

SCOMM

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ALASKA STATE HOUSE OF REPRESENTATIVES

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REPRESENTATIVE PAUL SEATON DISTRICT 35

Sponsor Statement HCR 22 REGULATION OF FISHERIES

HCR 22 affirms that legislative intent behind current law allows the Board of Fisheries to manage by allocation based on vessel size, gear type, trip limits, and different districts in an administrative area.

The resolution was introduced to provide the court with clear understanding of the Legislative intent utilized for current fisheries management statutes. This will be important if management regulations adopted over the past many years by the Board of Fisheries are challenged in court.

Following the Grunert decision by the Alaska Supreme Court regarding the Chignik cooperative fishery, attorneys for the Board of Fisheries have cautioned that any allocation within a fishery by the Board including long standing fundamental regulations could be in danger of being overturned.

This concern is highly speculative. The Grunert decision focused on a regulation allowing non-participants to benefit from the efforts of participants. This ran afoul of the Limited Entry Act, which requires the benefit of a fishery to go to active participants. The discussion in Grunert is separate from the wide range of management tools adopted by the board that flow from current law.

This Department of Law interpretation of the effects of the Grunert decision has factored into recent Board of Fisheries decisions to not adopt a variety of proposals that would have allocated fisheries resources within a fishery based on the historic intent of our statutes.

HCR 22 encourages the Board of Fisheries to proceed with the management of public resources without speculative consideration of the Grunert decisions. It does not provide the board with any additional allocation authority. It simply provides reaffirmation of the legislative intent of current statutes.

LEGAL SERVICES

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MEMORANDUM

January 28, 2008

SUBJECT: SSHB 188 and fisheries allocations
(Work Order No. 25-LS0709\K)

TO: Representative Paul Seaton
Attn: Louie Flora

FROM: Brian J. Kane *BJK*
Legislative Counsel

You have posed the following three questions regarding SSHB 188 for my review. I will answer them individually.

(1) Can the Board allocate quota within a single area based on vessel size class? For example, does the Board have authority to allocate 50 percent of the State water cod west of 170 degrees longitude to vessels under 60 feet in length (with the condition that fishermen in the administrative area will have the option to choose which vessel size they will fish)?

In parts 2 and 3 of the memo to your office dated March, 26, 2007, I discussed on page 3 the "vessel size class" regulations for Prince William Sound sablefish. The discussion revolved around different quotas for different vessels depending on the size of the vessel. If this is what you are referencing in your question, then the quota system is covered by AS 16.05.251(a)(3) and is under the authority of the Board. The practice of setting different quotas for vessels of different sizes already appears in regulation, and that practice does not appear to be in jeopardy of being overruled. Hence, I do not believe this distinction would be considered an allocation as much as it is a quota set by the Board.

(2) Is there anything in *Grunert* that prevents the Board from establishing sub-districts within an administrative area, as well as an exclusive registration system where the fisherman are restricted to fishing in the one sub-district for which they are registered at a time? Can the Board further manage the catch by separate quotas for each sub-district? If a sub-district is geographically defined to enable management to target separate stocks of fish, would that fall under the quota-setting authority of the Board?

This question seems to relate to the scenario in *State v. Herbert*, 803 P.2d 863 (Alaska 1990), where the court analyzed the concept of a "superexclusive use" fisheries regulatory scheme. As I discussed in part 1 of my March 26, 2007, memo to your office, the court upheld these superexclusive use areas, as a fisherman had the choice to only fish

in the superexclusive area or to fish only outside of that area. However, I am not sure that your concept of "sub-districts" is the same as the superexclusive use areas discussed in *Herbert*. In the *Herbert* case, the superexclusive areas were geographically separated, with one area being Cape Romanzof and the other Norton Sound. In an effort to give the smaller fishing outfits a better chance to compete in the fishing business, fishermen were given the option of either fishing only in a specific superexclusive area or fishing anywhere but the superexclusive area. Hence, the Board was making use of a geographical boundary to separate two areas as smaller designations.

The sub-districts you mention in your question, though, could create a difficult situation if they are in the same administrative area. In *State v. Grunert (I)*, 109 P.3d 924 (Alaska 2005), the court stated the following: "Therefore, if the cooperative fishery and the open fishery used the same type of gear in the same administrative area to take the same fishery resource, an allocation of resources to the cooperative would be an impermissible allocation within a single fishery." *Id.* at 932. Thus, these sub-districts would have to be distinguished in some manner so that they do not fall under the criteria above -- same gear, same administrative area, same resource.

The phrase "fish stock" is defined in AS 16.05.940(16) as follows: "a species, subspecies, geographic grouping, or other category of fish manageable as a unit." Hence, the definition of fish stock mentions the option of geography allowing a group of fish to be managed as a unit. Based on this definition, it would appear that it is possible that a sub-district would fall under the quota-setting authority of the Board if it is classified separately on the basis of different stocks of fish. However, before determining if separate fisheries exist in an area, one must look at the above factors set out in *Grunert(I)* relating to gear, administrative area, and resource.

(3) Can the legislature accomplish clarification for the Board and the Attorney General's office by adopting a resolution stating that the legislative intent and interpretation of current law allows this type of allocation, such as vessel size and by sub-district, and that these options fall within the Board's authority to set quotas and its authority to use management tools to manage stocks and harvests for conservation concerns? Can the legislature clarify its legislative intent of current language by passage of a concurrent resolution, as guidance for the court and the Board of Fisheries?

A resolution is merely a "wish or view" of the legislature and is not legally binding. Thus, drafting a resolution as you describe in your question would not obligate anyone to follow the terms of the resolution. A resolution stating the legislative intent could provide "guidance," but a resolution does not carry the power to obligate a court to defer to the intent stated in a resolution. A resolution of intent might be a factor a court looked at, but the court would be under no duty to do so.

Clear reading of ~~statute~~
legislative ~~statute~~

Time & area closures

37% of BSAI
Small Boat fleet

Kodiak
PWS

~~188~~

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MEMORANDUM

March 26, 2007

SUBJECT: Specific issues regarding HB 188

TO: Representative Paul Seaton

FROM: Brian J. Kane *BJK*

Legislative Counsel

You have asked a number of questions regarding the potential effect of House Bill 188. I have addressed your first three questions in light of the *Grunert* decisions, and the last two in light of the changes proposed by HB 188.

(1) Do the *Grunert* decisions undermine *Herbert*? The majority opinions in *Grunert v. State (I)*, 109 P.3d 924 (Alaska 2005) and *State v. Grunert (II)*, 139 P.3d 1226 (Alaska 2006) make no mention of the decision in *State v. Hebert*, 803 P.2d 863 (Alaska 1990), regarding superexclusive fishing areas.

Hebert involved an evaluation of choice among several geographic areas under a "superexclusive use" fisheries regulatory scheme. Fishermen would be required to choose among several geographic areas where a fish species occurs. A person who registered to fish an area designated as "superexclusive" could not harvest that type of fish in any other area. On the other hand, one who registered to fish in an area that is not "superexclusive" could not also fish for the same species in a "superexclusive" area. The court upheld the superexclusive use regulatory system,

and noted that "if anything, [it] furthers the interests underlying [Article VIII,] section 3's common use mandate." Thus, "broad public access" [described in earlier opinions as the hallmark of the common use clause of article VIII, section 3] is a principle that favors maximizing the number of persons able to participate in a hunt or fishery rather than maximizing an individual's opportunities to catch as much fish or harvest as much game in as many areas as possible.

Stephen M. White, "Equal Access' to Alaska's Fish & Wildlife," 11 Alaska Law Review 277, 281 (1994) (notes omitted).

Insofar as the regulation challenged in the *Grunert* litigation authorized an allocation of fishery resources within a single fishery in violation of the authorizing statute, the *Grunert* decisions are distinguishable. In that pair of cases, in response to declining

salmon prices in the Chignik commercial salmon fishery, the Board of Fisheries had adopted regulations authorizing a majority of Chignik salmon purse seine permit holders to apply to fish as a cooperative. When more than the minimum number of permit holders applied to participate, the board issued a single cooperative fishery permit to the cooperative, Chignik Seafood Producers Alliance, and allocated to the cooperative a percentage of the "harvestable surplus" of Chignik sockeye salmon based on the number of permit holders participating in the cooperative. The board's program regulations distinguished between the "cooperative fishery" and the "open fishery." "Cooperative fishery" was defined as "a commercial purse seine salmon fishery in which, by agreement of the participants, the number of fishing vessels may be reduced with the intent of decreasing overhead expenses associated with commercial fishing and controlling the rate of harvest to achieve a higher quality product," while the term "open fishery" was defined as "a commercial purse seine fishery conducted by [Commercial Fishery Entry Commission] permit holders who did not participate in the cooperative fishery." The court reasoned that the statute in question, AS 16.05.251(e), proposed for amendment in HB 188, did not allow the board to distinguish on the basis of the criteria in its regulation, and that its allocation of the harvestable salmon between the cooperative and the open fishers authorized an allocation of fishery resources within a single fishery in violation of the statute.

The *Hebert* and the *Grunert* decisions, together, proceed from different starting points. *Hebert* unquestionably involved active participation by individual fishermen; in *Grunert II*, the court noted:

"the Chignik cooperative fishery scheme is fundamentally at odds with [the idea of active individual participation] because [in permitting people who are not actually fishing to benefit from the fishery resource], it allows people who are not actually fishing to benefit from the fishery resource." 109 P.3d at 935. The cooperative scheme addressed in *Grunert I* differed from the cooperative scheme we consider here, but our conclusion is the same: The legislature must give the board statutory authority to create a fishery scheme in which permit holders profit from the harvests of other permit holders.

Grunert II, 139 P.3d at 1235, note 44.

Because of the factual circumstances and differing principles between the two sets of decisions, and because the regulatory system sustained in *Hebert* contemplated expanded opportunity for active fishermen within the entirety of a fishery administrative area, I don't see the court's *Hebert* decision as being put "at risk" either by the *Grunert* decisions or by legislative action, or inaction, on the amendment proposed by House Bill 188.

(2) and (3) Do the *Grunert* decisions threaten regulations limiting catch based on harvest objectives and vessel length? The analysis for evaluating the *Grunert* cases' effect on the regulations established for Prince William Sound (5 AAC 28.272(c)) and Chatham Strait

(5 AAC 28.170(f)) is somewhat similar to the *Hebert* analysis above. In *Grunert (II)*, the court rejected a regulation adopted by the board relating to cooperative fisheries. The court stated: "The legislature must give the board statutory authority to create a fishery scheme in which permit holders profit from the harvests of other permit holders." *Grunert (II)* at 1235, n.45. The situation that the court was concerned with in *Grunert (II)* was one where each individual fisherman shared in the profits of the entire fishery, as long as that fisherman fished a certain number of times. Hence, the fisherman who went out 50 times shared his profits with the fisherman who went out 15 times. This is where the major problem was for the court.

The regulations regarding Prince William Sound and Chatham Strait are different than what was struck down in *Grunert (II)*. For these regulations, each fisherman receives credit for what he harvests each time, and is only limited in the total amount he can harvest. There is no part of those regulations requiring an active fisherman to share his profits with an inactive fisherman. Hence, it appears that *Grunert (II)* focused on disallowing this cooperative fishery situation, specifically the one that occurred in Chignik. This could be viewed as a limited holding by the court that does not stretch to regulations that do not create a cooperative fishery. From my reading, the regulations for Prince William Sound and Chatham Strait do not create a cooperative fishery situation, but instead only limit the total number of fish that a fisherman can harvest.

A March 16 memo of Assistant Attorney General Steven A. Daugherty to Commissioner Denby Lloyd identifies 5 AAC 28.272(c) as the "vessel size class" Prince William Sound sablefish regulation, and I assume it is to that subsection to which you make reference.¹

¹ The text of 5 AAC 28.272(c) prescribes annual sablefish allocations that take into account vessel length as one factor of the allowable allocations:

(c) In the Prince William Sound Area, the holder of a CFEC limited entry permit or interim-use permit to take sablefish may not take more than the annual amount specified by the department. The department will determine the annual amount as follows:

(1) the annual amount will be the sum of one-half of the annual harvest objective divided by the number of permit holders registered to fish in the commercial sablefish fishery and one-half of the annual harvest objective multiplied by the average percentage of the harvest taken by the vessel category for which the CFEC permit was issued, as specified in 20 AAC 05.779, and divided by the number of permit holders registered to fish sablefish with the permits of that vessel category;

(2) the average percentages of harvest for the vessel categories described in (1) of this subsection are as follows:

(A) combined categories A, vessels with a length of 90 feet, and B, vessels with a maximum overall length of 60 feet: 18.53 percent;

Mr. Daugherty's memo relates that the regulation amounts to a quota, presumably allowable under the explicit language of AS 16.05.251(a)(3):

(a) The Board of Fisheries may adopt regulations it considers advisable in accordance with AS 44.62 (Administrative Procedure Act) for

(3) setting *quotas*, bag limits, harvest levels, and sex and size limitations on the taking of fish[.]

Since, independently of the amendment proposed by House Bill 188, the board has adopted in regulation a quota based, at least in part, on vessel size class, there is no reason to believe that legislative inaction on the bill would call that regulation into question.

Mr. Daugherty's March 16 memo identifies 5 AAC 28.170(f) as a quota for Northern Southeast Inside sablefish regulation and, again, I assume it is to that provision that you have reference.²

(B) category C, vessels with a maximum overall length of 50 feet: 70.33 percent;

(C) category D, vessels with a maximum overall length of 35 feet: 11.14 percent.

² The text of 5 AAC 28.170(f) prescribes a form of sablefish allocation that makes use of an "equal quota share" concept that I take to be functionally the equivalent of "equal poundage per permit," the phrase you used in your transmittal memo:

(f) Except as provided in (j) of this section, in the Northern Southeast Inside Subdistrict, the holder of a CFEC permit or interim use permit for sablefish may not retain more sablefish in the directed fishery than *the annual amount of sablefish equal quota share* that is specified by the department. A permit holder must retain all visibly injured or dead sablefish. Sablefish that are not visibly injured or dead may be released unharmed, but the permit holder must record the live releases in a logbook by gear settings. *The department shall determine the annual amount of sablefish equal quota share by dividing the annual harvest objective by the number of CFEC permits and interim use permits eligible to be fished in the fishery.* The department shall use the best available information, including harvest rate and biological data, to set the annual harvest objective.

These quota shares are subject to later-year adjustment under 5 AAC 28.170(j) and (k):

(j) If a permit holder's harvest exceeds the permit holder's equal quota share established under (f) or (g) of this section for that year, by not more than five percent, the department shall reduce the permit holder's

This question may be analyzed and answered in the same manner as the preceding examination, and that for substantially the same reasons -- clearly authorized ability for the board to adopt a quota under AS 16.05.251(a)(3) and a comprehensive treatment of the subject fishery that accounts for the active participants in the fishery (determine "equal quota share by dividing the annual harvest objective by the number of CFEC permits and interim use permits eligible to be fished in the fishery") without class or gear distinction.

(4) and (5) Would the amendment or HB 188 allow allocations based on participation or catch or landings history in the fishery? The two questions have, in common, reference to allocation of a part of the fishery "based on catch history or landings history." However, AS 16.05.251(e) does not now, and would not under the amendment proposed by House Bill 188, support use of individual catch history and landing history -- in other words, the record of individual participation in a fishery -- as the device or means to make fishery allocations. Mr. Daugherty makes this point in the paragraphs that conclude his March 16 memo, and the authorities there cited support that outcome.

The changes proposed by HB 188 (adding the phrase "and within") do not provide the board any power to allocate to individual fisherman. Hence, the bill does not provide authority for the board to allocate resources to permit holders based on number of years participating in the fishery, personal catch history, or landings history. There is nothing in AS 16.05.251(e) that refers to individual fishermen, and this bill does not add any language to that effect. The specific portion of AS 16.05.251 I believe you are referring to in your question is subsection (e)(1), which uses as a criteria "the history of each personal use, sport, guided sport, and commercial fishery. . . ." This criteria only makes mention of "fishery," not an individual fisherman. Adding the phrase "and within" does not open up the possibility for an allocation to individual fisherman based on any personal statistics; the statistics utilized by the board remain those that are relevant to the fishery as a whole. HB 188 provides for the board to merely allocate within a fishery, not

equal quota share for the following year by the amount of the overage. The adjusted equal quota share is the permit holder's quota share for that year. If a permit holder's harvest exceeds the permit holder's equal quota share by more than five percent, the proceeds from the sale of the overage in excess of five percent shall be surrendered to the state. A permit holder may not assume that the ability to adjust a quota share under this section is an opportunity to knowingly exceed a quota share or to exceed the equal quota share in an amount greater than five percent as such actions may be prosecuted under AS 16.05.722 or AS 16.05.723.

(k) If a permit holder's harvest is less than the permit holder's equal quota share established under (f) or (g) of this section for that year, the department shall increase the permit holder's equal quota share only for the following year by the amount of the underage that does not exceed five percent of the equal quota share.

to individual fishermen. Any changes that would effect individual fishermen would require more extensive statutory revisions than adding the words "and within" to AS 16.05.251(e). Further, the direct allocation of fishery resources among fishermen based on the fishermen's individual catch histories in the fishery likely impinges on the common use section and "no exclusive right of fishery" section of the state constitution. Under the common use doctrine, fishery resources are "owned" or held by the state in trust for all citizens of the state until the resource is lawfully reduced to physical possession of the fisherman. *Isakson v. Rickey*, 550 P.2d 359, 367 (Alaska 1976). Until the fish is in the physical possession of the fisherman, the fisherman has no claim to the fish. If the Board of Fisheries was to allocate fishery resources to an individual fisherman and then exercise its fishery management authority to ensure that the fisherman harvested that allocation of fish, the board has given an interest in a specific portion of the harvest of those fish to the fisherman and conferred a special privilege of fishery on the fisherman.³ The creation of private interests in a fishery resource before the resource is caught by a fisherman seems to be the kind of special privilege that the common use and "no exclusive right of fishery" sections were intended to prohibit.⁴ The 1971 limited entry amendment of the "no exclusive right of fishery" section, effective in October 1972, did nothing to make this kind of special privilege of fishery constitutional.⁵ That amendment allows the state to

³ The possible details of a scheme to allocate fishery resources among fishermen based on the fishermen's individualized catch histories in the fishery are wholly unknown at this time but those details will be critical to the constitutionality of the allocation scheme. Of particular importance will be, the determination of how the allocation to new entrants into the fishery would be determined and whether the allocation for new entrants would be based on the prior history of the previous permit holder.

⁴ The Natural Resources Committee of the Alaska Constitutional Convention explained the purpose of the common use clause in part, as follows:

Game fish, wildlife, fisheries, and water are recognized as belonging to the state so long as in a natural state. These resources are subject to a private right only when they have been acquired or utilized as provided by law. For example, a private person has no right to buy and sell wild animals in their natural state, but once an animal is taken in compliance with law, it becomes the property of the taker, subject to use or disposition within the law. . . .

⁶ Proceedings of the Alaska Constitutional Convention, Appendix 5, Proposal 8 at 75; Proposal 8A at 98. (Emphasis added)

⁵ The common use clause "mandates that limited entry be achieved through the least possible 'privatization' of the common resource." *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983), at 1196 (Rabinowitz, J. dissenting).

limit entry into the commercial fishing user groups only as necessary to achieve certain conservation and socio-economic goals. It did not authorize the state to grant other kinds of exclusive rights or special privileges of fishery that were not directly related to limiting access to a commercial fishing user group.

The direct allocation of fishery resources among individual fishermen based on their catch histories in the fishery is analogous to the allocation of game resources among big game guides that was considered by the Alaska Supreme Court in the *Owsichек* case. *Owsichек v. State, Guide Licensing and Control Board*, 763 P.2d 488 (Alaska 1988). The *Owsichек* case involved grants of exclusive access to game in an area to certain big game guides for the purpose of providing guide services to sport hunters. Under former provisions of AS 08.54, the Guide Licensing and Control Board granted exclusive guide areas and joint use areas to licensed big game guides. Within an exclusive guide area or joint use area, one or more big game guides were given the authority to provide guiding services to sport hunters. All guides who were not authorized to operate within a guide area were prohibited from providing guide services in that area. Guide areas were assigned in large part based on a guide's previous use, occupancy, and investment in an area. Such criteria favored established guides at the expense of new entrants into the guiding profession. *Id.* at 496. The Alaska Supreme Court found that a grant of a special privilege to operate in a guide area that was based primarily on seniority ran counter to the notion of common use. "[T]he common use clause . . . , reveals an anti-monopoly intent to prohibit 'exclusive grants' and 'special privilege[s]' wholly apart from the limits imposed by other constitutional provisions." *Id.* Thus, the court found that the guide areas were inconsistent with the common use provision of the Alaska Constitution and therefore unconstitutional. *Id.* at 498. The *Owsichек* case involved only the common use section of the Alaska Constitution. However, in the context of direct allocations within a fishery, the "no exclusive right of fishery" section is also implicated. If the "no exclusive right of fishery" section is to have any independent effect, distinct from that already provided under the common use clause, the "no exclusive right of fishery" section will have to be applied even more rigorously to prevent exclusive rights and special privileges of fishery. To assume that the "no exclusive right of fishery" section confers no more protection against privatization of fishery resources than is provided under the common use section is to nullify the express and specific prohibition against exclusive rights and special privileges of fishery. The court has consistently declined to nullify provisions of the Alaska Constitution.⁶

Mr. Daugherty's memo makes the point that the proposed amendment to AS 16.05.251(e) made by House Bill 188 is essential to maintain the historical efforts of the Board of Fisheries to regulate within a fishery against the possibility that application of the

⁶ *Owsichек*, 763 P.2d at 496; *Park v. State*, 528 P.2d 785, 786-87 (Alaska 1974).

Grunert decisions' reasoning may be applied to challenge them.⁷ For the reasons discussed in his memo and in this one, the bill's amendment should not have the effect of opening the door to allocation at the level of individual harvesters. If, however, the legislature has doubt on that point, since the question is one of statutory interpretation (within the constraints of the "common use," "no exclusive rights of fishery," and "uniform application" provisions of article VIII), the legislature may consider revising the bill's "purpose and intent" statement to ensure that fishery participants and the court understand that the legislature has no other intent than to continue to allocate within a fishery and not as to participation by individuals.

If I may be of further assistance, please advise.

BJK:med:ljw
07-186.med

⁷ Mr. Daugherty's memo makes the point that the proposed amendment to AS 16.05.251 made by House Bill 188 is essential to maintain the historical status of the fishery.

Mr. Daugherty lists three examples: (1) regulating fishing within different districts of a single administrative area; (2) regulating more than one gear type in a single limited entry fishery; and (3) allowing fishing when the available biomass will not allow a competitive fishery. I am not sure adding "within" in AS 16.05.251(e) affects examples (2) and (3). Given the definition of "fishery" in AS 16.05.940(14) -- which applies to AS 16.05.251 -- a different gear type will result in a different fishery; so HB 188 may not be relevant to Mr. Daugherty's second example. His third example -- which appears to involve quotas -- is governed by AS 16.05.251(a)(3)'s authorization of quotas.

FISCAL NOTE

STATE OF ALASKA
2008 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HCR 22
 () Publish Date: _____

Identifier (file name): _____ Dept. Affected: _____
 Title HCR 22 RDU _____
 Sponsor _____ Component _____
 Requester Representative Seaton Component Number _____

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
		FY 2009	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
OPERATING EXPENDITURES							
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING		0.0	0.0	0.0	0.0	0.0	0.0

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 Interagency Receipts							
TOTAL		0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2008) cost: _____

POSITIONS

Full-time							
Part-time							
Temporary							

ANALYSIS: (Attach a separate page if necessary)

Prepared by: House Fisheries Committee Staff Phone 465-3923
 Division _____ Date/Time 2/20/08 12:00 AM
 Approved by: Rep. Seaton Chairman Date 2/20/2008
 Legislature _____

FISCAL NOTE

**STATE OF ALASKA
2008 LEGISLATIVE SESSION**

BILL NO. _____

ANALYSIS CONTINUATION