

SCOMM

147:33

>>> Lance Nelson 03/27/07 4:42 PM >>>

Ben, Tim Barry at ADF&G authorized me to release the summary of our concerns that I plan to give in House Fisheries tomorrow:

Generally, this bill would tend to micromanage and also sets very difficult or impossible standards, and will result in increased litigation. Here are the primary specific concerns we have with the language of the bill: *Strict legal mandate instead of guiding principles*

1. Under paragraph (a)(1), does "comprehensive policy" mean that every regulatory plan has to be comprehensive? That will be an unrealistic standard for many stocks.

2. Under paragraph (a)(2), almost all plans are designed to achieve "maximum or optimum salmon production." What other objective would they have? So the department would have to affirmatively supply data on each of the listed criteria and the board would have to formally consider all the criteria, regardless of whether each was an important factor in the particular proposal before the board. In such cases, consideration tends to be a formal, rote recitation of the criteria without translating to a better, more informed decision; however, failure to expressly address any of the criteria could result in successful legal challenges against Board regulations.

3. Under subsection (b), the phrase "must ensure" sets an impossible standard for salmon management. "Ensure" means to guarantee a result, which is impossible given the way salmon return and the limits on the state's ability to control their entire lifecycle. Certainly, the Board has very limited control over the marine habitat of salmon, and no power to ensure the "sustained economic health of Alaska."

and 2006 CDFG - Ryplan not consistent
KFFA Reg inconsistent w/ ecosystem policy

4. In subsection (c), the term "shall" imposes new, difficult standards.

5. For example, in (c)(1), even in the sustained yield provision of the Alaska Constitution (section 4, article VIII) there is no mandate that salmon stocks be maintained to "ensure sustained yields." The constitutional provision says: "Fish ... shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses." That language has been interpreted with flexibility in light of the record of the constitutional convention, which states, in pertinent part: As to forests, timber volume, rate of growth, and acreage of timber type can be determined with some degree of accuracy. For fish, for wildlife, and for some other replenishable resources *, it is difficult or even impossible to measure accurately the factors by which a calculated sustained yield could be determined. Yet the term "sustained yield principle" is used in connection with management of such resources. When so used it denotes conscious application insofar as practicable of principles of management intended to sustain the yield of the resource being managed. That broad meaning is the meaning of the term as used in the Article. Papers of Alaska Constitutional Convention, 1955-1956, Folder 210, Terms quoted in Native Village of Elim v. State, 990 P.2d 1, 7 (Alaska 1999). The Supreme Court went on to elaborate as follows in the Elim case: [T]he primary emphasis of the framers' discussions and the glossary's definitions of sustained yield is on the flexibility of the sustained yield requirement and its status as a guiding principle rather than a concrete, predefined process. Id. at 7-8. The language in the bill, on the other hand, imposes a standard of strict guarantees.

Changes from
previous version
to flexible constitutional
provision to fixed

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6. Under (c)(2), the directive "shall be managed to allow escapement within ranges necessary to conserve and sustain wild salmon production and maintain normal ecosystem functioning" is also problematic. It does not recognize the variables at work in salmon management. As noted by the Alaska Supreme Court: The salmon in these waters are subject to numerous pressures, any one of which could account for a population decrease in a given year. A short and incomplete list of these factors includes weather, natural predators, competition with other fish, international fishing efforts, water pollution, and improved efficiency of fleets and fishing methods. Moreover, several different species of salmon travel through the False Pass fishery, thus creating a mixed stock that increases challenges of management. The record also shows that the salmon operate on a fluctuating cycle that makes estimating returns from year to year difficult even under the best conditions. Id. at

7. Use of mandatory terms like "shall" and "ensure" in salmon management statutes sets up unrealistic expectations and invites legal challenges, which are much more likely to be successful with mandatory language. Provision (c)(4) could be interpreted to require the Board to shut down any mixed stock fishery that involves take of a depleted salmon stock regardless of consequences to other fisheries or other escapement objectives. Thus, a relatively low rate of interception of a depleted stock could result in closure of a fishery causing significant overescapement and possibly harming production of another stock, even while providing little benefit to the depleted stock. The failure to define the terms "depleted" and "actively restored" also raises concerns. Other paragraphs of subsection (c) also contain problematic language such as "to the maximum extent possible," and "priority."

Similar language in a regulation can be addressed by qualifying language in another regulation, such as by adding a "notwithstanding" provision, and further, the Board receives great deference in interpreting its own regulations, however if this type of language is put in statute, the Board will not have any discretion to do anything but follow the letter of statutory language.

8. In subsection (d), the language "best available information" could be problematic because it might be construed to require the department and board to seek out and review all possible information rather than what they deem to be the most critical. Any one could argue that there was better information available and the Board did not hear or consider it. The Board normally relies upon a short report from the Department and consideration of all public comments submitted to it in adoption of its regulatory decisions. Similarly, the Department normally relies principally upon fish ticket and escapement information collected by the department in development of its reports and recommendations to the Board. While this information is often extensive, other information is available from the internet, scientific journals, and other sources, and it could certainly be argued that some of this information may be "better" regarding discrete issues. This bill could be interpreted to require the Department and Board to actively gather and review this information even if not presented by a member of the public. Thus, if this bill were enacted, Department recommendations and Board decisions would be vulnerable to potentially successful legal challenges unless the Department commits significant new resources to doing a thorough scientific review of all potentially relevant background information, and presents the resulting information to the Board for consideration with regard to each of the several

hundred proposals considered by the Board each year. This would require increased staffing of biologists and economists and would significantly extend the time necessary for Board meetings, possibly to the extent that Board members would be precluded from effectively engaging in other occupations.

9. In (d)(1) the language applies to "human activities that affect salmon," but the statutory authority of the Board extends generally to fishing activities and not many other activities that affect salmon, some of which are more specifically regulated by other state agencies, such as salmon stream activity permitting under AS 41.14.870. X X

10. Under (d)(2), every management plan would have to contain "goals and measurable objectives." This connotes a formulaic, equation*type approach to management plans that works in some fisheries, but there are probably current plans that do not specifically express goals and measurable objectives because of the nature of those fisheries or the lack of information. They would be subject to challenge under this provision.

11. Paragraph (d)(3) has the same kind of language that sets the Board and Department up for easy challenges to regulations and department actions. The language on habitat restoration and protection measure is largely outside the authority of the Board or Department.

Every

SUMMARY OF THE "SUSTAINABLE SALMON FISHERIES POLICY FOR THE STATE OF ALASKA"

The policy consists of four sections:

- (a) This first section is similar to a problem statement, or rationale, for the policy. It recognizes that Alaska's salmon fisheries are well-managed, however threats to sustainable management do exist, and they justify development of an explicit statewide umbrella policy to help guide fishery management plans and programs.
- (b) Principles and Criteria - This section of the policy articulates five fundamental principles for sustainable salmon management, and the criteria that apply these principles to real issues
 - Wild salmon populations and their habitats must be protected to maintain resource productivity. Fisheries must be managed to allow escapements within ranges necessary to
 - conserve and sustain potential salmon production and maintain normal ecosystem functioning. Effective salmon management systems must be established and applied to
 - regulate human activities that affect salmon. Public support and involvement for sustained use and protection of salmon resources must be maintained.
 -
 - In the face of uncertainty, salmon stocks, fisheries, artificial propagation and essential habitats must be managed conservatively.
- (c) Implementation - This section of the policy describes procedures by which the principles and criteria are applied to actual management plans. It also describes the sequence of events by which stock concerns are identified and addressed by the department and the board. Key implementation steps are:
 - At Board of Fisheries regulatory meetings the department provides reports on the status of stocks, fisheries and associated habitats. The reports include a description of the extent management of the stocks and fisheries conforms to the principles and criteria in (b). Also, the reports identify any stock and habitat concerns, and options for addressing these concerns.
 - In response to the status reports the board reviews all relevant stock or fishery management plans, or considers developing a management plan if one does not already exist. The policy identifies key ingredients of a management plan including goals and measurable and implementable objectives.
 - If the department and board identify a stock of concern the board amends or develops a management plan to address the concern.
 - As part of the management plan for a stock of concern the board and department collaborate in the development and periodic review of an action plan. The policy identifies key ingredients of an action plan, including necessary management actions, measures needed to restore and protect habitat, and a research plan.
- (d) Terms and Definitions - This section of the policy defines key terms used in the policy.

Salmon Escapement Goal Policy

LA. The Salmon Escapement Goal Policy adopted by the Alaska Department of Fish & Game in 1992 and subsequent refinements of this policy moved state fisheries management toward the objectives of sustainability and regional adaptability.

A significant step toward protecting Alaska's salmon runs and fisheries would later be taken in 2000 when the Alaska Board of Fisheries adopted the Statewide Sustainable Salmon Fisheries Policy [5 AAC 39.222]. Adoption of this policy was the culmination of years of work that built upon a Department attempt to formulate a Salmon Escapement Goal Policy that saw fruition in 1992. The escapement goal policy defined and put structure to the process of establishing and changing escapement goals in Alaska (ADF&G, 1992).

Although the Department had established escapement and management goals for years, the efforts behind the Salmon Escapement Goal Policy were the first attempts to formalize how this process would be conducted, define terminology, and specify how the public was to be involved in the process. Given that the Salmon Escapement Goal Policy was signed by the Commissioner of the Alaska Department of Fish & Game and its division directors, it was, at first, an internal department policy rather than one approved by the Alaska Board of Fisheries. This later changed in 2001 when the Board of Fisheries adopted the Escapement Goal Policy into regulation.

In 1992, the creation of the escapement goal policy was viewed as a positive step by virtually all those associated with the salmon fisheries in Alaska. In the years just prior to its adoption, the department had engaged in a series of escapement goal revisions, some of which had substantial impacts to users. There was no explicit framework to address concerns about salmon allocations underlying the adoption of or changes made in escapement goals. Foremost among these were changes to the escapement goal for Kenai River late run sockeye salmon, adoption of escapement goals for early and late run Kenai River chinook salmon, and movement from a cyclic escapement goal for Kvichak sockeye salmon to a more stable level of escapement.

Adjustments such as these were historically made by the Department of Fish and Game with little public involvement or Board of Fisheries oversight. Some of these changes, particularly in the Kenai River, had very substantial impacts on the allocation of salmon between and among various user groups. There was a very strong undercurrent within the department for a "regionalized" approach to management rather than a uniform department standard. The process in establishing escapement goals was no different. Terminology, methods and application of research to management varied greatly throughout the state.

Following the adoption of the Salmon Escapement Goal Policy in late 1992, the Alaska Board of Fisheries, and the Alaskan public, began to have an increasing interest in how these goals were established and at what levels. There were obvious consequences to those who participated in the salmon fisheries depending on what management goals that were adopted. There was a global movement occurring at this time toward sustainability in nearly all forms of natural resource management. Sustainable community development and tourism, sustainable timber harvest and, naturally, sustainable salmon management were all topics that were being discussed on a global scale. There was a growing level of scientific literature [REDACTED] the National Academy of Sciences on the subject of sustainability. The book *UPSTREAM*, published in 1996 by the National Academy of Sciences, was part of that growing body of literature. Upstream and several AFS papers concluded that the old style of single species, single stock management, coupled with significant habitat degradation and loss prevalent in the Pacific Northwest, had lead to the demise of the salmon runs to the region. To some the message from "the book" was that management systems historically have not been robust enough to address the growing complexities of mixed stock and multi-species management in an environment of degrading habitat.

At this time Dr. John White, from Bethel, was seated on the Board of Fisheries. Dr. White had taken a special interest in the message of sustainable management and having seen first hand the significant declines in Kuskokwim chum salmon, and believed a more complete approach to Pacific salmon management was needed. At a meeting of the Board of Fisheries addressing Cook Inlet in the mid 1990s he focused his attention on clarifying terminology with the Department staff. He was concerned the current model of management was not adequate to keep pace with threats to habitat, changing climate, and inter-stock and inter-species relationships.

This meeting marked the genesis of the Sustainable Salmon Fisheries Policy. Doug McBride, research supervisor for the division of Sport Fisheries, was there and recalls the following:

"We (the Department staff) had entered the Board of Fisheries meeting as we would any other Cook Inlet Board of Fisheries meeting. We were prepared to speak to the issues of conservation, management goals, and assist the Board with the information related to the allocative issues that had come to define the Cook Inlet Board meetings. I recall that while the Department was prepared and focused in a traditional manner, it became abundantly clear that the focus of the Board members was not the same. Led principally by Dr. John White, a round of intense questioning concerning terminology and the application of management principles outlined in UPSTREAM began to shape the meeting" (Doug McBride, personal communication).

Dr. White recalls that he was motivated over concern about the regionalized approach the department used in the application of science to management (the establishment of escapement goals being only one example) and the differing meaning placed on terms related to management. He was

concerned over inconsistencies he saw between the existing escapement goal policy, and the bank of scientific literature including Upstream and those put forth by the American Fisheries Society. He believed these inconsistencies and lack of a common lexicon compromised the quality of management and the ability to uniformly address management challenges (John White, personal communication).

The outcome of this discussion was the establishment of a Board of Fish and Department of Fish and Game committee charged with defining terms useful in discussions concerning Alaskan salmon management. An example was the use of the term "escapement". In Alaska salmon management, escapement had historically referred to the fish that passed through the commercial fishery and had entered the river on their way to the spawning grounds. At this time, the allocation (in regulation) to the growing in Kenai River sport fishery was "no more than 10% of the escapement estimated by sonar at mile 19 of the Kenai River". The question arose as to the meaning of escapement. Did the term refer to spawning salmon, and if so how could the Department and the Board allow a sport fishery to be prosecuted on the "escapement". The development of terminology is an example of the evolution of management that was underway in Alaska at this time.

Dr. White was not alone in his thinking; soon the committee assigned to define terms was quickly engaged in efforts to define concepts in management. These concepts reached beyond the traditional terms of catch, escapement, and total run. The notion of managing salt water fisheries such that a predetermined level of in river abundance was realized was not really new. What was new was the concept that this management target (later defined as an in-river goal) included sufficient numbers of fish for both the spawning escapement and an in-river allocation for in-river fisheries.

Deputy Commissioner Rob Bosworth was the lead for the department in the process of developing the Sustainable Salmon Fisheries Policy. Development of this policy was not universally accepted as a great idea for Alaskan salmon management. A special Board work session was held in Girdwood to specifically deal with the Sustainable Salmon Fisheries Policy. A very serious challenge in the development of the sustainable fisheries policy was how to effectively involve all segments of the public. Leadership within the public and the department realized that the process needed to be inclusive if it was to be successful. There needed to be meaningful involvement by the general fishing public, the broad scientific community and the scientific community within the department.

Among these involved publics, sport fishing groups were some of the first to endorse the idea of a sustainable fisheries policy. They viewed the development of such a policy to be positive since it would address their over-fishing, escapement, and habitat concerns. But their endorsements lead to skepticism on the part of the commercial fishing industry which felt threatened by the clear conservation, or "green"

nature of such a policy. Ultimately, a working group comprised of members of the fishing groups, department staff, board of fish members and outside technical staff were all involved in close consultations as the policy began to take shape. Dr White and Rob Bosworth both recall the process being laborious and tedious. White recalls there were numerous draft documents and a great deal of effort put forth to ensure that anyone who desired to could participate in the process.

House Special Committee on Fisheries
Representative Paul Seaton, Chair
Re: HB 189, oppose

March 28th, 2007

Dear Chairman Seaton,

5 AAC 39.222., Policy for the Management of Sustainable Salmon Fisheries (SSFP, Policy) - is in regulation. The SSFP's preambles and provisions are constructed carefully on a wide range of fisheries management practices and standards. 44 provisional definitions apply meaning in implementing the SSFP policy.

Instead, HB 189's context arbitrarily condenses the SSFP primarily within a conservation only context; without any definitional terms, provisions, or overall fisheries resource management practices - by comparison to the current SSFP. For example, escapement goals are deemed as a range only, which can be construed differently by the department, board, stakeholders, and public in terms of sustainable, biological, optimal, or inriver goals. Sustainable could simply mean one: one replacement in adult spawner recruitment; thus undermining any optimum sustained benefit to the State.

HB 189 instead, simplifies and undermines the current regulatory Policy (5 AAC 39.222). Legal challenges could be made by interpretive, arbitrary, and undefined standards (without meaning), as applied within a wide range of fisheries management practices subjectively throughout the State; including management plans in current regulation.

A similar situation occurred in 2003, when Sport Fish division submitted proposal 2 to the statewide finfish meeting. Proposal 2 rewrote the SSFP into a similar condensed version, which undermined management accountability differently by divisions within the Department of Fish and Game; including meaningless definitions applied to escapement goals. Proposal 2 did not pass and was unanimously defeated by the public and board.

HB 189 only creates confusion, and undermines the current regulatory framework of 5 AAC 39.222. (SSFP).

Sincerely,

Jeffrey Beaudoin
P.O. Box 75
Kasilof, Alaska 99610

From: Ricky Gease [ricky@kenairiversportfishing.com]
Sent: Wednesday, March 28, 2007 10:29 AM
To: Rep. Paul Seaton
Cc: Rep. Bill Stoltze
Subject: HB 189

Dear Rep. Seaton and House Fisheries Committee members:

I appreciate the opportunity today to talk to the committee about HB 189. In testimony I spoke about the legal questions raised by Lance Nelson at the last statewide BOF meeting in which a proposal to remove the sustainable salmon policy was considered and ultimately rejected by the board. Lance Nelson stated that he had some questions and concerns about the legality of the BOF having policies such as the sustainable salmon policy and the wild trout policy in regulation.

I encourage you to discuss this issue with Lance Nelson prior to your next hearing on Monday and craft substitute language that would authorize the BOF to have important policies like the sustainable salmon policy and the wild trout policy in regulation. This was the legal question brought to the discussion by Lance Nelson and should be addressed by the legislature to ensure that the BOF has the proper legal authority to have such policies in regulation. As I mentioned in testimony, the fact that the sustainable salmon policy is in regulation has been instrumental in the branding and marketing of Alaska wild salmon.

Thank you for your time and consideration in this important matter,

Ricky Gease
Kenai River Sportfishing Association

LEGAL SERVICES

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LEGISLATIVE AFFAIRS AGENCY
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MEMORANDUM

March 15, 2007

SUBJECT: Sectional Summary of HB 189 (Work Order No. 25-LS0713\A)

TO: Representative Bill Stoltze
Attn: Ben

FROM: Brian J. Kane *BJK*
Legislative Counsel

You have requested a sectional summary of HB 189, a bill relating to the policy for management of sustainable salmon fisheries.

Please note that a sectional summary of a bill is not an authoritative interpretation of a bill. The bill itself is the best statement of its contents.

Section 1 of the bill amends AS 16.05 by adding a new section regarding the management of sustainable salmon fisheries.

Subsections (a) and (b) require the Board of Fisheries and Department of Fish and Game to adopt regulations relating to management of sustainable salmon fisheries while ensuring conservation of salmon habitats and protecting subsistence uses.

Subsection (c) lists five criteria to be used for management of salmon fisheries by the state.

Subsection (d) lists the basis for developing the principles and criteria for sustainable salmon fisheries, such as effective management systems to regulate human activity affecting salmon, and management and action plans for fisheries and salmon.

Subsection (e) states that nothing in the policy of this new section added by the bill is intended to expand, reduce, or be inconsistent with the authority of any agency or department with statutory regulatory authority.

BJK:lmb
07-056.lmb

ALASKA STATE LEGISLATURE

Vice Chair:
House Finance Committee

Chair:
House Finance Subcommittees for:
Department of Public Safety
Department of Law



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BILL STOLTZE **State Representative**

Representative_Bill_Stoltze@legis.state.ak.us

House Bill 189

Management of Sustainable Salmon Fisheries

"An Act relating to the policy for management of sustainable salmon fisheries."

In 2000, the Alaska Board of Fish adopted the Statewide Sustainable Salmon Fisheries Policy. This policy recognized that threats to sustainable management do exist, and they justify the development of an explicit statewide umbrella policy to help guide fishery management plans and programs. Given the importance of salmon in Alaska, both for consumptive use and commercial fishing, it is vital to ensure salmon populations are sustained for future generations by strengthening this policy by codifying it into statute.

The provisions of HB 189 establish:

- The fundamental principles for the policy, and the criteria that apply these principles to real issues;
- The implementation procedures in which this policy will be carried out; and
- Clarifies terminology used in the language of the legislation.

I ask for your consideration and support of HB 189 to strengthen our state's resolve to protect one of our most important resources.

DISTRICT 16

BIRCHWOOD • BUTTE • CHUGIAK • EKLUTNA • FAIRVIEW LOOP
KNIK RIVER ROAD • LAZY MOUNTAIN • PALMER • PETER'S CREEK

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: HB189-DFG-DAS-03-27-07
Bill Version: HB 189
() Publish Date: _____

Revision Date/Time (Note if correction): _____

Dept. Affected: Fish and Game

Title Management of Sustainable Salmon Fisheries

RDU Administration and Support

Component Administration and Support

Sponsor Representatives Stoltze, Johnson

Requester House Special Committee on Fisheries

Component No. 470

Expenditures/Revenues

(Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2007) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal: ☐

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

House Bill 189 would enshrine in statute certain provisions of the Policy for the management of sustainable salmon fisheries that are currently in regulation (5 AAC 39.222). The Department of Law has indicated that there may be some costs to the Department of Fish and Game created by passage of this bill. Pending further consultation internally and with the Department of Law, ADF&G is right now unable to estimate the amount of any increased costs as a result of passage of HB 189.

Prepared by: Tim Barry
Division: Commissioner's Office
Approved by: Denby Lloyd
Agency: Department of Fish and Game

Phone 465-6137
Date/Time 03/27/07 3:00 p.m.
Date 3/27/2007

-----Original Message-----

From: sterlingstudios@acsalaska.net [mailto:sterlingstudios@acsalaska.net]
Sent: Tuesday, March 27, 2007 10:12 AM
To: Rep. Paul Seaton
Cc: Rep. Craig Johnson; rep_kyle_johnasen@legis.state.ak.us; Rep. Gabrielle LeDoux; Rep. Peggy Wilson; Rep. Bryce Edgmon; Rep. Lindsey Holmes
Subject: Hb 189

Representatives,

I wish to extend a short note in strong support for the moving of House Bill 189 out of committee and sending it forward for passage into law.

Regards

Dennis LaRoche

Sterling Ak

907-262-0478

From: cderrickak@aim.com
Sent: Tuesday, March 27, 2007 11:33 PM
To: Rep. Paul Seaton
Subject: Hse. Bill 189 pass out of comm.

Alaskas' salmon fisheries should be managed on a sustained yield basis as called for in Hse.Bill 189. I ask you to pass this Bill out of committee and on to the full House.

Check Out the new free AIM(R) Mail -- 2 GB of storage and industry-leading spam and email virus protection.

Louie Flota

From: Mal Linthwaite [malburro@gci.net]
Sent: Tuesday, March 27, 2007 10:07 PM
To: Rep. Paul Seaton
Cc: Rod Arno
Subject: HB 189

Dear Representative Seaton:

Please insure that the State of Alaska's salmon resources are protected in the future, by passing HB 189. This bill will stop big money outside commercial interests from controlling the Board of Fish, by placing the Board of Fisheries' Sustainable Salmon management Policy in Statute. This bill will require the Board of Fish, no matter who is on the Board, to make their decisions based on management of sustainable salmon fisheries.

Your vote for this Bill, would prove your support of protection of our Alaska Fisheries, throughout the Sate of Alaska.

Thank you for your consideration of my request,

Sincerely,

Mal Linthwaite
P. O. Box 33219
Juneau, AK 99803
(907) 789-3289