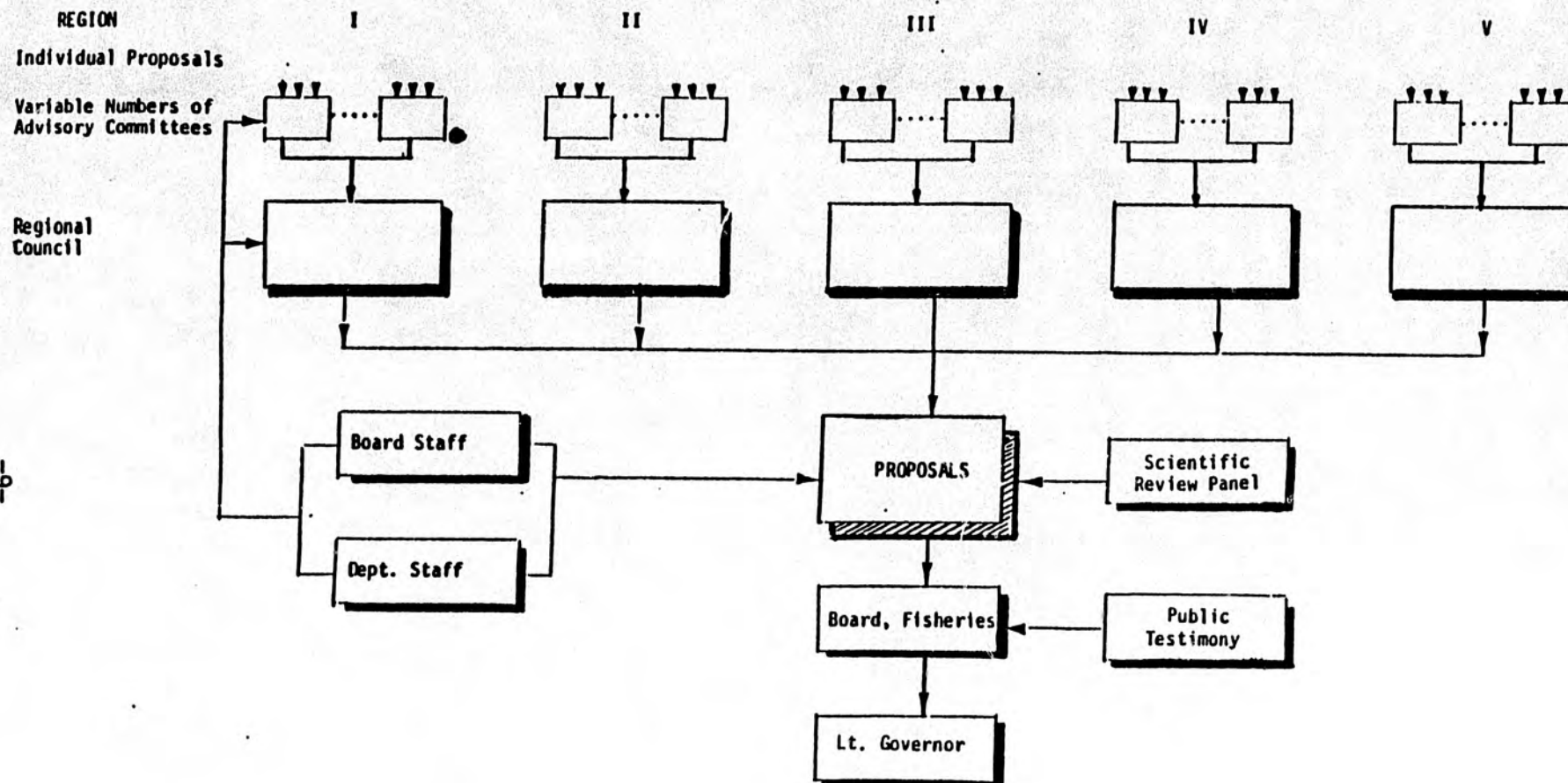
(d) In addition to the biannual cycle for proposals by area, all regulatory proposals should be submitted sufficiently in advance of board meetings to accommodate adequate review according to an established schedule similar to the following:

<u>Finfish</u>		<u>Shellfish</u>
January 1	Department proposed RADs and MPs should be published and distributed	January 1
February 1	deadline for submittal of proposals	May 1
March 1	deadline for publication and distribution of proposals	June 1
March 15	deadline for submittal of written comments relating to proposals, and meetings of Local Advisory Committees to discuss RADs and MPs	June 15
April 15	deadline for written comments on RADs and other proposals	September 15
May 15	meetings of regional councils for debate and comment on proposals	October 15
September 1	regional council meetings to review proposals for which new information has been acquired, with participation by the board and Department staff	November 1
October 1	deadline for submittal of recommendations by the regional councils	February 1
November 1	Board meeting	March 1

3.3 Appointment to the Board:

(a) The governor should appoint persons to the board who concur with and agree to implement state fishery policy. Such persons are expected to be knowledgeable and

ALASKA DEPARTMENT OF FISH & GAME
Flow Chart of Regulatory Process



experienced concerning aquatic renewable resources and their uses in Alaska.

3.4 Structure and Composition of the Board:

(a) After lengthy deliberation the majority view of the committee was that a full-time professional board is not necessary at this time and that the present lay board system should be retained. Other recommendations relating to this decision are as follows:

(b) Board of Fisheries appointments should be salaried, part-time positions within the state employee system.

(c) Appointment to the board should not require divestiture of financial interests in fisheries or fishery-related businesses. Board members, however, should not hold concurrent positions as officers or directors, paid or unpaid, of professional fisheries organizations.

(d) Members of the Board of Fisheries should be required to provide full public disclosure of interests, financial or otherwise, in fisheries related businesses or organizations. The board's current abstention policy should be maintained.

(e) Any member of the Board of Fisheries convicted of a violation of fish and game regulations should be subject to automatic removal. A minority of the committee felt a board member should be removed only for an intentional violation.

3.5 Ex parte Communication:

(a) Members of the Board of Fisheries may not have ex parte communication relating to regulatory proposals during meetings of the Board of Fisheries which they are attending, including periods of recess. Board members have the obligation to inform the public of this prohibition if improperly approached, and to disclose such approaches as soon as the board reconvenes. Failure to do so should be considered grounds for automatic removal of the board member. A minority of the committee felt that automatic removal was too severe.

In recognition of limitations which this places on the board and the public for information exchange, the committee recommends that chairpersons of advisory committees be allowed to participate in deliberation of issues relating to their areas at the discretion of the Board chairperson.

3.6 Documentation:

(a) The Board should provide written documentation which identifies evidence in the

administrative record upon which it relied in arriving at all decisions, along with a summary of reasons for such decisions. This administrative record should also include the voting record of board members on each decision.

3.7 Support Staff

(a) The executive director of the Board of Fisheries should be a partially exempt position, and should be hired and fired by mutual consent of the Board of Fisheries and the Commissioner of the Department of Fish and Game.

(b) The board should prepare and submit its own budget to the Governor for staffing and annual expenses.

(c) A professional staff, serving exclusively the board, should be hired and fired by the executive director of the board and should consist of partially exempt positions within the state employee system.

(d) Staff needs of the Board of Fisheries, as determined by its executive director, should be consistent with the recommendations of this report and the statutory duties of the board. The committee recognizes the need for both full and part-time staff to provide biological and socioeconomic advice as required.

(e) In addition to salaried staff, there should be appointed a non-salaried scientific review panel representing socioeconomic as well as biological, statistical and oceanographic areas of expertise. Funding for travel and expenses should be provided as necessary by the Board of Fisheries.

3.8 Criteria and Policy for Allocation:

The board should regulate personal use, subsistence, sport and commercial fisheries for long-term sustained utilization and with sufficient regulatory stability to facilitate efficient management and fair and reasonable utilization of such resources. In this context it is recognized that changes in biological, ecological, social and economic conditions may necessitate corresponding changes in allocation among the various user groups. In order to facilitate rational decisions by the board affecting such allocation, it is recommended that the following policy and criteria be adopted:

Management plans and regulations which allocate fishery resources among personal use, sport and commercial interests should:

- o Be based on the best scientific information available and be calculated to achieve conservation of the resource addressed,
- o Be designed to achieve fair and reasonable opportunities for the taking of fishery resources by user groups identified in the plan or regulation, be based on the best social and economic information available, and be consistent with sustained yield management and subsistence priorities as established by the legislature. Such plans and regulations should take into consideration natural fluctuations in resource standing stock and should be reasonably enforceable.

If the Board of Fisheries determines that it is necessary to restrict opportunities for the taking of fisheries resources, decisions should be based upon the following factors as appropriate to each particular decision:

(a) Ecological considerations, including:

- o The biological stock description of the resource addressed and,
- o Factors affecting the carrying capacity of the region or area for the resource addressed.

(b) Economic impact, including:

- o Losses or benefits which may accrue to relevant user groups,
- o An assessment of the dependency of affected users on the resource for their livelihood,
- o Alternative fishery resources available to affected users, and the cost to the affected user for switching to the alternative resource,
- o The importance of the affected fishery to state, local and regional economies.

(c) Social impact, including:

- o The history of the affected fishery and historic levels of utilization by various user groups,

- o The capacity of the area in terms of physical facilities available to resource users,
- o The importance of the fishery for personal use by local residents,
- o The importance and capacity of the affected fishery for providing recreational opportunities to residents and non-residents.

3.9 Future Actions:

(a) The committee recommends that the governor continue this evaluation process, either through this committee or a new committee. It is particularly important that representatives of Local Advisory Committees, Regional Councils, and the Board of Fisheries be included in such further evaluation in order to better define the role and responsibility of the advisory committees and regional councils in the regulatory process.

(b) Some of the preceding recommendations of the committee will require legislative action. Members of the committee could be available to assist in the drafting and review of such legislative proposals.

4. DISCUSSION

The following discussion relates by topic to recommendations presented earlier in this report.

4.1 Policy:

The committee agreed that a major problem in arriving at either conservation or allocation decisions derives from the fact that the state has no well-defined and comprehensive fisheries policy in place and that resource assessment documents (RADs) and area management plans (MPs) are often deficient or non-existent. The committee strongly recommends that the board, the department, the administration, and the legislature make every effort to develop a coherent statewide fisheries policy as soon as possible in order to provide structure and guidelines for the formulation and submittal of management plans and proposals, and to provide focus and direction to the board.

It is the committee's recommendation that the board be provided with adequate staff, independent of the department, in order to effectively review and summarize for the board relevant information received from the department and other sources, to work with the department in the formulation of RAD's and MP's, and to inform the department as to informational needs of the board. The board should, with the help of its staff and the department, construct over time a record of stock statuses for all major species, and should work with the department to summarize RAD's and MP's on file for use by the board, the advisory committees, and the regional councils. Whenever lacking, the board and the department should cooperate in formulating RAD's and MP's as consistent with the priorities of state fisheries policy, and should establish better sustainable yield estimates, with confidence limits, for major stocks and species whenever possible.

It is also the recommendation of the committee that the board and the department interact closely with each other and with the local advisory committees and regional councils as appropriate for formulation of resource assessment documents (RADs), area management plans (MP's) and regulations. In this regard it is recommended that representatives of the department and the board attend and participate in meetings of advisory committees and regional councils whenever possible and appropriate. The department should also make sure that RAD's and MP's are made available to the board, advisory committees, and regional councils for use in evaluation and deliberation of regulatory proposals.

4.2 Regulatory Process:

A major concern regarding the board process is the increasing number of proposals submitted to the board, the resultant work load on the board, and the need to somehow limit or screen the input of such proposals. However, while almost everyone agrees that there is a problem in this regard, there is no general consensus on how such screening or limitation should be accomplished. As discussed in the recent report by the Senate Advisory Council:

"The value of much of what the board must consider is questionable. Many proposals are nearly identical in intent or are trivial in content. Others are ghosts of proposals past, having suffered numerous previous rejections. There are usually several "pay back" proposals, the purpose of which is primarily to exact revenge on a user group by which the proposer feels it has been wronged. Still others concern actions clearly outside the authority of the board. No formal controls or screening to separate these proposals from the legitimate, thoughtful, articulate variety exists. All must be considered in one way or another by the board at its public meetings."

Suggestions as to methods for screening proposals include appointment of an independent committee to perform that function, screening and approval by the advisory committees and/or regional councils, and requiring multiple sponsorship for proposals.

After due consideration, the decision of the committee is that none of these methods are acceptable or appropriate, and would not serve to alleviate the problem. Screening of proposals by a committee or panel would not result in overall savings in either time or money, would probably not be effective, and would very likely lead to further criticism of the process. Similarly, screening by advisory committees and/or regional councils would be overly time-consuming and costly, would be of minimal benefit, and might make the process more vulnerable to special-interest pressure. As outlined in the section dealing with formal recommendations, the committee does suggest earlier submittal of proposals and more involvement of the advisory committees and regional councils in proposal review and evaluation.

And again, the recommendation of the committee is for board staffing to review, consolidate and evaluate proposals and to make appropriate recommendations regarding

them. It is felt that this in itself will greatly improve efficiency and reduce demands on the board.

The committee agrees with the decision of the board (November 9, 1987), to review proposals from each of two areas (Kodiak/Western and Cook Inlet/Gulf of Alaska/Southeast) on an alternate year basis. This plan will reduce to some extent the annual work load faced by the board, will allow more considered review of proposals, and will provide for increased regulatory stability. Protection of the resource can be accomplished in alternate years through emergency orders or regulations by the department, or the advisory committees can themselves undertake closures of threatened fisheries.

Several complaints were received by the governor's office and the committee about the process, or lack of such, used by the board to schedule debate on issues and regulations. Some complain that the board has at times dealt with an issue during the period scheduled for public testimony and then reconsidered that decision at a later time without adequate public notification.

The committee agrees that the board needs to incorporate new information as it is received, and may find it appropriate and necessary to undertake last minute reevaluations. When this occurs the board should be required to serve timely notification and should make public the reasons for such reconsideration.

Present law (AS 16.05.300b) requires the board to hold at least one meeting or hearing a year in each of four areas of the state. On the other hand, the same statute says that "Each board shall select the time and place in the state for the transaction of business".

Not surprisingly, this rule has been variously interpreted. Those living in outlying areas frequently feel disadvantaged by having to travel long distances (generally to Anchorage) to participate in board meetings, and are inclined to interpret this statute to mean that the board must hold full meetings in each region each year.

For the board to move meeting locations to regional centers would, of course, provide increased access for residents of that region. On the other hand, it would increase considerably the cost and time commitments of the board, and would not improve and might hinder access by residents of other regions. In addition, limitations on physical and communication facilities in some of the outlying regions would very likely complicate the process and reduce effectiveness and efficiency.

The consensus of this committee is that the board should not be constrained to hold full meetings in locations other than those it decides upon as practical and cost/time effective. On the other hand, it is recommended that board members, along with board and department staff, schedule and attend regular meetings on at least an annual basis in each region for purposes of explaining decisions and receiving testimony. It is also felt that better definition of the role of advisory committees and regional councils, and increased participation of these organizations in the regulatory process, will go far to improve public participation.

Local advisory committees were authorized and institutionalized by passage of AS 16.05.260, while regional councils resulted from the Alaska National Interest Lands Conservation Act (ANILCA). The number of advisory committees has increased greatly in recent years, from about 50 early in this decade to 76 at present. The roles of regional councils and advisory committees, however, and criteria for creation of advisory committees, have never been clearly defined. The recent (1987) report of the Senate Advisory Council states that:

"Fish and Game Advisory Committees are mandated by 5 AAC 96.050 to develop regulatory proposals, evaluate proposals, provide a "local forum" for fish and wildlife matters, to work with the appropriate regional councils regarding conservation and harvest strategies, and to interact with other interested parties. The department has interpreted that role as "committees are intended to provide a local forum for the collection and expression of opinions and recommendations on the management of fish and game" (ADF&G, 1981). Congress, in ANILCA, expressed a broader orientation and purpose for the advisory committee/regional council system (Gorsuch, 1983):"

The public participation system described in ANILCA section 805 and incorporated into state law was viewed by Congress as essential. The findings in ANILCA section 801 (5) reflect that assessment:

"[T]he proper regulation, protection and conservation of fish and wildlife...and the continuation of the opportunity for a subsistence way of life...require that an administrative structure be established for the purpose of enabling rural

residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses...in Alaska."

The intent of the advisory committees and regional councils was to draw upon the expertise of local residents and insure that local interests were represented in the regulatory process.

Some local advisory committees seem to function quite well and are effective organizations for providing local input to the regulatory process; others are essentially non-functional and are seldom if ever heard from. In some instances there is criticism that the local advisory committees are merely forums for special-interest groups, and that committees are in fact not representative of the resident population. As discussed in the Senate Advisory Council Report (1987).

"There has been considerable criticism of the advisory committee process and composition. Many assert that certain advisory committees are or have been formed around special interest groups and have not been representative of a community's entire user spectrum or are single issue in scope."

In southeast Alaska nearly every community, regardless of size, has its own advisory committee. In western Alaska four committees represent the forty some villages of the Calista region. Anchorage, with nearly half the state's population, has one advisory committee with a voice equal to that of any other committee.

And, while the stated role of the advisory committees is, among other things, "to develop regulatory proposals", the committees have been minimally effective in this regard. The report of the Senate Advisory Council (1987) states:

"Although the source of proposals is not always clear, the annual number of proposals noted as originating with advisory committees or regional councils has remained relatively unchanged since 1975; about 16% of the total voted on during the period 1975-1987."

Proposals regarding the role and function of advisory committees range from suggestions to reduce or limit the number of committees to suggestions that committees and/or regional councils be authorized to pass

local regulations or to veto regulations passed by the Board.

The recommendation of this committee is that participation by local advisory committees and regional councils in the regulatory process in formulation of resource assessment documents, area management plans, and statewide fisheries policy statements should be encouraged and that the format for such participation should be more clearly defined.

4.3 Appointment to the Board:

The recommendation of the committee is to retain the present process of appointment and removal, with the stipulation that certain specific causes for removal should be defined.

The committee recognizes that the present process of appointment of board members by the governor, subject to majority approval by the legislature in joint session, is by nature a political process. It is the responsibility of both the governor and the legislature, and ultimately the electorate, to see that the appointment system functions efficiently and fairly. Moreover, the committee agrees that the goal of the appointment process is to appoint board members who will direct and implement state fisheries policy as formulated by the administration and legislature, and that it is appropriate for the administration, with legislative concurrence, to control such appointments.

The committee strongly reaffirms that appointments to the board should not be representative of or accountable to narrow regional or user group interests, as has often been the case in the past, but should be responsible and responsive to the best interests of the resource and the state as whole.

A proposal was entertained to select board members from a list of nominations submitted by the local advisory committees and/or regional councils. The consensus of the committee was that such a process would only increase the vulnerability of the system to special-interest pressure and would remove much of the responsibility from where it rightly belongs--with the administration and the legislature.

Another proposal considered was that board members be elected from their region of residency. The decision of the committee was that election of board members, whether on a statewide or regional basis, would only increase special-interest pressure and would compromise the administration's ability to direct statewide fisheries policy.

Consideration was also given to the problem of removal of board members, including a proposal that members serve strictly at the pleasure of the governor, subject to removal for failure to follow and implement administration policy. The decision of the committee is that to so liberalize the process of removal would create further instability in the system. The majority of the committee did agree, however, on two specific causes for removal. These include violation of fish and game regulations and violation of ex parte communication prohibitions.

4.4 Structure and Composition of the Board:

The majority view of the committee was that, for the present at least, employment of a full-time board is not necessary and would not solve problems attributed to the present process. There was unanimous agreement that the board should be provided with increased and adequate staffing, and that this, along with other measures to be discussed, would increase efficiency and reduce the work load and time demands on the board members to a reasonable level. It was felt by some that formation of a full-time board might result in increased complexity and special-interest bias. The tendency could be for the board itself, if employed full-time, to expand and complicate issues to justify such a time commitment. In any case, a full-time board would very likely find itself under increased lobbying pressure from special interest groups. The North Pacific Fisheries Management Council operates under a system comparable to that proposed for the Board, with a part-time lay council augmented by strong professional staff and advisory committees support.

The committee also decided not to recommend the creation of regional boards with regulatory authority over local or intra-regional issues. It was felt that such a division of responsibility and authority would very likely result in increased regulatory complexity and inconsistency, and would heighten frustration and confusion among users whose interests cross regional boundaries. Also, local autonomy would probably result in increased inter-regional conflict and competition. Since most resources currently regulated by the board, as well as resource users, are not confined to a single region, local autonomy would very likely lead to increased complication and difficulty in management of inter-regional resources.

Also, the committee agreed that the tendency would be for regional boards to be even more susceptible to special-interest pressure and bias than is the case with the statewide board. The creation of regional boards would further complicate the appointment process and would make it difficult to find and appoint board members with statewide perspective.

Another proposal considered and rejected by the committee was to split the present board into two boards--one to deal with salmon and herring or anadromous and freshwater finfish, the other to deal with marine fish and shellfish. The committee agrees with concerns that salmon interests have tended to dominate the board process, sometimes to the neglect of other fisheries. It feels, however, that to split the board would complicate management of resources and would not be in the best interests of the state or the resources.

The committee consensus is that the board should be structured to provide a comprehensive assessment of fisheries and fishery resources as a whole, and that fragmentation of this responsibility would increase the difficulty of designing and implementing a cohesive statewide and resource-wide fisheries policy. The feeling is that better staff support to the board will permit appropriate attention to non-salmon concerns as well as reduce time and effort demands on the board.

Other major concerns voiced in regard to conduct of the board relate to conflict of interest, special-interest bias, and influence on board members by special-interest advocates.

While it is recognized by the committee that conflict of interest and special-interest bias can be and has at times been a problem with board members, the unanimous view of the committee, and the majority view received from the public, supports appointment to the board of persons with hands-on knowledge of and experience with fisheries resources and sport, commercial, subsistence and personal use fisheries. The feeling of the committee is that even with a full-time board divested of financial interest in the industry, persons of sufficient knowledge and experience to qualify for appointment will bring with them, by definition, certain views commensurate with their experience and background.

Conflict of interest and special interest bias is not necessarily limited to commercial or financial interests, but also extends to sport fishing, subsistence, and personal use. Any broad interpretation of conflict of interest or special interest would, therefore, tend to severely limit the number of qualified and knowledgeable persons available for appointment to the board. This does not mean, however, that both the governor and the legislature should not use reasonable care in avoiding the appointment of persons perceived as advocates of special interest groups.

Divestiture of fisheries interests by persons appointed to the board was carefully considered and ultimately rejected by the majority of the committee. Part

of the problem lies in the definition of financial interest and to what lengths this definition should be taken. In many cases financial involvement in the fisheries industry involves heavy investment of capital for gear and equipment, with demanding payment schedules which cannot easily be divested. To require such divestiture would, again, seriously limit the number of qualified persons available for appointment.

In addition, the majority view of the committee is that it is possible to conceal financial interests, and that to require divestiture would not prove meaningful.

But while the majority of the committee did not feel it necessary to require divestiture of financial interest for appointment to the board, it did unanimously reaffirm the necessity for full and clear disclosure by appointees of any and all financial investments in fisheries or fishery related businesses as well as membership in organizations.

The committee also considered a proposal which would require board members to abstain from discussing or voting on issues in which the member has any economic interest, including subsistence or personal use. It was decided that such a requirement would seriously hinder the board's ability to function, and that, while laudable in principle, absention should be at the discretion of the board itself. Currently, the board chairperson has the authority to decide whether or not a member has a conflict of interest which might influence their position and which should preclude his or her discussion or vote on a given issue. The committee recommends that the chair diligently exercise this authority.

The committee does recommend that board members be compensated by an appropriate salary while on board business. The primary concern is that recent time demands on the board make it financially difficult for persons to accept appointment, and that this difficulty may compromise appointment of the most qualified persons to the board. Salaries for board members should be comparable to those received by members of the North Pacific Fishery Management Council for their service.

4.5 Ex parte Communication:

In regard to inappropriate or undue influence on a board member by special interest representation, the committee has drafted formal recommendations which expressly forbid ex parte communication with and lobbying of board members during board meetings. The purpose of this recommendation is not to forbid or curtail discussion of issues, but rather to ensure that such discussion takes place on the public record.

A minority of the committee, while sharing the concern that ex parte communications have at times presented the appearance of impropriety, believes that ex parte communications are frequently a valuable contribution to the board process. The ability of the unrepresented, unsophisticated public to have access to and influence on the rule makers is what in fact makes the board process so unique and advantageous in the view of many.

4.6 Documentation:

This issue is closely related to that of board conduct and special-interest bias. Board decisions are frequently made for reasons which are not made clear in the record, which fosters the perception that board members are "making deals" with each other or with special interest groups or are voting to further their own interests.

Consequently, the committee recommends that all information relied upon by the board in making a decision be identified in the administrative record, and that board members provide a summary of the reasons for decisions, including economic and other impacts of that decision. It is also recommended that the Board keep an accurate record on how each member votes on each issue and that such be public information. It is hoped that such documentation will serve to define and clarify, for both the board and the public, the criteria and process employed to reach decisions.

4.7 Support Staff:

There was unanimous agreement that the board should be provided with increased and adequate staffing.

The conclusion of this committee is that the present staff needs of the board are not being adequately met, and that the board must have the authority and funding to hire and fire its own research and advisory staff. This is not intended as a negative reflection on the department or its staff and their efforts to supply information to the board. It is absolutely essential, however, that in addition to department support the board retain its own staff, including socioeconomic, biological, and biostatistical expertise for the review, evaluation and summation of information acquired from the department and other sources, and to interact with the department year-round.

The committee also recognizes that many of the decisions the board is called upon to make, particularly those involving allocation, require socioeconomic information and advice which the department, except for subsistence issues, is poorly equipped to provide. It is

essential that the board have appropriate staff to supply such advice if it is expected to make informed allocative decisions.

In this context it is the committee's recommendation that biologists in the department should not deal with issues having socioeconomic implications, and that both the board and the department should retain appropriate staff to address those matters.

Another recommendation of the committee is that the executive director of the board be appointed and dismissed by mutual consent of the Board of Fisheries and the commissioner of the department. The board research and advisory staff should be hired and fired by this executive director and should be salaried, partially exempt positions within the state employee system. Funding for executive director and staff positions should be the responsibility of the board rather than the department, and will require that the board prepare its own budget, in consultation with the governor's office, for submittal to the legislature. This will place responsibility for funding and performance of the board more directly on the administration and the legislature, where it should properly reside, and will allow the board to structure its staff and budget requirements in response to demands placed on it.

In addition to salaried staff, the committee recommends that a non-salaried review panel be appointed to assist and advise the board. This committee would consist of persons of appropriate scientific and statistical background and expertise, and would be appointed by the board from the university system and the private sector. Primary duties of this committee would be to review and evaluate resource assessment documents, management plans, stock assessments, and other information supplied to the board for use in its deliberations. The committee would serve without salary, but would be reimbursed for expenses associated with its duties.

The committee also considered recommending an industry advisory panel, such as is also employed by the North Pacific Fisheries Management Council, but decided that this is not necessary given the composition of the board and the use of advisory committees and regional councils.

4.8 Criteria and Policy for Allocation:

It is the opinion of this committee that many of the difficulties experienced by the board in the past are attributable to the fact that allocation decisions should be based on socioeconomic considerations, which neither the board nor the department are adequately equipped to evaluate

and for which neither the legislature nor the executive have provided adequate standards or criteria.

It is clear that responsibility for allocating surpluses in fisheries resources fall to the Board of Fisheries. As these allocative decisions become more complex, which they are bound to do as our population expands and increasing competition develops for the fisheries, the more need there is for definitive criteria.

The Board of fisheries was mandated by the legislature to adopt criteria for the allocation of fishery resources among personal use, sport and commercial interests. In April, 1987, the board adopted seven criteria suggested by the legislature (AS 16.05.251). The Senate Advisory Council Report (1987) states, however, that:

"The failure to develop more specific criteria may result in inconsistencies in those (allocation) decisions and more legal problems for the board."

This same report goes on to say that:

"There has been widespread agreement among the industry, science, and public figures interviewed for this report that the allocation decisions and general management of fisheries by the board of fisheries would be improved significantly if relevant, timely socioeconomic data were routinely available to it."

In order to facilitate the meaningful utilization of these data, the board must have definitive criteria to apply, and must have adequate staff to evaluate and summarize such information.

In order to assist the board in developing allocation criteria, the committee has drafted formal recommendations as presented in an earlier section of the report.

5. HISTORY AND BACKGROUND OF THE BOARD

The first Alaska Fisheries Board was created in 1949 by the Territorial Legislature as part of the Alaska Department of Fisheries. Board members were appointed by the governor and confirmed by the legislature to serve staggered five-year terms. Membership consisted of one commercial fisherman from each of three regions, a processor, and one member at large. The board appointed its own executive director and was empowered to:

determine and promulgate reasonable rules and regulations not in derogation of restrictions imposed by the U.S. Fish and Wildlife Service...police the fisheries and investigate matters pertaining to the fisheries for fact-finding purposes...maintain, improve and extend the fisheries resources of Alaska in the interest of the economy and general well-being of Alaska (CH 68, SLA 1949).

In 1957, preparatory to statehood, the legislature created the Alaska Department of Fish and Game and the Alaska Fish and Game Commission. This commission consisted of seven members, including three commercial fisherman, a sport fisherman, a fish processor, a hunter, and a trapper appointed by the Governor and confirmed by the legislature. Appointments were for staggered terms of seven years. The mandate to this commission was "... to supervise the Department in maintaining, improving, and extending the fish and game resources of Alaska". After Statehood, in 1959, the new State Legislature created the Alaska Board of Fish and Game to replace the commission in response to charges of special interest bias.

The present Board of Fisheries was created by the state legislature in 1975, along with its counterpart the Board of Game. As defined in AS 16.05.221, "For purposes of the conservation and development of the fishery resources of the state, there is created the Board of Fisheries composed of seven members appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The appointed members shall be residents of the state and shall be appointed without regard to political affiliation or geographical location of residence...". In effect, however, appointments to the board have continued to be made along lines of both regional and industry or user group representation, as provided for in the original territorial Fisheries Board.

The procedural process for selection of board members has varied from administration to administration, and has

always been a political process. In all cases, a pool of potential candidates has been developed by the governor's staff, from which members are selected by the governor. Board members are appointed for three-year staggered terms. Members may be removed from the board for inefficiency, neglect of duty, or misconduct in office.

The board staff includes an executive director appointed by the commissioner of the Department of Fish and Game, an assistant executive director, six regulatory specialists, and a clerk typist.

Duties and authority of the board are established in the Administrative Procedure Act and AS 16.05.251. Duties include establishing seasons and areas, quotas and bag limits, and ways and means of taking fish. The board is also charged with classification of species as commercial, sport or predator for management purposes, promulgation of regulations regarding fisheries management, regulation of entrance into research agreements, regulations regarding harvest of aquatic plants, and regulation of licensing activities. Additionally, AS 16.05.251 mandates that the board should establish criteria for the allocation of fishery resources among personal use, sport, and commercial fisheries along statutory guidelines.

The present advisory committee system was established under AS 16.05.260, while regional councils resulted from the Alaska National Interest Lands Conservation Act (ANILCA), section 805. In addition, AS 16.05.300 requires that the board either meet or hold hearings in each of five regions of the state each year, further expanding and facilitating public participation in the board process.

The board currently meets twice yearly, in the spring to consider shellfish regulations and in the winter to consider finfish regulations. In most sessions, statewide regulatory proposals have been considered. In 1983 the board adopted for the first time a system whereby the state is divided into two regions, with regulatory consideration by region in alternate years. The present board has reaffirmed that it will adhere to that approach. In years when an area is not open to regulatory consideration by the board, or when the board is not in session, management authority to open and close harvests and adjust their time or area, or to regulate ways and means of harvest, is delegated to the Department as provided for under AS 16.05.060. The intent is that the use of such emergency orders or emergency regulations be invoked only as necessary to protect the biological base of a stock if an unforeseen event occurs which threatens that stock, or to resolve unexpected conflicts over allocation. In addition, the advisory committees have the authority under statute to close seasons, though this authority has never been applied.

When the advisory committees were established, part of their function mandated by AAC 96.050 was to develop and evaluate regulatory proposals to the board. In practice, however, only about 16% of the proposals voted on by the board between 1975 and 1987 originated with advisory committees or regional councils, while 49% have originated with individuals or interest groups and 35% with the Department or the board itself.

It is clear that the number of proposals submitted to the board and its consequent workload has increased dramatically in recent years (since about 1975). In the sixties and early seventies meetings of the joint board consumed about 10-15 days total for the year, with 100 to 125 proposals considered. Since 1975 fisheries board meetings have occupied from 17 to 81 days per year, with as many as 895 proposals for consideration. In large part this expanded work load is a reflection of the increased value of and competition for fisheries resources themselves. For instance, ex-vessel values have increased from \$70 million in 1965 to nearly \$900 million in 1986, and wholesale values from \$166 million to \$1.6 billion (Senate Advisory/Council, 1987). The volume and complexity of conservation and allocation issues to which the board has been subjected have increased accordingly, though its capacity to deal with such volume and complexity, in terms of funding and technical assistance, probably has not.

Other major factors contributing to this increased work load include (1) the delineation of subsistence and personal use categories, (2) revitalization of the state's salmon fishery and, concurrently, increased harvests of non-salmonoid species, (3) lack of comprehensive state fisheries policy within which to formulate management and allocation guidelines and (4) generally increased public participation and access to the board process. The increased quantity, if not quality, of proposals with which the board must contend are described in a recent (1987) report of the Senate Advisory Council, as quoted below:

"The mushrooming quantity of information and proposals thus presented to the board and the time consumed in public testimony before it has constrained the board's ability to carefully and reasonably consider all of the proposals and issues before it.

The options, in light of such an increased and increasing work load, would seem to be: (1) limit the number of proposals submitted to the board or (2) increase the efficiency of the board. Due to 1988 budget limitations, the board is constrained to 27-30 meeting days this year, which is probably insufficient to deal with the issues facing it (Senate Advisory Council, 1987).

While problems with the board, either in terms of appointments or function, and public criticism of the board are nothing new, the recent unscheduled adjournment of the board in Anchorage last December (1986) has resulted in unprecedented criticism of the board and loss of confidence in the process. This adjournment served notice in a fairly dramatic way that the process was in trouble and badly needed attention. Several measures were undertaken by the legislature and the Governor in response to this situation.

One such response, originating with Senator Hensley, was proposed Senate Bill No. 188, which would establish a full-time, salaried, Alaska Fisheries Management Commission to replace The Board of Fisheries.

The legislature also authorized and budgeted a review of the board of fisheries by the Senate Advisory Council. This review, prepared by Sheila Helgath and Richard Rainery, is referred to and was used extensively during preparation of the present report.

A third response was appointment by the governor of a Board of Fisheries Review Committee, the determinations of which are presented in this report.

6. MINORITY VIEWS
(Prepared by Don Mitchell)

The recommendations of the Board of Fisheries Review Committee reflect a high degree of unanimity. All committee members agreed that board decisions should be based exclusively on information in the public record, that the board should identify the information in the record upon which it relied in making a particular decision, and that board members should not participate in ex parte communications during board meetings about matters related to regulatory proposals pending before the board. Committee members also unanimously agreed that, with the exception of its enactment of the 1978 and 1986 subsistence statutes, the Alaska Legislature has, in large measure, abdicated its responsibility pursuant to section 2 of article VIII of the Alaska Constitution to provide for the utilization, development and conservation of Alaska's fish stocks. To remedy the latter problem, the committee recommended that the Governor and the Alaska Legislature develop a fishery management policy which included standards for the allocation of fishing opportunities between commercial fisheries and among commercial, sport and personal use fishermen, and that the board implement the policy through the adoption of fishing regulations that are based on Resource Assessment Documents (which assess the biological status of fish stocks) and Management Plans (which identify the allocative goals the regulations are intended to advance).

However, despite the aforementioned unanimity, the committee's recommendation on the most important issue considered during its deliberations was not unanimous. While a majority of the committee agreed that the board should continue to be composed of part-time members who have "hands-on knowledge of and experience with fisheries resources and sport, commercial, subsistence and personal use fisheries," a minority did not. Based on the information acquired during the committee's deliberations, and for the reasons set forth below, the minority recommends that the Alaska Legislature amend the statute which establishes the Board of Fisheries to establish a board composed of full-time, rather than part-time, members who are salaried employees of the State of Alaska who have no economic or political interest in the fisheries they regulate.

A. The Workload Requires A Full-Time Board of Fisheries.

In 1960 when President Eisenhower transferred to the State of Alaska authority to regulate fishing inside its territorial boundaries, Alaska had a population of 226,167. Today, the population has almost doubled. Even more

importantly, fishing has become a labor and capital intensive industry of immense importance. Tens of thousands of Alaskans, most of whom live in rural villages, depend upon the harvest of salmon, herring and other fish stocks for their sustenance. In addition, since 1960 the economic importance of Alaska's commercial and sport fisheries has grown exponentially. In 1965 the ex-vessel value of the commercial fishery was \$70,000,000. In 1986 the ex-vessel value was \$890,000,000. The economic value of the sport fishery has grown at a similar pace. In 1987 the Alaska Department of Fish and Game estimated that the sport fishery annually contributes \$150,000,000 to the Alaska economy.

Unsurprisingly, the increase in population and in the economic value of Alaska fisheries has had two results: it has increased the number of allocation conflicts that must be resolved at each board meeting and it has generated an ever increasing amount of biological, social and economic information in the form of reports, statistical tables, graphs and oral testimony which board members must absorb and evaluate before they can cast informed votes.

During its deliberations, the committee received testimony from numerous persons who have observed or participated in board meetings each of whom attested to the fact that these two factors have increased the board's workload to a level approaching the intolerable. In 1975 the board met 17 days. In 1985 it met 56. Although the board's decisions to consider regulatory proposals bi-annually and to prevent advisory committee chairmen from participating in board debate are reforms intended to reduce the workload, they have not solved the problem. At the December 1987 meeting, for example, board members worked weekends and late into the night, but failed to complete the agenda. An even when the work gets done, when board members are required to work 10 to 12 hours a day, seven days a week, to absorb, synthesize and apply complex biological, economic and social data to resolve esoteric problems, marathon meetings frequently result in board decisions of questionable quality.

Although the procedural reforms the committee recommends are intended to reduce the board workload, if adopted, the recommendation that advisory committee chairman again be allowed to participate in board debate will offset a substantial portion of the gain. More importantly, in the years ahead the amount of biological, social and economic information that will be generated about particular fisheries can only be expected to increase.

Consequently, no matter what changes in board procedures are adopted, the regulation of Alaska's fisheries is a responsibility which can no longer be adequately discharged by part-time volunteers, even if they are paid a

fair wage. The committee report acknowledges this reality, albeit begrudgingly, by concluding that a full-time, salaried board is not necessary "at this time." For the reasons set forth above, the minority believes that a full-time, salaried board is not only necessary, it is at least half a decade past due.

In addition to ensuring that board decisions are made in a timely fashion after a thorough consideration of all available information, a full-time, salaried board would have a second benefit. The opportunity to testify orally and to answer questions from board members is an important part of the regulatory process. During its deliberations, the committee heard considerable testimony that the board's disinclination to meet at locations other than Anchorage and Juneau has prevented fishermen affected by board decisions, particularly fishermen who live in rural areas, from presenting oral testimony. A full-time board would have time to conduct meetings and hearings in communities located closer to the fisheries being regulated and to visit fisheries during their operation to observe the effect of regulatory decisions firsthand.

B. A Part-Time Board Composed Of Persons Who Participate In The Fisheries They Regulate Is Unlawful.

In the eyes of too many members of the public, the Board of Fisheries is entangled in a web of bias and conflict of interest that frequently results in unfair regulatory decisions that adversely affect fishermen who are dependent upon access to Alaska's fisheries for their sustenance, their livelihood or their recreation. Although reasonable minds may differ as to the truth of the allegation, everyone familiar with the situation agrees that the perception of bias and conflict of interest is real.

In response to the problem, the committee report recommends that ex parte communications be prohibited and that board members be required to publicly announce their biases and conflicts of interest. However, whatever their merit as policy, the committee's recommendations ignore the fact that the present composition of the board is unlawful. Not only does the appointment of individuals to the board who represent (either explicitly or implicitly) specific interest groups or fishermen who live in specific geographic areas violate the statute which governs the Governor's power of appointment, allowing board members with biases or conflicts of interest to vote on regulatory proposals violates the right to due process of law of fishermen who are adversely affected by the outcome of the votes.

In anticipation of statehood, in 1957 the Alaska Legislature enacted a statute which established a seven

member Fish and Game Commission composed of three commercial fishermen representing specific geographic areas, one hunter, one trapper and one sportfisherman. (ch 63 SLA 1957.) In other words, the Legislature purposely delegated its authority to regulate hunting and fishing to a group of individuals who would be appointed because they had substantial vested interests in, or prejudgments about, the regulations they were empowered to adopt.

The Congress was so appalled by this result that it amended section 6(e) of the Alaska Statehood Act to prevent the State of Alaska from regulating the taking of fish and game until such time as the Secretary of the Interior certified that the Alaska Legislature had made adequate provision for the administration, management and conservation of Alaska's fish and game resources. Subsequent to the enactment of the Statehood Act, Secretary of the Interior Fred Seaton informed Hugh Wade, the Acting Governor of Alaska, that, with respect to the composition of the Fish and Game Commission, section 6(e) required that:

[T]he policy-making officials should be selected for their ability and their dedicated interest in the resource, and no identification should be made between a policy-making official and any particular segment of the population; likewise, no official should be bound to represent the interests of a specific geographical region.

In response to Secretary Seaton's admonition, in 1959 the Alaska Legislature enacted a new statute which established a Board of Fish and Game composed of eight members "having a general knowledge of the fish and game resources of the State and selected without regard to political affiliation or special interest." (ch. 94 SLA 1959.) Secretary Seaton then certified that Alaska was in compliance with section 6(e), and on January 5, 1960, President Eisenhower transferred authority to regulate the taking of fish and game. Executive Order No. 10857. In 1975 the Legislature enacted a new statute which split the Board of Fish and Game into a Board of Fisheries and Board of Game, the members of which must be appointed by the Governor and confirmed by the Legislature "without regard to political affiliation or geographical location." ch. 206 SLA 1975.

However, despite the explicit aforementioned statutory prohibitions, for more than a quarter of a century Alaska Governors, aided and abetted by the Legislature, have appointed individuals to the board because of their identification with special interests or geographic areas. Three recent examples should suffice to make the point.

In 1983 the Alaska Legislature refused to confirm Governor Sheffield's board appointments because a majority of the Legislature was of the opinion that the Governor had not appointed an adequate number of persons who sportfishermen identified as representatives of their user group. In response, Governor Sheffield publicly promised to appoint a Fairbanks sportfisherman to the board, and then did so by appointing Ernie Carter.

When Chris Goll, a professional sportfisherman who had been appointed by Governor Hammond, left the Board of Fisheries, Governor Sheffield appointed Bix Bonney, an officer of the Kenai River Sportfishermen's Association, to take his place. When Mr. Bonney resigned from the Board in 1987, Governor Cowper appointed Bud Hodson, the owner of a sportfishing lodge, to the seat.

Lastly, as of the date of the filing of this report, Governor Cowper is seeking a replacement for Mike Haggren, a commercial fisherman from Kodiak. If tradition is a precedent, the Governor will appoint a Kodiak resident to fill Mr. Haggren's seat.

As these examples demonstrate, it is little wonder that many fishermen believe that controversial board decisions are frequently made based on bias or personal or special interest. However, whenever the impropriety of a part-time board composed of individuals who have obvious economic or political interests in the fisheries they regulate is challenged, the proponents of the present system, including a majority of this committee, answer that the appearance of bias and conflict of interest is an unavoidable by-product of a board composed of individuals who have "hands-on" fishing experience, and that such experience is somehow more important than eliminating the appearance of impropriety. Whatever the merit of this argument during the years immediately succeeding statehood, in 1988 it is a rationalization which is both morally and constitutionally bankrupt.

If a Governor attempted to appoint the president of the Chugiak Electric Association to a seat on the Alaska Public Utilities Commission and then attempted to justify the appointment by arguing that the commission needed members with "hands-on" experience in the public utility industry, the public outcry would be deafening. But for 28 years Governors have appointed processors, commercial fishermen, professional sportfishing guides, officers of fishing organizations, and persons appointed to represent the interests of fishermen who reside in specific geographic areas to the Board of Fisheries as a matter of course.

But no matter how strong the tradition, a board composed of part-time members who have vested interests in

the fisheries they regulate violates the statute which controls their appointment.

It is also unconstitutional.

The right to have regulatory decisions made by an impartial decision-maker is an elemental tenet of due process of law. However, it is a right which Governors and the Alaska Legislature have historically honored in the breach. Two, by no means exclusive, United States Supreme Court cases invalidating statutes which established regulatory boards composed of individuals with biases and conflicts of interest demonstrate the constitutional infirmity of the present system.

In Carter v. Carter Coal Co., 298 U.S. 238 (1936), the Court struck down a statute which established a regulatory board composed of coal producers who were empowered to regulate other coal producers. In doing so, the Court stated:

The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor. An a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of the court which foreclose the question.

And in Gibson v. Berryhill, 411 U.S. 564 (1973), the Court affirmed a District Court decision which struck down a regulatory board composed of optometrists who were empowered to revoke the licenses of other optometrists. The case is of particular relevance to an analysis of the constitutionality of the Board of Fisheries because the District Court opinion makes unequivocally clear that the perception of bias or conflict of interest can be as violative of the right to due process of law as actual bias or conflict of interest.

According to the District Court:

The question of possible bias of the Board members in this case is not whether the members are actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try a case with bias for or against any issue presented to him. A basic element of justice in America is that the court must avoid, not only evil, but the appearance thereof.

Nevertheless, despite the clear constitutional command that the State of Alaska regulate fishing in a manner which, in both perception and deed, is truly impartial, in order to acquire the purported benefit of "hands-on" fishing experience, a majority of this committee is prepared to continue to allow members of the Kenai Sportfishing Association to regulate Cook Inlet commercial fishermen, to allow Bristol Bay drift net fishermen to regulate Bristol Bay set net fishermen and to allow processors who buy salmon caught in the False Pass fishery to vote on proposals to close that fishery so long as board members identify their biases and conflicts of interest on the public record before voting.

However, while requiring public disclosure of bias and conflict of interest is certainly a laudable reform, requiring board members to announce on the record what the fishermen who may be adversely affected by their votes already know cannot transform a biased, conflict-ridden regulatory board into an impartial decision-maker.

Consequently, for the reasons set forth above, the present Board of Fisheries should be replaced by a three to five member board composed of full-time, salaried members, none of whom have an economic, political or geographic interest in Alaska fisheries.

MEMORANDUM

Redated for printing
January 1, 1994

State of Alaska

Department of Law

TO: Designated Ethics Supervisor

DATE: ~~October 20, 1993~~

FILE NO: 661-93-0540

TEL. NO: 465-3600

SUBJECT: Board member's conflict
of interest arising from
permits and membership
in organizations -
Executive Branch Ethics
Act (AS 39.52)

FROM: Martin M. Weinstein *M.M.W.*
Assistant Attorney General
Natural Resources Section-Juneau

Pursuant to AS 39.52, the Alaska Executive Branch Ethics Act (hereafter the "Ethics Act" or the "Act"), you have requested advice concerning possible conflicts of interest posed by Board member "A"'s ownership of two permits in Area B; his membership in a Corporation, a Council, and an Association; and his position as Mayor of a Borough. You request advice regarding whether it would be a violation of the Ethics Act for "A" to participate as a board member on matters pertaining to issues in Area B, other issues concerning other groups in Area B, and other issues in other administrative areas in Alaska that compete with Area B.

I. BACKGROUND

The following is our understanding of the facts based on information provided by you in a letter dated February 8, 1993, and upon information obtained from public records concerning the various organizations and entities in which "A" is either a shareholder, member, or employee.

A. "A"'s, his wife's, and his daughter's interests in Area B

Presently, "A" owns two permits in Area B. His wife also owns a permit in Area B. You state that one of the Area B permits has not been used by "A" since 1974 and that he will transfer this permit to his wife. "A" uses his other Area B permit. You also state that "A"'s daughter possesses an Area B permit.

B. "A"'s membership in and association with organizations and entities that have interests in the activities in Area B.

"A" is a member of an Association, a nonprofit, nonstock, cooperative corporation and association that represents

Designated Ethics Supervisor
AGO 661-93-0540

~~October 20, 1993~~
Page 2

the interests of permit holders in Area B. There are approximately 150 to 200 members, all of whom own Area B permits.

"A" is a shareholder of a Corporation, a Native corporation formed pursuant to the Alaska Native Claims Settlement Act ("ANCSA"). The Corporation has approximately 400 shareholders, the majority of whom reside in a Community. A large number of the shareholders derive their livelihood from Area B, either directly or indirectly.

"A" is a member of a Council, a federally recognized Alaska Native tribe in a Community. There are approximately 665 members, all of whom live in a Community, and many of whom own or hold Area B permits. In court proceedings, the Council has stated that the activities in Area B are "essential to the economic and cultural survival of the Tribe."¹

"A" also is the Mayor of a Borough, an incorporated borough under the laws of Alaska that serves a number of communities. The Borough provides educational, social, health, and other governmental services and facilities to these remote communities. In court proceedings, the Borough has stated that it relies almost entirely on taxes on sales within its jurisdictional boundaries and therefore economically depends on the activities in Area B.²

Based on a review of court documents from suits before the U.S. District Court in Alaska,³ the Superior Court for the

¹ Memorandum In Support of Motion To Intervene at 4, submitted in support of a Council's motion to intervene in a suit brought in the U.S. District Court for Alaska, discussed infra at 2, n.3.

² Memorandum in Support of Motion to Intervene at 4, submitted in support of the Borough's motion to intervene in a suit before the U.S. District Court for Alaska.

³ In this suit, a coalition of people from two regions challenge the state's operation of activities in Area B and seek an order from the court requiring the United States Secretary of Commerce or Interior to take over the management of the activities in Area B and in the two regions. The Association, Borough, Corporation, and Council together moved to intervene as a matter of right in order to protect their interests in the activities. This case is still pending.

Designated Ethics Supervisor
AGO 661-93-0540

~~October 20, 1993~~
Page 3

State of Alaska, Third Judicial District,⁴ and the Superior Court for the State of Alaska, Second Judicial District,⁵ it is apparent that the Association, Borough, Corporation, and Council have demonstrated their respective interests in the board's management of the activities in Area B. The activities have been the subject of tremendous contention and litigation among groups in Alaska. The activities take place along an area that affects other regions in Alaska.

II. ISSUES

Based on the foregoing facts, you have asked six questions:

1. Whether "A"'s ownership of permits in Area B gives rise to a conflict of interest with regard to proposals and other matters before the board concerning issues in Area B or other areas of Alaska.

2. Whether "A"'s interests in the permits for Area B will create a conflict of interest with regard to proposals and other matters concerning activities in Area B or other areas of Alaska.

3. Whether "A"'s ownership of an Area B permit creates a conflict of interest, as described in number (1) and (2) above, even though he has not used with the permit since 1974, and it is being transferred to his wife.

⁴ In this suit, the Association, Borough, and Corporation brought a lawsuit against the board seeking an injunction to invalidate the board's limit for activities set forth in the Alaska Administrative Code. The superior court granted the state's motion for summary judgment, declaring the limit valid. The case is now over.

⁵ In this suit, Native groups from another part of Alaska seek an injunction to close down activities in Area B. The plaintiffs claim that the activities violate the statutes and provisions of the Alaska Constitution because they interfere with activities in other regions. The Association, Borough, Corporation, and Council moved to intervene as a matter of right to continue the activities. This lawsuit is still pending.

Designated Ethics Supervisor
AGO 661-93-0540

~~October 20, 1993~~
Page 4

4. Whether "A"'s wife's ownership of an Area B permit creates a conflict of interest for "A".

5. Whether "A"'s membership in the Association, Corporation, or Council, all of which are involved in litigation as plaintiff's against the state, or as co-defendants with the state, or both, creates a conflict of interest with regard to proposals and matters uses in Area B or other parts of Alaska.

6. Whether "A"'s position as Mayor of a Borough and the Borough's involvement in litigation against and with the state create a conflict.

III. ANALYSIS

A. "A"'s ownership of Area B permits.

The Ethics Act provides that "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." AS 39.52.120(a). Furthermore, the Act prohibits a public officer from using his official position to "take or withhold official action, in order to affect a matter in which the public officer has a personal or financial interest." AS 39.52.120(b)(4).

The Ethics Act defines "personal interest" to mean

an interest held or involvement by a public officer, or the officer's immediate family member or parent, including membership, in any organization, whether fraternal, nonprofit, for profit, charitable, or political, from which, or as a result of which, a person or organization receives a benefit.⁶

⁶ The Act defines "benefit" to mean

anything that is to a person's advantage or self-interest, or from which a person profits, regardless of the financial gain, including any dividend, pension, salary, acquisition, agreement to purchase, transfer of money, deposit, loan or
(continued...)

Designated Ethics Supervisor
AGO 661-93-0540

~~October 20, 1993~~
Page 5

AS 39.52.960(18).

The Act defines "financial interest" to include

(A) an interest held by a public officer or an immediate family member, which includes an involvement or ownership of an interest in a business, including property ownership, or a professional or private relationship that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit;

AS 39.52.960(9)(A).

Where there is a conflict, the Ethics Act requires that a determination be made as to whether the conflict is minor and inconsequential ("conflicts that are unavoidable in a free society") or substantial and material. AS 39.52.110(a)(3). The Act provides that there is no violation where

(1) the 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) [the] action or influence would have insignificant or conjectural effect on the matter.

AS 39.52.110(b)(1) and (2).

"A" actively uses one permit but has not used his other permit since 1974. Based on his ownership and active use of one of his Area B permits, we believe "A" has a financial interest in proposals affecting Area B permit holders. With respect to the Area B permit (which he does not use), the question arises whether his ownership of this permit alone would give him a financial interest in proposals affecting similar Area B permit holders. We believe it does.

⁶(...continued)

loan guarantee, promise to pay, grant, contract, lease, money, goods, service, privilege, exemption, patronage, advantage, advancement, or anything of value.

AS 39.52.960(3).

Designated Ethics Supervisor
AGO 661-93-0540

~~October 20, 1993~~
Page 6

Although "A" does not use one of his Area B permits, he possesses a financial interest in the value of the permit, which will fluctuate depending on board regulations that direct when the permit may be used or activities by these permit holders. Accordingly, we believe that "A"'s ownership of the Area B permit gives him a financial interest in proposals affecting Area B permit holders.

If "A" transfers his Area B permit to his wife, this would not eliminate his financial interest in proposals affecting the interests of Area B permit holders. For purposes of determining a board member's financial interests in a particular matter, the Act defines "financial interest" to include those interests held by an "immediate family member." AS 39.52.960(9)(A). The Act defines "immediate family member" as

a public officer's spouse, a relation by blood with and including the second degree of kindred, and a regular member of the officer's household.

AS 39.52.960(11). Whether "A" or his wife owns the permit, there still is a conflict. Similarly, his daughter's ownership of an Area B permit would also give "A" a financial interest in proposals affecting the Area B permit holders.

There are approximately 129 Area B permit holders of one type and 120 Area B permit holders of another type. As a member of these user groups in Area B, "A"'s financial interest in proposals affecting these user groups is not "of a type that is possessed generally by the public or a large class of persons to which the public officer belongs." AS 39.52.110(b)(2). We believe that it would be a violation of the Act for "A" to vote on a proposal that significantly affects his financial interests as a member of these user groups. Id.; see 1991 Inf. Op. Att'y Gen. (Nov. 25; 663-91-0180) (in considering whether a board member's interest in a matter could give rise to a conflict under the Act, we concluded that a significant factor was whether the action would have regional as opposed to statewide effect); see 1989 Inf. Op. Att'y Gen. (August 30; 663-90-0073) (we advised a department that it would be a violation of the Act if one of its biologists held a limited entry permit for and possessed the management authority to influence and direct the economics of the same fishery); see, e.g., Carney v. State, 785 P.2d 544, 548 (Alaska 1990) (holding under common law conflict of interest rules that because of their active fishing interests in the commercial salmon drift net fishery in the Nushagak district, four members of the board of fisheries possessed conflicts of interests with respect to proposals that could benefit their user groups at the expense of competing user groups in the district). If a proposal has an insignificant effect on "A"'s financial

Designated Ethics Supervisor
AGO 661-93-0540

~~October 20, 1993~~
Page 7

interests as a member of the Area B permit holders, then he should be allowed to participate.

With respect to proposals pertaining to allocations to competing user groups in Area B or in other regions of Alaska, a similar analysis applies. We advise that if a proposal to a competing user group significantly affects "A"'s financial interests as a member of the Area B permit holders, then "A" should recuse himself from voting on that proposal. If a particular proposal concerning a competing user group has an insignificant effect on "A"'s financial interests as a member of the Area B permit holders, then we advise that "A" should be allowed to vote on the proposal.

We believe the foregoing answers question numbers 1, 2, 3, and 4.

B. "A"'s membership in the Association, Corporation, and Council.

"A" is not an officer or director of the Association, Corporation, or Council. "A" is a member of the Association and Council and a shareholder of the Corporation. In accordance with the Ethics Act's definition of "personal interest," membership in these organizations gives him a "personal interest" in proposals before the board that would confer a "benefit" to these organizations.⁷

From a review of the lawsuits in which these organizations are parties either as co-defendants with the state or as plaintiffs against the state, the interests of these organizations appear to be concentrated on the board's management of Area B. Given "A"'s independent financial interests in the Area B activities, it is unnecessary to analyze further what "A"'s conflicts are based on these organizations' interests in the activities in Area B. We cannot conceive of a proposal that would specifically and significantly affect these organizations' interests in the Area B activities that would not also specifically and significantly affect "A"'s financial interests in these activities. If a situation arises where a proposal might affect these organizations' interests in the Area B activities but not "A"'s financial interests in these activities, we will address the issue at that time.

We believe that the foregoing answers question number 5.

⁷ See supra at 4, n.6.

Designated Ethics Supervisor
AGO 661-93-0540

~~October 20, 1993~~
Page 8

C. "A"'s position as Mayor of a Borough.

"A" is the Mayor of a Borough, which is an incorporated borough under the laws of Alaska that serves several communities. The Borough provides educational, social, health, and other governmental services and facilities to these remote communities. As discussed earlier in the opinion, the Borough has stated that it depends on the activities in Area B for its primary source of revenue.

Based on "A"'s position as mayor, we believe that "A" has a personal interest in proposals that would confer a "benefit" to the Borough. However, similar to our discussion above, it is unnecessary to analyze further what "A"'s conflicts are based on whether a particular proposal confers a significant "benefit" to the Borough. We cannot conceive of a proposal that would directly and specifically affect the Borough's interests in the Area B activities that would not also directly and specifically affect "A"'s financial interests in these activities. If a situation arises where a proposal may "benefit" the Borough but not "A", we will address the issue at that time.

We believe the foregoing answers question number 6.

If you have further questions, please do not hesitate to contact me.

MMW:tg

MEMORANDUM

State of Alaska

Department of Law

TO: Designated Ethics Supervisor

DATE: January 21, 1993

FILE NO.: 663-93-0259

TEL. NO.: 465-3600

SUBJECT: Board member's potential conflict of interest arising from personal interests in a federal contract - Executive Branch Ethics Act (AS 39.52)

FROM: Martin M. Weinstein ¹⁵¹
Assistant Attorney General
Natural Resources Section-Juneau

Pursuant to AS 39.52, the Alaska Executive Branch Ethics Act, (hereinafter "Ethics Act" or the "Act"), you have requested advice concerning a possible conflict of interest posed by a board member's interests and activities in a certain federal contract between the Department of Interior's National Park Service and a Native association, of which the board member is the president. In accordance with AS 39.52.240(b), we provided verbal advice to you on October 29, 1992.¹ The written opinion herein confirms the advice given at that time and clarifies additional duties imposed by the Ethics Act on members of the board.

BACKGROUND

The following is our understanding of the facts, based on information provided in a letter by the chair of the board dated October 8, 1992, and in a fax from the department dated October 13, 1992.

Presently, A is a member of a board serving as a Vice Chair. A is also a member of a tribal council of his Native village and is president of X Native Association (hereinafter "X Native Association").² A has stated that he has extensive experience and familiarity with the subsistence hunting and fishing practices in the Y region. A's experience in this area is derived in part from his own private interests as a subsistence hunter and fisherman in the Y region, and from his experiences as a representative acting on behalf of his village and the Native Association. Prior to serving on the board, A has represented both his village and the Native Association in numerous hearings

¹ Assistant Attorney General Elizabeth J. Kerttula provided the oral advice confirmed by this opinion.

² The Native Association is a nonprofit Native organization authorized by and representing eight village councils.

before the board as a proponent of proposals relating to the subsistence rights of the Native groups in the Y region.³ Additionally, recently, while serving on the board pending confirmation by the legislature, A participated in litigation in support of his village against the State of Alaska and specifically the board on matters relating to the subsistence rights of his village.⁴ This litigation is pending before the Alaska Supreme Court.

In addition to A's extensive representation of his native village and the Native Association before and against the board on matters relating to the rights of native subsistence users in Y region, as president of the Native Association, A recently executed a contract on behalf of Native Association with the Department of Interior's National Park Service Alaska Region to conduct a research study of customary and traditional subsistence use patterns by residents living adjacent to L National Park (hereinafter the "Native Association Contract"). The Native Association Contract is dated September 25, 1992.⁵

Article II of the Native Association Contract, "Scope of Work," identifies two major objectives of the research work to be performed under the contract that are of relevance here. In part, Article II states:

Potential deliverables that may result from Native Association's proposal:

³ The boundaries of the Y region are set forth in the Alaska Administrative Code.

⁴ The foregoing background history concerning A comes directly from an affidavit by him dated April 27, 1992, that he submitted in support of his village's litigation against the State of Alaska and the board. In the lawsuit, his village challenged the board's regulations for moose hunting in Y region for failing to adhere to the state's subsistence law requirements. Ruling in his village's favor, Judge Z entered a final judgment on July 28, 1992, invalidating the board's regulations for moose hunting in Y region. The State of Alaska has appealed Judge Z's judgment to the Alaska Supreme Court, and the Court has stayed the judgment pending resolution of the appeal.

⁵ Pursuant to Article III of the Native Association Contract, the duration of the contract is one year commencing with the signature date of September 25, 1992, unless terminated earlier or otherwise amended.

1. Identification of those individuals or families that have a direct dependence on park/preserve subsistence resources;
2. Submission of applications for subsistence eligibility permits pursuant to Section 13.44, Title 36 Code of Federal Regulations, on behalf of individuals or families to the Superintendent for evaluation for permitting subsistence uses within L National Park

According to these objectives, a primary use of the Native Association studies will be to assist subsistence users living in areas adjacent to L National Park, an area that covers the Y region, in obtaining federal subsistence permits.

Based on A's involvement and interests in the Native Association Contract, you requested from this office advice in accordance with AS 39.52.240 regarding whether A might have a conflict of interest should he continue to participate as a member of the board on matters affecting the Y region. Accordingly, we advised you verbally on October 29, 1992 that it would be prudent to excuse A from participating as a board member on matters affecting the Y region until further determination could be made.

ISSUES

Based on the foregoing facts and in response to the specific requests you made to us on October 8 and 13, 1992, and additional concerns you have expressed to us since regarding application of the Act's disclosure requirements to members of the board, we address the following legal issues:

1. Whether A's personal interests in the Native Association Contract resulting from his involvement as president of the Native Association give rise to an actual or potential conflict of interest or other violation of the Ethics Act that justifies the decision to excuse A from participating as a member of the board on all management matters affecting the Y region.
2. Whether members of the board are required before taking official action to come forward upon their own initiative and disclose to the chairperson (the designated ethics supervisor) all personal and professional interests and activities that potentially could give rise to a conflict of

interest concerning a particular subject matter before the board.

3. Whether A's possession of an Assistant O license by itself gives rise to a potential conflict of interest violation for which A should be excused from participating as a member of the board on matters affecting the Y region.

ANALYSIS

I. CONFLICT OF INTEREST RULES AND OTHER PROHIBITIONS OF RELEVANCE UNDER THE ETHICS ACT

The board is an entity created by statute whose seven members are appointed by the governor subject to confirmation by a majority of the members of the legislature in joint session. The Ethics Act states that except as specifically provided it "applies to all public officers within executive-branch agencies, including members of boards or commissions." AS 39.52.910(a). "Board or commission" is defined to include any "board, commission, authority, or board of directors of a public or quasi-public corporation, established by statute in the executive branch, but excluding the Alaska Railroad." AS 39.52.960(4). Clearly, the board is "established by statute within the executive branch" and therefore its members are public officers subject to the provisions of the Act.

As public officers within the executive branch, the members of the board must abide by the strict "high moral and ethical standards" required by the Act. AS 39.52.010(a). In this regard, the Ethics Act sets forth certain standards concerning conflicts of interest that may infect a public officer's ability to faithfully and impartially discharge the officer's public trust responsibilities.⁶ While AS 39.52.110(a)(1) recognizes that public officers "are drawn from society and, therefore cannot and should not be without personal and financial interests," AS 39.52.110(a)(3) requires that public officers "distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interests that are substantial and material."

To provide some guidance in this difficult area of demarcation between conflicts that are "minor" and "inconsequential" and those that are "substantial" and "material," the Act provides:

⁶ The Act affirms that "each public officer holds office as a public trust." AS 39.52.110(a).

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.

AS 39.52.110(b).

Where there exists the possibility of a conflict of interest and therefore a potential violation of AS 39.52.110, the Act requires that the public officer

(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.

AS 39.52.210(a).

In determining what personal interests give rise to a conflict of interest violation of the Act, we also are aware that members of the board receive their appointments from the governor because of their interests and experiences in matters coming before the board, and therefore such individuals are bound to have some personal interests in board matters. Nonetheless, members of the board, like all public officers, are bound foremost by the Act's general mandate to abide by "high moral and ethical standards," and therefore board members should refrain from taking official action on matters whenever there exists the potential for a conflict of interest until a further determination is made by the designated ethics supervisor.⁷ AS 39.52.210(b); 1991 Inf. Op. Att'y Gen. (Aug. 14; 663-91-0323); 1989 Inf. Op. Att'y Gen. (Aug. 30; 663-90-0073).

In addition to the foregoing conflict-of-interest rules, the Ethics Act sets forth additional prohibitions that are relevant to our discussion of A's situation. AS 39.52.120(a)

⁷ "Official action" includes any "recommendation, decision, approval, disapproval, vote or other similar action, including inaction, by a public officer." AS 39.52.960(14).

prohibits a public officer from using the officer's position for personal gain or to secure unwarranted benefits for any person.⁸ Furthermore, AS 39.52.120(b)(4) prohibits a public officer from taking or withholding "official action in order to affect a matter in which the public officer has a personal or financial interest."⁹

II. A'S INTERESTS AND INVOLVEMENT IN THE NATIVE ASSOCIATION CONTRACT GIVES A A SUBSTANTIAL AND MATERIAL PERSONAL INTEREST IN Y REGION'S MANAGEMENT MATTERS THAT AFFECT SUBSISTENCE USERS IN Y

Based on A's involvement in the Native Association as its president and his execution of the Native Association Contract on its behalf, we believe that he possesses a substantial and material personal interest in the Y region's management matters affecting subsistence users in Y that, at a minimum, could give rise to a potential conflict of interest with his public trust duties to impartially serve as a board member. Accordingly, we advise you that it would be prudent to excuse A from participating as a board member in any Y management matter that could actually or potentially result in benefits being given to subsistence users over other user groups in Y.

The interests of A in the Native Association, both as its president and as a member of his tribal council (which is a constituent member of the Native Association) give him a substan-

⁸ "Gain" includes any "actual or anticipated gain, benefit, profit, or compensation." AS 39.52.960(10). "Benefit" is broadly defined under the Act to include "anything that is to a person's advantage or self-interest, or from which a person profits, regardless of the financial gain, including any dividend, pension, salary, acquisition, agreement to purchase, transfer of money, deposit, loan or loan guarantee, promise to pay, grant, contract, lease, money, goods, service, privilege, exemption, patronage, advantage, advancement, or anything of value." AS 39.52.960(3).

⁹ "Personal interest" includes any "interest held or involvement by a public officer, or the officer's immediate family member or parent, including membership in any organization, whether fraternal, nonprofit, for profit, charitable or political, from which or as a result of which, a person or organization receives a benefit." AS 39.52.960(18). "Financial interest" includes not only economic gain, but also "holding a position in a business, such as an officer, director, trustee, partner, employee, or the like, or holding a position of management." AS 39.52.960(9)(b).

tial personal interest in the benefits to be derived from as well as the obligations to be performed by the Native Association under the Native Association Contract. The interests and obligations of the Native Association and, derivatively, those of A in the Native Association Contract extend beyond the mere pursuit of academic studies. Under the Native Association Contract, the Native Association is to perform studies and analysis in the Y region for the purpose of assisting the Native members in the Y region obtain federal subsistence permits. Based on A's involvement in and relationship to the Native Association and the Native Association Contract, his personal interests therein transcend his own private concerns about subsistence matters in the Y region because they also include those of the Native Association and its constituent members whom he actively represents on such matters.¹⁰ As such, we believe that A possesses a substantial and material personal interest in the subsistence rights of all the Native Association constituent members in the Y region.

Matters attending the rights of subsistence users in Y are important matters that the board regularly addresses. 5 AAC 99.010. Where the board deliberates on proposals that actually or potentially advance the rights of subsistence users over other user groups in Y, we believe that A's participation as a board member will put him in a conflict between his interests and responsibilities to the Native Association and its constituents (Native subsistence users in Y) and his public trust responsibilities to discharge impartially his duties as a member of the board on behalf of all user groups. In such instances, it would be extremely problematic for A to remain impartial and unbiased, or to refrain from exercising any undue influence or otherwise misuse his official position on behalf of the Native Association groups whom he actively represents, while serving as a member of the board. AS 39.52.120(a) and (b)(4); 1989 Inf. Op. Att'y Gen. (Jan. 1; 663-89-0017) (a board member's employment with an orga-

¹⁰ In addition to A's personal interests in advancing and representing the Native members' interests on subsistence matters in the Y region through his position and involvement with the Native Association, it may well be that A additionally stands to financially benefit in his efforts to promote subsistence interests. For example, it may be that the more successful he is in advancing the subsistence interests of the Native Association and its constituents in the Y region, the more he will benefit financially as president of the Native Association; i.e., bonus, salary increases, or job security based on job performance, or possibly additional subsistence study contracts for the Native Association. At this point, we lack the information to determine what financial rewards or benefits A may reap by advancing the interests of the Native Association the Y region.

nization that received funding from the state could give rise to violation of the Ethics Act where the board had review authority over matters affecting the organization); 1988 Inf. Op. Att'y Gen. (Oct. 27; 663-89-0178) (approval of a board member's participation in a professional services contract because the private organization had only a general interest in the board matters); 1988 Inf. Op. Att'y Gen. (Apr. 21; 663-88-0429) (approval of a board member's private employment so long as he abstained from participating on board matters relating to his private employer).

No doubt, at some point in the near future, either the Native Association or its constituent members will seek to influence the board on subsistence matters in Y very likely using the same data being collected under the Native Association Contract. Certainly in that situation, A would have an immediate and glaring conflict of interest in serving on the board on matters relating to the Native Association and its constituent members while serving as the Native Association's President. AS 39.52.160(a). We do not believe that we must await the time when the Native Association or its constituent members press their interests before the board before we are able to discern A's potential conflict of interest.¹¹

Where the board deliberates on subsistence proposals for Y, A's conflict of interest is most clear. However, where the board deliberates on nonsubsistence proposals for Y, the chair of the board then will have to determine whether A's active interests on behalf of the Native Association amount to an actual or potential conflict of interest. If the nonsubsistence proposal is one that, if taken or not taken, could actually or potentially give advantage to subsistence users over other user groups in Y, then it may be prudent to excuse A from participating as a board member even on such nonsubsistence matters.¹²

Even if A were to disassociate himself from the Native Association and the Native Association Contract, there still

¹¹ In fact, A's substantial and material personal interests in assisting subsistence users in the Y region is amply demonstrated by his present involvement in his village's litigation against the board.

¹² There may be some situations where the board may consider taking action that could benefit all user groups in the Y region; i.e., the adoption of a conservation regulation that benefits all user groups. In this type of situation, where A is in no position to exert his influence on the board to benefit subsistence users over other user groups in Y, we believe that he may participate as a board member.

might be a conflict of interest problem posed in situations where the Native Association or its constituents press subsistence proposals before the board.¹³ However, we cannot predict now what conflicts might arise in those situations.

III. A, AS A MEMBER OF THE BOARD, IS REQUIRED TO FULLY AND FORTH-RIGHTLY DISCLOSE TO THE DESIGNATED ETHICS SUPERVISOR, BEFORE TAKING OFFICIAL ACTION AS A PUBLIC OFFICER, ANY INTEREST OR ACTIVITY THAT COULD GIVE RISE TO EITHER AN ACTUAL OR POTENTIAL CONFLICT OF INTEREST

In addition to the foregoing analysis, which clarifies how important it is for public officers to inform their designated ethics supervisor of any potential conflicts of interest they may have, the Ethics Act plainly states:

In addition to other provisions of this section, a public officer who is a member of [the board] 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 [G] resources.

The failure to abide by the Act's disclosure requirements imposed upon members of the board would amount to a violation of the Act for which a complaint could be filed against the offending board member. The Ethics Act would be seriously undermined unless

¹³ Proposed regulations by the Department of Law, recently published for comment, address the situation where a violation of the Ethics Act might arise should a public officer, who previously held a position of responsibility in a large organization, takes official action on a matter in which his organization is involved and in which he was involved while working for the organization. In pertinent part, the proposed regulations state:

If the public officer has held a position of responsibility in a large organization within the two years preceding the officer's action on a matter in an official state capacity, the officer's action may be an ethical violation if, at the time the officer held the position, the organization was involved in the same matter pending before the administrative unit that the officer serves.

3 Alaska Admin. J. 1993, (to be codified at 9 AAC 52.110(c) (proposed Dec. 22, 1992)).

public officers upon their own initiative diligently and completely informed their designated supervisors of any potential conflict of interest before taking official action on a particular matter before the board. AS 39.52.210(a)(1) and (2).

**IV. A'S POSSESSION OF AN ASSISTANT O LICENSE BY ITSELF DOES NOT
APPEAR TO GIVE RISE TO A CONFLICT OF INTEREST VIOLATION
UNDER THE ETHICS ACT**

As discussed earlier, whether a public officer's personal or financial interests amount to a "minor" and "inconsequential" conflict or one that is "substantial" and "material" is a question of degree. We cannot conclude that A's possession of the Assistant O license constitutes a "substantial" and "material" conflict of interest unless we learn more about the nature and extent of A's business.

MMW:tg