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74:7

ALASKA STATE LEGISLATURE SENATE

SENATOR RICHARD I. ELIASON

PRESIDENT OF THE SENATE
LABOR & COMMERCE COMMITTEE
RESOURCES COMMITTEE
RULES COMMITTEE
CHAIRMAN, SPECIAL COMMITTEE ON
DOMESTIC & INTERNATIONAL
COMMERCIAL FISHERIES



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SITKA, ALASKA 99835

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JUNEAU, ALASKA 99811
(907) 485-4916

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MEMORANDUM

TO: Members of the Senate Special Committee on Domestic and
International Commercial Fisheries

FROM: Senator Dick Eliason

DATE: March 23, 1992

RE: For your info

For your information, I am attaching a copy of a letter concerning a question that was raised at last Wednesday's Fisheries Committee meeting on the Hatchery Review Project. During that meeting we discussed whether there is now, or should be, a mechanism for collecting and reporting information regarding statewide levels of production by ALL hatcheries, including state and PNP facilities. The letter was provided to my office after the meeting by the United Fishermen of Alaska. It is a response that organization received from the Department of Fish and Game to UFA's suggestion that just such a review be done.

Also, the Special Committee decided during the March 18 meeting to introduce a committee-sponsored bill regarding a wild stock priority, broodstock and cost recovery fish. That bill, SB 457, was introduced today and referred to the Senate Resources Committee. The bill contains the language the committee agreed upon, plus the addition of a "house-keeping" section suggested by Legal Services which amends the statutory definition of "fishery." This was necessary as the current definition, which should have been corrected long ago to be consistent with other statutes, uses the word "commercial." References to personal use, sport, and subsistence "fisheries" are used throughout state law, but this definition has never been corrected to match our useage of the term. It is appropriate to include this amended definition in this bill as we want to ensure that the Board of Fisheries will manage ALL fisheries, not just commercial fisheries, to meet the wildstock priority.

STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

WALTER J. HICKEL, GOVERNOR

P.O. BOX 3-2000
JUNEAU, ALASKA 99802-2000
PHONE: (907) 465-4100

February 28, 1992

Mr. Rich Davis
Aquaculture Committee Chairman
United Fishermen of Alaska
211 4th Street, Suite 112
Juneau, AK 99801

Dear Mr. Davis:

This letter responds to the United Fishermen of Alaska's request for the Division of Fisheries Rehabilitation, Enhancement and Development (FRED) to undertake a statewide hatchery production review process that involves the existing regional planning teams (RPT).

The Alaska Department of Fish and Game (ADF&G) has been considering the need for this type of review and methods by which it could be accomplished in conjunction with the legislative review of the Alaska salmon enhancement program. I have asked Dr. Jeff Koenings, Director of the FRED Division, to contact you to see if an efficient and effective review process can be established that has the potential of providing significant recommendations.

I and my staff look forward to coordinating this effort with the Senate Special Committee on Domestic and International Fisheries, the RPTs throughout the state, and the United Fishermen of Alaska.

Sincerely,



Charles P. Meacham
Deputy Commissioner

cc: Jeff Koenings
Kevin C. Duffy

RECEIVED

MAR 11 1992

UNITED FISHMEN
OF ALASKA



Alaska State Senate

Office of the President

Senator Richard I. Eliason, President

Bill History

SB 457 was sponsored and introduced by the Senate Fisheries Committee (as an outgrowth of the Hatchery Review Study). The bill was referred to the Senate Resources Comm. where Sen. Eliason was assigned to serve as a sub-committee to draft a Resources CS to refine the language. That version was the one that passed.

THE
CONSTITUTION
OF THE
STATE OF
ALASKA



John B. Coghill

Lieutenant Governor

Constitutional Issues

Health, Education and Welfare

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presence of three members is required for a
a lesser number may conduct hearings or

Reapportionment Plan and Proclamation.

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stricting or reapportionment must be filed
the proclamation. Original jurisdiction in
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reme court upon the law and the facts.

Article VII

Education and Welfare

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Natural Resources

Article VIII

Section 2 - State University.

The University of Alaska is hereby established as the state university and constituted a body corporate. It shall have title to all real and personal property now or hereafter set aside for or conveyed to it. Its property shall be administered and disposed of according to law.

Section 3 - Board of Regents of University.

The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The board shall, in accordance with law, formulate policy and appoint the president of the university. He shall be the executive officer of the board.

Section 4 - Public Health.

The legislature shall provide for the promotion and protection of public health.

Section 5 - Public Welfare.

The legislature shall provide for public welfare.

Article VIII

Natural Resources

Section 1 - Statement of Policy.

It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

Section 2 - General Authority.

The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Section 3 - Common Use.

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Article VIII

Natural Resources

Section 4 - Sustained Yield.

Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Section 5 - Facilities and Improvements.

The legislature may provide for facilities, improvements, and services to assure greater utilization, development, reclamation, and settlement of lands, and to assure fuller utilization and development of the fisheries, wildlife, and waters.

Section 6 - State Public Domain.

Lands and interests therein, including submerged and tidal lands, possessed or acquired by the State, and not used or intended exclusively for governmental purposes, constitute the state public domain. The legislature shall provide for the selection of lands granted to the State by the United States, and for the administration of the state public domain.

Section 7 - Special Purpose Sites.

The legislature may provide for the acquisition of sites, objects, and areas of natural beauty or of historic, cultural, recreational, or scientific value. It may reserve them from the public domain and provide for their administration and preservation for the use, enjoyment, and welfare of the people.

Section 8 - Leases.

The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses. Leases and permits shall provide, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing concurrent use, and for forfeiture in the event of breach of conditions.

Section 9 - Sales and Grants.

Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures. All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall

TESTIMONY OF SEN. ELIASON ON SB:457

"RELATING TO MANAGEMENT OF WILD AND HATCHERY STOCKS OF FISH"

SENATE RESOURCES COMMITTEE - APRIL 1, 1992

The Senate Special Committee on Fisheries, which I chair, has been working for nearly a year on a review of the Alaska Salmon Enhancement Program. In February a draft report on this review was printed and distributed to interested parties all over the state. At that time we solicited the public's scrutiny of the report, and their comments and suggestions about the report and the enhancement program itself.

A good deal of public comment has been received both by teleconference and in written comment. The review project will be an on-going process, and will hopefully result in discussion and action over the next few years to make adjustments and improvements to many facets of the enhancement program.

As a starting point, the Fisheries Committee decided to introduce the legislation before us today. The subject of this bill is the action which has been requested the most frequently by those who have submitted comments to the Fisheries Committee. Most who have suggested this action have referred to it as "establishing a wild

stock priority in law." SB 457 is intended to do that by clarifying what responsibilities the state has in managing wild and enhanced fish stocks. It establishes that the state does have an obligation to manage wild stocks for sustained yield, but that hatchery stocks do not have that same level of mandatory protection. The bill basically sets out that wild stocks SHALL be managed for sustained yield, and that hatchery stocks MAY be managed for sustained yield. It states that the Board must CONSIDER the needs of hatcheries for broodstock, and then MAY provide for broodstock. For hatchery cost recovery fish, the board MAY consider hatchery needs, and MAY provide for it. This boils down to spelling out a prioritization of responsibilities in fish management as follows:

Sustained yield of wild stocks is top priority. After that has been achieved; fishery user groups , hatchery broodstock, and hatchery cost recovery fish are basically on equal footing. However, broodstock has a status that is slightly elevated from cost recovery in that the Board must at least CONSIDER the need for broodstock before making its allocation decisions.

SB 457 was introduced quickly after public comment had been gathered, in an effort to get this important matter before the Legislature and the public for consideration yet this session. It is a sort of working draft. And it has already generated several suggestions for amended language. The Department of Fish and Game is proposing several changes, and I am sure a representative of the Department will speak to those.

The group of legislative staffers who have been working on the Enhancement Review Project have met with both the legislative drafting attorney and the Assistant Attorney General who serves as the Board of Fisheries' attorney, to consider those ideas and others from review project research and the public testimony received on the draft report, and to propose some fine-tuning of the language in SB 457. In your folders you will find a possible Committee Substitute version that this group of staffers has drafted for the Resources Committee to use for discussions and consideration. This version starts with the suggestions being made by the Department of Fish and Game, and then goes on to add a phrase in sub-section (a) of the first page to make it clear that wild and hatchery stocks do not have the same level of guaranteed protection. In this version, the priority for wild stocks pertains to ALL fish stocks, not just anadromous or salmon stocks. In thinking over the goal of the bill, the directive being given to the Board, it didn't make sense not to do this. Right now our enhancement program focuses almost exclusively on anadromous fish, but if and when it expands into other species, this priority for protection of the wild stocks would be in place. This version also changes ~~the~~ all references in sections b and c to "hatcheries" to "enhancement projects and facilities." If broodstock or cost recovery fish are needed by enhancement projects, the responsibilities of the board would then be clear for All such efforts, not only hatcheries. ~~The~~ The final suggestion made in this version is in section (c) where reference is made to hatcheries authorized under AS 16.10.400. That is the private non-profit

hatchery statute. It was noted that there are also State-owned hatcheries which are contracted out to be run by Regional Aquaculture Associations. While these hatcheries themselves are not authorized under 16.10.400, the operators of them ARE allowed to take cost recovery fish, and so reference to such facilities has been added here to include them.

One thing that the committee should probably take a look at, is whether definitions should be added for "wild" and "enhanced" fish stocks. Both the original bill and the draft substitute version, leave the responsibility for defining these terms as they apply to this bill, to the Board of Fisheries. The definitions would not be easy to arrive at for either the Legislature OR the board. Where do you draw the line between wild and enhanced? For example, if eggs are taken from a stream, incubated at a hatchery, and then released back into the same stream, has it become an enhanced stock? What if they were released into a DIFFERENT stream? If a major goal of this bill is to protect genetic integrity and run strength of wild stocks, the definition of wild would have to be fairly narrow. It is a difficult question, and I urge the committee to discuss whether these definitions are best spelled out in statute or best left to the board.

In your folders you will find a copy of the chapter from the Enhancement Review Project regarding the legal issues which this bill addresses. Attached to that chapter is a copy of the letter from the Board of Fisheries last spring, explaining the need for

some statutory direction on these issues. The folders also contain samples of written testimony from various groups and individuals which all contain comments on the subject matter of this bill. Also in your folders are copies of the sections of the State Constitution which pertain to these issues.

It might be worthwhile to start with having Fish and Game explain their position and proposed amendments and where those fit in with the original bill and the draft substitute bill.



Alaska Environmental Lobby, Inc.

P.O. Box 22151

Juneau, Alaska 99802

907-463-3366

SB 457 - ANADROMOUS FISH

The Alaska State Constitution mandates sustained yield of fish stocks, but because hatcheries did not exist when the Constitution was written, questions have arisen. The Department of Fish & Game and the Fish Board have always assumed that they are managing fisheries with the priority for sustained yield of wild fish stocks over hatchery stocks. But this concept has never been mentioned in statute.

SB 457 will give overriding protection to wild stocks. It clarifies that hatchery fish do not have the same status as wild fish. It won't change the way things have been done, it will simply enhance everyone's understanding of the law. This will guarantee that wild anadromous fish stocks will always have priority in Alaska.

The Alaska Environmental Lobby supports SB 457.

April 29, 1992 Issue Paper
Linda Franklin, citizen lobbyist

ALASKA CENTER FOR THE ENVIRONMENT • ALASKA CHAPTER, SIERRA CLUB • ALASKA FRIENDS OF THE EARTH
ANCHORAGE AUDUBON SOCIETY • ARCTIC AUDUBON SOCIETY • CLEAN AIR COALITION • DENALI CITIZENS' COUNCIL
DENALI GROUP, SIERRA CLUB • JUNEAU AUDUBON SOCIETY • JUNEAU GROUP, SIERRA CLUB
KACHEMAK BAY CONSERVATION SOCIETY • KENAI PENINSULA AUDUBON SOCIETY • KNIK CANOERS AND KAYAKERS
KNIK GROUP, SIERRA CLUB • KODIAK AUDUBON SOCIETY • LYNN CANAL CONSERVATION • NORTHERN ALASKA ENVIRONMENTAL CENTER
PRINCE WILLIAM SOUND CONSERVATION ALLIANCE • SITKA CONSERVATION SOCIETY • SOUTHEAST ALASKA CONSERVATION COUNCIL



PUBLIC OPINION MESSAGE

DEAR: SENATOR ELIASON

NAME: PAUL MC COLLUM
TITLE: EXECUTIVE DIRECTOR, VALDEZ FISHERIES
ADDRESS: P.O. BOX 125
CITY: VALDEZ ZIP: 99686
PHONE: 835-4874
BILL NO: SB 457
SUBJECT: WILD/HATCHERY ANADROMOUS FISH MANAGEMENT
MESSAGE: WE NEED A STRUCTURED REVIEW PROCESS FOR ENHANCEMENT PROJECTS BUT
UNTIL SUCH IS IN EFFECT PROJECTS SHOULD NOT BE ELIMINATED BY
POLITICAL AMBIGUITY. A PERMITTED OPERATION SHOULD HAVE A REASONABLE
CHANCE TO SUCCEED. THE ATTORNEY GENERAL'S OPINION ON HATCHERY BROOD
STOCK BEING NO DIFFERENT THAN OTHER STOCKS SHOULD BE REFLECTED.

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DATE: 92/04/30
TIME: 10:38:11
LIONAME: VALDEZ INFORMATION OFFICE

COPIES: REPRESENTATIVES SENATORS

CARNEY	KERTTULA
FINKELSTEIN	MENARD
HUDSON	
IVAN	
KUBINA	
LEMAN	
LINCOLN	
MOYER	
ZAWACKI	

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ADDRESS: P.O. BOX 125
CITY: VALDEZ ZIP: 99686
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SUBJECT: WILD/HATCHERY ANADROMOUS FISH MANAGEMENT
MESSAGE: WHILE I AGREE THAT CLARIFICATION IS NEEDED ON THIS ISSUE THE LANGUAGE
IS TOO AMBIGUOUS TOWARDS ENHANCED STOCKS. THE SUSTAINED YIELD CONCEPT
FROM THE CONSTITUTION IS VERY VAGUE. PLEASE CONSIDER STRIKING "MAY BE
MANAGED" FROM (A) CHANGE ALL REMAINING "MAY" TO "SHALL". PLEASE DON'T
WRITE OFF OUR HATCHERIES TOO SOON.

POMID: 17104225
DATE: 92/04/30
TIME: 10:42:25
LIONAME: VALDEZ INFORMATION OFFICE

COPIES: REPRESENTATIVES SENATORS

CARNEY	KERTTULA
FINKELSTEIN	MENARD
HUDSON	
IVAN	
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LEMAN	
LINCOLN	
MOYER	
ZAWACKI	

To meet PWSAC concern
in section (c) - could
amend references to "cost of
operating" to refer to the
Statute that spells out
all the things that are
allowed under cost recovery
(operating costs, debt retirement,
etc).

We meant to be referring
to Bd. ^{may provide} ~~allowing~~ for all their
normal cost recovery activities.

THE
CONSTITUTION
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ALASKA



John B. Coghill
Lieutenant Governor

December 1990

Health, Education and Welfare

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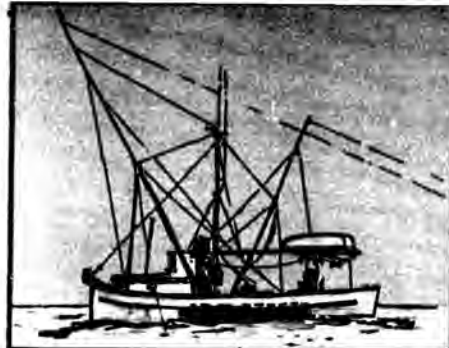
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Alaska Trollers Association

REPRESENTING ALASKA TROLLERS

130 Seward St., No. 213
Juneau, Alaska 99801
(907) 586-9400

April 3, 1992

Senator Dick Eliason, President
Alaska State Senate
Pouch V
Juneau, AK 99811

Dear Senator Jones:

On behalf of the Alaska Trollers Association (ATA), I would like to issue support for the April 3, 1992 committee substitute for SB 457. This bill seeks to affirm Alaska's commitment to its fisheries resource by mandating a wild stock management priority; a policy which ATA has endorsed for many years.

Salmon fishermen throughout the state have been the beneficiaries of more stable fisheries due to hatchery programs. In addition, many wild stocks have enjoyed reduced fishing pressure because of the presence of hatchery fish. Unfortunately, one side-effect of hatchery production has been the confusion which has arisen, due to the lack of a definitive management policy regarding wild stocks.

The success of the fishing industry is deeply rooted in the health of our natural runs of fish. Our members recognize an obligation to sustain healthy populations of fish and do not wish to see enhanced runs given preferential treatment over wild. Also, our fishermen are concerned that without clear statutory wording, the potential exists whereby traditional fisheries could be disrupted to accommodate the needs of hatchery facilities.

ATA believes that by adopting the language in SB 457 the intent of the state, to protect wild stocks of fish above all others, is made sufficiently clear to the Board of Fisheries and the Department of Fish and Game. Without such language, increased levels of frustration, and subsequent polarization of fishing and hatchery interests, is likely. This would be unfortunate, given the obvious benefits that have been realized through our enhancement programs. Finally, it should also be noted that the language is not so restrictive as to prevent the Board of Fisheries from choosing to provide adequate passage of hatchery fish for cost recovery, so long as wild stock needs are given first priority.

Thank you for your efforts on this important piece of legislation. If I can be helpful on this or any other issue, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dale", followed by a horizontal line.

Dale A. Kelley
Executive Director

PRINCE WILLIAM SOUND AQUACULTURE CORPORATION
P. O. BOX 1110
CORDOVA, ALASKA 99574

April 6, 1992

Senator Lloyd Jones, Chairman
Senate Resources Committee
Alaska State Senate
P.O. Box V
Juneau, Alaska 99811

Dear Mr. Chairman:

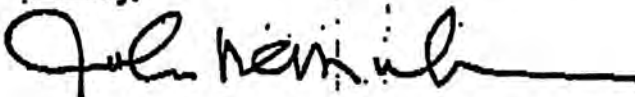
On April 1st, I testified before your committee on Senate Bill 457. A written copy of that testimony is included in your committee's files.

Prior to the time that I testified, a committee substitute for Senate Bill 457 was discussed by the committee. At the close of my testimony, in response to a question from Senator Menard, I tentatively agreed to the language in the Bill.

Since that date, I have received the Committee Substitute and have had an opportunity to discuss it with some members of our board of directors. We are supportive of CSSB 457 as written.

Thank you very much for providing us the opportunity to participate in this legislative process.

Sincerely,



John McMullen
President

cc: PWSAC EXCOM Members

introduced by Europeans many decades ago. Stocking records going back thirty years established that there had been no hatchery fish releases in the brook or the kill.

He further explained that there is a difference between wild trout and hatchery trout. Hatchery trout are not as healthy, as large, or as adaptable as wild trout. They often die young and small, introduce diseases to the wild populations, reproduce at dramatically low rates, displace wild trout habitat, and generally disrupt wild populations. Indeed, recent studies establish that hatchery trout are sort of aquatic sociopaths, travelling in gangs and disturbing the wilderness. Worst of all, they taunt and disrupt the spawning rituals and rates of the wild fish, like heartless frat boys with floodlights on lovers' 'ane.

The electroshocking survey revealed almost no fish from the point of the spill on the small tributary to a low dam almost three miles away on the Stony Kill. A survey of the benthic macroinvertebrates in the sediment established that the viability of the ecosystem was not harmed by the slug of ammonium hydroxide. Rather, the chemical stunned the fish with immediate gill failure but left the stream system otherwise unharmed.

As we pushed through a beaver path near the banks of the Stony Kill, I casually asked our trout expert what fish populations might have been expected in an unpolluted stream. "Oh, I took electroshocking data all through here in 1988. I'll see if I can dig 'em up for you," he remarked. I danced and skipped as well as my hip boots permitted. Pre-release "baseline conditions" under the natural resource damage regulations had just fallen into place.

Extrapolation of the baseline data established a pre-release population in the impacted reaches of 25,000 - 30,000 fish, from minnows to lunkers. Species and sizes ranged from blacknose dace (*Rhinichthys atratulus*) as small as one inch to big boy brownies (*Salmo trutta*) sixteen inches long. Among these were about 5,000 trout, from young of the year fingerlings to "let 'em go" trophies.

My hard data compiled, I sized up the natural resource damage case. Our trout expert would defend the wilderness conditions of the stream to his death. Based on the degradation consequences of stocking, we prepared to refute the expected industry quick-fix stocking alternative. Rather, our restoration plan was to allow upstream and downstream surviving fish populations to gradually migrate back to the area of the kill. Since it takes three years for a brown trout to reach sixteen inches, we were prepared to maintain that the resource was severely impaired and thus unusable for three years.

These data were considered in arriving at "lost use" values, an economic methodology embraced by the new natural resource regulations. Geographic and demographic factors indicate angler use in the affected reaches of stream averages 170 hours per acre per year. Virtually all this angling is directed at trout. Lost angling opportunity for the projected three-year impact period would be a total of 1,689 angler trips. Trip related expenditures by New York resident anglers average about \$26.89 per day according to United States Department of Interior survey data, adjusted for inflation. The lost economic value of these trips was conservatively estimated to be \$45,417.21.

FLOOR COMMENTS

CSSB 457 (RES) "RELATING TO MANAGEMENT OF WILD AND ENHANCED STOCKS OF FISH"

SB 457 was introduced by the Senate Special Committee on Fisheries as a result of the Review Project it has been conducting on Alaska's Salmon Enhancement Program, and in response to a request from the Board of Fisheries for some clarification and direction about priorities in fisheries management.

The Enhancement Program is now producing a huge percentage of the fish in Alaska, which adds to the ever-increasing complexity of fish management. We need to spell out where enhanced stocks fit into the overall management picture in the state.

This bill does that by setting out in LAW, the policy that the Board of Fisheries and Department of Fish and Game have been using. That is: that the sustained yield of WILD fish stocks is the first obligation in management of fish in Alaska.

As long as that priority is met, the Board and the Department may also manage in a way that will provide broodstock and cost recovery fish to enhancement projects. All management would of course, still fall under the constitutional directive to maximize USE of fishery resources.

SB 457 has the support of the Department of Fish and Game, major fishing organizations, and aquaculture organizations, and it passed the Senate unanimously. It has a zero fiscal note.

This bill establishes sound groundrules for management of fish in the state, and I urge your support.

IN CASE OF QUESTIONS:

Do broodstock and cost recovery have equal status under this bill?

Status of broodstock is very slightly elevated above cost recovery fish in that Board is required to at least CONSIDER the needs of enhancement projects for broodstock, and is not obligated to consider cost recovery needs. But in both cases, there is no requirement that the Board provide for them.

Where does fishing fit into the prioritization?

Harvest of fish is clearly mandated by the "maximum use" clause of the state Constitution, but would essentially compete for specific allocations on equal footing with broodstock and cost recovery fish as the state's only obligation is to sustained yield of wild stocks. Balancing other uses is left to the discretion of the Board of Fisheries and the Department of Fish and Game.

Why is definition of "fishery" included in this bill (last section)?

"Housekeeping provision" as current definition in law should have been corrected long ago. Throughout statutes we refer to personal use, subsistence, and sport "fisheries," but definition of fishery had the word "commercial" in it. This bill is an especially appropriate place to fix the definition to match the use of "fishery" throughout the law, because we want to make it clear that ALL fisheries are to be managed consistent with sustained yield of wild stocks, not only commercial fisheries.

ALASKA STATE LEGISLATURE SENATE

SENATOR RICHARD I. ELIASON

PRESIDENT OF THE SENATE
LABOR & COMMERCE COMMITTEE
RESOURCES COMMITTEE
RULES COMMITTEE
CHAIRMAN, SPECIAL COMMITTEE ON
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MEMORANDUM

TO: ALL SENATORS

FROM: SEN. DICK ELIASON, CHAIRMAN
SENATE SPECIAL COMMITTEE ON DOMESTIC AND INTERNATIONAL
COMMERCIAL FISHERIES

DATE: APRIL 10, 1992

RE: CSSB 457 (RES) -- ON TODAY'S CALENDAR

A summary of CSSB 457 (RES), which is on today's Senate calendar,
is attached for your information.

I urge your support of this bill.

SB 457 "RELATING TO MANAGEMENT OF WILD AND ENHANCED STOCKS OF FISH"

**Explanation by Senator Dick Eliason, Chairman
Senate Special Committee on Domestic and International
Commercial Fisheries**

The Senate Special Committee on Domestic and International Commercial Fisheries has been working for nearly a year on a review of the Alaska Salmon Enhancement Program. SB 457 is the first piece of legislation to result from the Review Project. The subject of this bill, establishing a "wild stock priority," is the action most requested by those who have submitted comments during the review process. Also, it provides the statutory clarification which was requested last year by the Board of Fisheries.

The goal of SB 457 is to make it clear that the sustained yield of wild stocks is the top priority of state fish management. A number of developments have pointed to the value of establishing this priority in law. During the 20 years since Alaska's salmon enhancement statutes were enacted, hatcheries in the state have become very successful at producing huge numbers of salmon. Fisheries management has become increasingly complex as consideration must be given to harvest and escapement of both wild and hatchery stocks. During recent years we have also experienced poor salmon market conditions; questions about ocean carrying capacity; rising concerns over the genetic diversity of salmon, intermingling of wild and hatchery fish, and the potential genetic and disease problems generated by fish farming. We have also witnessed the disastrous plunge in the viability of salmon stocks along the west coast of the lower 48 states and the resulting threat of fishing closures under the Endangered Species Act. Factors such as these have made Alaskans more and more aware of the critical need to make a priority of taking care of our wild salmon stocks.

Our state Constitution mandates the management of fish on the sustained yield principal. But the Constitution was written before the evolution of our highly productive enhancement program. The question then arises as to whether the constitutional mandate for sustained yield applies equally to wild fish and "enhancement fish." What if providing for broodstock to a hatchery would jeopardize the sustained yield of a wild stock? Is the obligation to provide adequate escapement of wild salmon to their stream of origin equal to providing broodstock to a hatchery?

The Board of Fisheries and the Department of Fish and Game have been dealing with these questions for a number of years. They have managed fisheries under a self-imposed policy of making wild stock escapement a higher priority than providing for hatchery broodstock or cost recovery fish. SB 457 essentially puts that policy into law by clarifying what the state's responsibilities are in managing wild and hatchery stocks.

The bill establishes that the state has an OBLIGATION to manage for sustained yield of wild stocks, but that enhancement project stocks do not have that same level of MANDATORY protection. The bill states that the Board of Fisheries MUST CONSIDER the needs of enhancement projects for broodstock, and MAY consider their cost recovery needs, and then MAY provide for broodstock and cost recovery, IF doing so would be consistent with the sustained yield of wild stocks. This clarifies the different levels of consideration the Board must give to wild and enhanced stocks.

The Senate Resources Committee Substitute incorporates suggestions made during the hearing process, and more clearly meets the original intent of the legislation. CS SB 457 (Resources) has the support of the Departments of Fish and Game and Law, members of the Board of Fisheries, The United Fishermen of Alaska, other commercial fishing organizations, and regional aquaculture associations. The bill passed Senate Resources with a unanimous vote of "Do Pass," and no public opposition to the Committee Substitute version has been expressed.

CSSB 457 establishes sound statutory guidelines for the management of fish stocks based on a priority for our wild stocks. It is the result of the cooperative efforts of people involved in fishing, aquaculture, fish management, and the Legislature to learn from the mistakes made in other places, to recognize Alaska's fish stocks as a treasured heritage to be protected, and to acknowledge that the proper role of our fish enhancement program is to enhance, but not replace or displace, wild stocks.

SB 457 "RELATING TO MANAGEMENT OF WILD AND ENHANCED STOCKS OF FISH"

TESTIMONY BY SENATOR DICK ELIASON
BEFORE THE HOUSE RESOURCES COMMITTEE
APRIL 29, 1992

THE SENATE SPECIAL COMMITTEE ON DOMESTIC AND INTERNATIONAL COMMERCIAL FISHERIES HAS BEEN WORKING FOR NEARLY A YEAR ON A REVIEW OF THE ALASKA SALMON ENHANCEMENT PROGRAM. SB 457 IS THE FIRST PIECE OF LEGISLATION TO RESULT FROM THE REVIEW PROJECT.

THE SUBJECT OF THIS BILL, ESTABLISHING A "WILD STOCK PRIORITY," IS THE ACTION MOST REQUESTED BY THOSE WHO HAVE SUBMITTED COMMENTS DURING THE REVIEW PROCESS. ALSO, IT PROVIDES THE STATUTORY CLARIFICATION WHICH WAS REQUESTED LAST YEAR BY THE BOARD OF FISHERIES.

THE GOAL OF SB 457 IS TO MAKE CLEAR THAT THE SUSTAINED YIELD OF WILD STOCKS IS THE TOP PRIORITY OF STATE FISH MANAGEMENT. A NUMBER OF DEVELOPMENTS HAVE POINTED TO THE VALUE OF ESTABLISHING THIS PRIORITY IN LAW. DURING THE 20 YEARS SINCE ALASKA'S SALMON ENHANCEMENT STATUTES WERE ENACTED, HATCHERIES IN THE STATE HAVE BECOME VERY SUCCESSFUL AT PRODUCING HUGE NUMBERS OF SALMON. FISHERIES MANAGEMENT HAS BECOME INCREASINGLY COMPLEX AS CONSIDERATION MUST BE GIVEN TO HARVEST AND ESCAPEMENT OF BOTH WILD AND HATCHERY STOCKS.

DURING RECENT YEARS WE HAVE ~~DE~~ EXPERIENCED POOR SALMON MARKET CONDITIONS; QUESTIONS ABOUT OCEAN CARRYING CAPACITY; ^{AND} RISING CONCERNS OVER THE GENETIC DIVERSITY OF SALMON, INTERMINGLING OF

WILD AND HATCHERY FISH, AND THE POTENTIAL GENETIC AND DISEASE PROBLEMS GENERATED BY FISH FARMING.

WE HAVE ALSO WITNESSED THE DISASTROUS PLUNGE IN THE VIABILITY OF SALMON STOCKS ALONG THE WEST COAST OF THE LOWER 48 STATES, AND THE RESULTING THREAT OF FISHING CLOSURES UNDER THE ENDANGERED SPECIES ACT.

FACTORS SUCH AS THESE, HAVE MADE ALASKANS MORE AND MORE AWARE OF THE CRITICAL NEED TO MAKE A PRIORITY OF TAKING CARE OF OUR WILD SALMON STOCKS.

OUR STATE CONSTITUTION MANDATES THE MANAGEMENT OF FISH ON THE SUSTAINED YIELD PRINCIPAL. BUT THE CONSTITUTION WAS WRITTEN BEFORE THE EVOLUTION OF OUR HIGHLY PRODUCTIVE ENHANCEMENT PROGRAM. THE QUESTION THEN ARISES AS TO WHETHER THE CONSTITUTIONAL MANDATE FOR SUSTAINED YIELD APPLIES EQUALLY TO WILD FISH, AND "ENHANCEMENT FISH."

WHAT IF PROVIDING FOR BROODSTOCK TO A HATCHERY WOULD JEOPARDIZE THE SUSTAINED YIELD OF A WILD STOCK? IS THE OBLIGATION TO PROVIDE ADEQUATE ESCAPEMENT OF WILD SALMON TO THEIR STREAM OF ORIGIN, EQUAL TO PROVIDING BROODSTOCK TO A HATCHERY?

THE BOARD OF FISHERIES AND THE DEPARTMENT OF FISH AND GAME HAVE BEEN DEALING WITH THESE QUESTIONS FOR A NUMBER OF YEARS. THEY HAVE MANAGED FISHERIES UNDER A SELF-IMPOSED POLICY OF MAKING WILD STOCK

ESCAPEMENT A HIGHER PRIORITY THAN PROVIDING FOR HATCHERY BROODSTOCK OR COST RECOVERY FISH.

SB 457 ESSENTIALLY PUTS THAT POLICY INTO LAW BY CLARIFYING WHAT THE STATE'S RESPONSIBILITIES ARE IN MANAGING WILD AND HATCHERY STOCKS.

THE BILL ESTABLISHES THAT THE STATE HAS AN OBLIGATION TO MANAGE FOR SUSTAINED YIELD OF WILD STOCKS, BUT THAT ENHANCEMENT PROJECT STOCKS DO NOT HAVE THAT SAME LEVEL OF MANDATORY PROTECTION. THE BILL STATES THAT THE BOARD OF FISHERIES MUST CONSIDER THE NEEDS OF ENHANCEMENT PROJECTS FOR BROODSTOCK, AND MAY CONSIDER THEIR COST RECOVERY NEEDS, AND THEN MAY PROVIDE FOR BROODSTOCK AND COST RECOVERY, IF DOING SO WOULD BE CONSISTENT WITH THE SUSTAINED YIELD OF WILD STOCKS. THIS CLARIFIES THE DIFFERENT LEVELS OF CONSIDERATION THE BOARD MUST GIVE TO WILD AND ENHANCED STOCKS.

CS SB 457 (RESOURCES) HAS THE SUPPORT OF THE DEPARTMENTS OF FISH AND GAME AND LAW, MEMBERS OF THE BOARD OF FISHERIES, THE UNITED FISHERMEN OF ALASKA, OTHER COMMERCIAL FISHING ORGANIZATIONS, AND REGIONAL AQUACULTURE ASSOCIATIONS.

THE BILL HAS A ZERO FISCAL NOTE, AND PASSED BOTH THE SENATE RESOURCES COMMITTEE AND THE FULL SENATE UNANIMOUSLY. NO PUBLIC OPPOSITION TO THE COMMITTEE SUBSTITUTE VERSION HAS BEEN EXPRESSED.

③

CSSB 457 ESTABLISHES SOUND STATUTORY GUIDELINES FOR THE MANAGEMENT OF FISH STOCKS, BASED ON A PRIORITY FOR OUR WILD STOCKS. IT IS THE RESULT OF THE COOPERATIVE EFFORTS OF PEOPLE INVOLVED IN FISHING, AQUACULTURE, FISH MANAGEMENT, AND THE LEGISLATURE, TO LEARN FROM THE MISTAKES MADE IN OTHER PLACES, TO RECOGNIZE ALASKA'S FISH STOCKS AS A TREASURED HERITAGE TO BE PROTECTED, AND TO ACKNOWLEDGE THAT THE PROPER ROLE OF OUR FISH ENHANCEMENT PROGRAM IS TO ENHANCE, BUT NOT REPLACE OR DISPLACE, WILD STOCKS.

THE END

If questioned about last section of bill which re-defines "fishery" —

Only a "housekeeping" measure. Statutes have an out-dated definition of "fishery" now which refers to "commercial" gear, etc.

But throughout statutes we refer to "sport fisheries", "personal use fisheries", etc. So definition of "fishery" needs to be broadened.

This bill is appropriate vehicle for fixing this as we want to ensure that all fisheries are managed toward a wild stock priority.

4

IN CASE OF QUESTIONS:

Original bill only covered anadromous fish, SC says "fish". Why?

CS version covers ALL fish stocks (both finfish and shellfish).
Wild stock priority should logically extended to all species.
Already we

Do broodstock and cost recovery have equal status?

Status of broodstock is very slightly elevated above cost recovery fish in that Board is required to at least CONSIDER the needs of enhancement projects for broodstock, and is not obligated to consider cost recovery needs. But in both cases, there is no requirement that the Board provide for them.

Where does fishing fit into the prioritization?

Harvest of fish is clearly mandated by the "maximum use" clause of the state Constitution, but would essentially compete for specific allocations, in some instances, on equal footing with broodstock and cost recovery fish as the state's only obligation is to sustained yield of wild stocks. Balancing other uses is at the discretion of the managers.

Why is definition of "fishery" included in this bill (last section)?

Housekeeping measure as current definition in law should have been corrected long ago. Throughout statutes we refer to personal use, subsistence, and sport "fisheries," but definition of fishery had the word "commercial" in it. This bill is an especially appropriate place to fix the definition to match the use of "fishery" throughout the law, because we want to make it clear that ALL fisheries are to be managed consistent with sustained yield, not only commercial fisheries.

SUMMARY OF CHANGES MADE TO APRIL 1, 1992 PROPOSED CS FOR SB457 TO
RFACH APRIL 3 DRAFT CSSB457 (RESOURCES)

Throughout new version:

"to achieve sustained yield" is changed to "consistent with sustained yield."

Reason: "achieve" was stronger mandate and burden than State Constitution and other statutes require. Constitution requires "on the sustained yield principle."

This language change will keep this directive about wild stock priority at a consistent level of obligation.

Other changes:

Page 1, Sub-section (a)

First word, "Fisheries" is changed to "Fish Stocks."

Reason: This makes it clear that the goal of sustained yield of wild stocks applies to ALL management decisions regarding fish, not only to the management of the HARVEST of fish (fisheries)

Page 1, Sub-section (b)

Just a wordage change from "enhanced fish stocks" to "fish from enhanced stocks"

Reason: clarity of meaning as FISH, rather than STOCKS, return to enhancement projects

Page 2, Sub-section (c)

Throughout this section, references to fish that are "surplus" are changed to references to fish "not needed for broodstock" and "in addition to the fish needed for broodstock."

Reason: Term "surplus" was less accurate and descriptive

Throughout this section, "offset the cost of operating the enhancement project" has been replaced with reference to the harvest and sale of fish to "obtain funds for the purposes allowed under AS 16.10.450 or 16.10.480 (d)." (cost recovery statutes)

Reason: To make it clear that the board may provide for harvest of fish for ALL cost recovery allowed under law (including such things as debt retirement), not ONLY the operating costs.

"Return" of fish is changed to "harvest" of fish for cost recovery

Reason: Clarify that it is the actual harvest and selling of fish for cost recovery that may be provided for, not just the allowing of fish to return to the project.

In last line of sub-section (c), deleted "may adopt criteria for determining the reasonable needs of enhancement projects for surplus fish and"

Reason: Phrase was not necessary for purpose of the sentence which was to state that the board may adopt a plan for managing fisheries which will provide enhancement projects with the fish they are allowed under cost recovery statutes.

FAX TRANSMITTAL

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Anchorage
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FAX: 907-274-1999

Prince William Sound
Aquaculture Corporation



TO: Mary McDowell
WITH: Sen. Ellison's Office
FAX#: 465-4928

DATE: April 3, 1992
TIME: 10:08 a.

FROM: John McMullen
CITY: Cordova

RE: SB 457 (CS)

Total pages including cover 3. For transmission error, please call sender.

MESSAGE: I received the CS for SB 457 which
you faxed this a.m. Thank you.
These revisions satisfy my concerns
that were included in my testimony of
April 1, 1992 (enclosed).

Armin Koernig has requested that
legislative intent be adopted for this
bill.

also --

does sustinial yield refer to
"harvest", "escapement" or both?

Thanks --

John McMullen

Prince William Sound Aquaculture Corporation

P.O. Box 1110 Cordova, Alaska 99574-1110 Phone (907) 434-7511 FAX (907) 434-7514
821 N St. #101B Anchorage, Alaska 99501-3285 Phone (907) 274-4066 FAX (907) 274-1999



April 1, 1992

Senator Lloyd Jones, Chairman
Senate Resources Committee
Alaska State Senate

Dear Mr. Chairman:

I am John McMullen, President of Prince William Sound Aquaculture Corporation. Thank you for the opportunity to testify before your committee.

I wish to comment on Senate Bill 457, an Act relating to management of wild and hatchery stocks of anadromous fishes.

Senate Bill 457 has melted down the issues associated with the nationalized aquaculture programs within the state. Those issues are:

1. The maintenance of a preference for wild stocks within fisheries management and conservation programs.
2. The determination of acceptable levels of hatchery production, by region.
3. The regulation of hatchery stocks in a manner which does not disrupt traditional fisheries.

It is our belief that existing Alaska statutes and the regulations of the Alaska Board of Fisheries and the ADF&G presently provide for wild stock preferences and the orderly operation of hatcheries.

At the same time, we understand that hatchery programs in some regions of the state were initiated without proper regard for the design of associated cost recovery programs which would not impact traditional fisheries.

We believe that unresolved issues are regional in scope, and that the resolution of these issues should be confined to each region.

Mr. Chairman, the specific statements in SB 457 upon which I will comment include the following.

Sec.16.05.730 (a); The board may manage fisheries in the state to achieve sustained yield for wild anadromous fish stocks.

Sec 16.05.730 (b) line 10; The board may manage fisheries in the state to achieve an adequate return of hatchery produced anadromous fish stocks to hatcheries for brood stock.

Sec 16.05.730 (c) page 2, line 2; The board may exercise its authority under this title as it considers necessary to provide a reasonable return of surplus fish to a hatchery to offset the cost of

operating the hatchery if the return of surplus fish to the hatchery or the harvest of surplus fish by the hatchery does not prevent achievement of sustained yield for wild anadromous fish stocks.

Sec. 16.05.730 (c) page 2, line 6: The board may adopt criteria for determining the reasonable needs of hatcheries for surplus fish, and may adopt a management plan to provide surplus fish to a hatchery.

Mr. Chairman, in Prince William Sound, levels of hatchery production are determined by adherence to the optimum sustained yield principle. The Regional Planning Team in Prince William Sound is basing its revision of the Regional Comprehensive Salmon Plan on the concept of optimum sustained yield for wild and enhanced stocks, rather than on wild stocks alone. At the same time, we recognize and agree with a priority for maintenance of wild stocks.

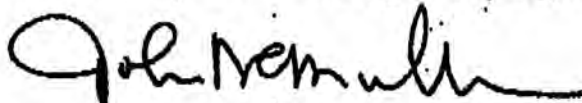
In February, 1991, the Alaska Board of Fisheries adopted a salmon management plan for Prince William Sound. That plan, which was developed by the Regional Planning Team through the public participation process, allocates all the salmon returning to the Sound to wild and hatchery brood stocks and to specific user groups including hatcheries. We do not utilize the concept of "surplus" fish as written into Senate Bill 457. We believe this is in keeping with Alaska Statute 16.10.440 (a) which states that "Fish released into the natural waters of the state by a hatchery operated under AS 16.10.420-470 are available to the people for common use and are subject to regulation under applicable law in the same way as fish occurring in their natural state until they return to the specific location designated by the department for harvest by the hatchery operator."

Mr. Chairman, regarding cost recovery and use of funds, AS 16.10.450 says, among other things, that a hatchery operator who sells salmon returning from the natural waters of the state "after utilizing the funds for reasonable operating costs, including debt retirement, expanding its facilities, salmon rehabilitation projects, fisheries research, or for costs of operating the regional association for the area in which the hatchery is located, shall expend the remaining funds on other fisheries activities of the qualified regional association."

However, Senate Bill 457 proposes that the board adopt criteria for determining reasonable needs for hatchery funding, which appears to conflict with the intent of present regulations and could serve as a mechanism to reduce hatchery operations.

Although the Prince William Sound Salmon Allocation and Management Plan is in place, and PWSAC's cost recovery fish are assured, we do not agree with the proposal that would authorize the board to establish hatchery funding levels. Instead, we presently work with the ADF&G on a regular basis to determine the annual revenue needs of our hatchery program.

Thank you very much for the opportunity to present this testimony.



John McMullen
President

PRINCE WILLIAM SOUND AQUACULTURE CORPORATION
P.O. BOX 1110
CORDOVA, ALASKA 99574

April 6, 1992

Senator Lloyd Jones, Chairman
Senate Resources Committee
Alaska State Senate
P.O. Box V
Juneau, Alaska 99811

Dear Mr. Chairman:

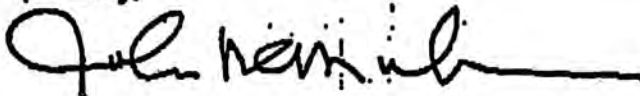
On April 1st, I testified before your committee on Senate Bill 457. A written copy of that testimony is included in your committee's files.

Prior to the time that I testified, a committee substitute for Senate Bill 457 was discussed by the committee. At the close of my testimony, in response to a question from Senator Menard, I tentatively agreed to the language in the Bill.

Since that date, I have received the Committee Substitute and have had an opportunity to discuss it with some members of our board of directors. We are supportive of CSSB 457 as written.

Thank you very much for providing us the opportunity to participate in this legislative process.

Sincerely,



John McMullen
President

cc: PWSAC EXCOM Members

APR 6 1992
April 6, 1992

Dear Senator Eliassen:

U.F.A. supports SB 457 with the summary of changes made on April 1. With a definition of sustained yield, it will be possible for the Alaska Department of Fish to achieve wild stock priority and maintain catch and escapement levels.

I would hope reasonable harvest of fish means that the board and the ADF&G will take a good look at the public benefits a hatchery project provides for all common property resource users.

I think this bill has gone as far as it can without mudding up the waters. I give credit to the whole committee for listening to the public and taking the time to make this bill palatable for all parties involved.

Sincerely,

Jerry McCune
Jerry McCune
President, U.F.A.

Southern Southeast Regional Aquaculture Association, Inc.

2721 Tongass Avenue

Ketchikan, Alaska 99901

Phone: (907) 225-9605

Fax: (907) 225-1330

March 30, 1992



Dr. Jeff Koenings, Director
Alaska Department of Fish & Game
FRED Division
P.O. Box 3-2000
Juneau, Alaska 99802

Dear Jeff:

Thank you for asking for my comments on S.B. 457 and S.B. 443 regarding the definition and implications of sustain yield of natural (wild) fish. I believe the intent of protecting anadromous salmonid stocks is consistent with the desires of the SSRAA Board and most fishermen. S.B. 457 allow for consideration of hatchery broodstock and cost recovery, but wild stock protection is paramount. The definition of sustained yield of "naturally" occurring fish in S.B. 443 is consistent with this intent. However, there are some potential problems.

I believe most of us think of salmon when we talk about sustained yields of fish. Are there species of fish other than salmon that could conflict with S.B. 457, i.e., a small herring population in Wrangell Narrows preventing the harvest of salmon returning to Crystal Lake? Or, could a small pink run of several dozen fish in Neets Bay prevent any consideration for broodstock or cost recovery in view of S.B. 457? Or, are there anadromous runs of fish other than salmon that could prevent broodstock collection or cost recovery, i.e., anadromous dolly varden?

I believe most people are talking about economically important salmon stocks. One would also have to define "economically important." What scares me is some management biologist talking the extreme view mentioned above, which by these statutes could stop everything. The intent in the language of both bills is fine, and in most cases, there is no conflict. How does one protect against the extreme position?

I hope my comments are helpful.

Sincerely,

Donald F. Amend
General Manager
92/14E

COOK INLET
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(907) 283-5781

Fax # 283-9433

FACSIMILE COVER PAGE

THIS TRANSMISSION CONSISTS OF 1 PAGES INCLUDING COVER PAGE.FAX TO: Molly McCammonFAX #: 465-4928 ATTN: _____FROM: Tom MearsSPECIAL REMARKS: Have CS for SB457 (7-LSB1706, 4/8/92)Believe section 1 - part (a) reads better this way:Wild fish stocks in the state shall be managed consistent with sustained yield principles & enhanced fish stocks may be managed consistent with sustained yield principles.Time: 12:10Date: 3/4/92

P.S. Part c really sounds good to me. now,

Sen. Eliason's Comments to Senate Resources Committee
on new CSCB 457 (Resources) (Dated 4-3-92)

New Committee Substitute is before the Committee.

Also before you is a one-page summary of the changes that have been made to the bill to incorporate the suggestions, and address the concerns that were expressed in Wednesday's meeting.

This CS was faxed this morning to all Legislative Information Offices that participated in the Wed. teleconference, and to a number of the groups and individuals who testified. So far we have had a lot of favorable comment about this amended version, and I believe that this CS better accomplishes the intended goals of the bill.

DISCUSSION AND PUBLIC TESTIMONY

MOTION TO ADOPT CS

NOTE ATTACHMENT OF ZERO FISCAL NOTE FROM FISH AND GAME

IF NO APPARENT DISCOMFORT BY THE PUBLIC, FISH AND GAME, OR COMMITTEE, MOTION TO MOVE BILL.

BUT

IF ANYONE HAS ANY CONCERNS -- ASK CHAIRMAN TO HOLD BILL OVER UNTIL MIDDLE OF NEXT WEEK FOR FURTHER REVIEW AND COMMENT

7-LS2170G

Utermobile

4/3/92

CS FOR SENATE BILL NO. 457 (RESOURCES)
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE RESOURCES COMMITTEE

Offered:

Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE SENATE SPECIAL COMMITTEE ON DOMESTIC AND INTERNATIONAL COMMERCIAL FISHERIES

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to management of wild and enhanced stocks of fish; and amending the
2 definition of 'fishery.'"

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

4 * Section 1. AS 16.05 is amended by adding a new section to read:

5 ARTICLE 5. MANAGEMENT OF FISH AND FISHERIES.

6 Sec. 16.05.730. MANAGEMENT OF WILD AND ENHANCED STOCKS OF FISH.

7 (a) Fish stocks in the state shall be managed consistent with sustained yield of wild fish stocks
8 and may be managed consistent with sustained yield of enhanced fish stocks.

9 (b) In allocating enhanced fish stocks, the board shall consider the need of fish
10 enhancement projects to obtain brood stock. The board may direct the department to manage
11 fisheries in the state to achieve an adequate return of fish from enhanced stocks to enhancement
12 projects for brood stock; however, management to achieve an adequate return of fish to
13 enhancement projects for brood stock shall be consistent with sustained yield of wild fish stocks.

14 (c) The board may consider the need of enhancement projects authorized under

1 AS 16.10.400 and contractors who operate state-owned enhancement projects under AS 16.10.480
2 to harvest and sell fish produced by the enhancement project that are not needed for brood stock
3 to obtain funds for the purposes allowed under AS 16.10.450 or 16.10.480(d). The board may
4 exercise its authority under this title as it considers necessary to direct the department to provide
5 a reasonable harvest of fish, in addition to the fish needed for brood stock, to an enhancement
6 project to obtain funds for the enhancement project if the harvest is consistent with sustained
7 yield of wild fish stocks. The board may adopt a fishery management plan to provide fish to an
8 enhancement project to obtain funds for the purposes allowed under AS 16.10.450 or
9 16.10.480(d).

10 (d) In this section, "enhancement project" means a project, facility, or hatchery for the
11 enhancement of fishery resources of the state for which the department has issued a permit.

12 * Sec. 2. AS 16.05.940(12) is repealed and reenacted to read:

13 (12) "fishery" means a specific administrative area in which a specific fishery
14 resource is taken with a specific type of gear; however, the Board of Fisheries may designate a
15 fishery to include more than one specific administrative area, type of gear, or fishery resource;
16 in this paragraph,

17 (A) "gear" means the specific apparatus used in the harvest of a fishery
18 resource; and

19 (B) "type of gear" means an identifiable classification of gear and may
20 include

21 (i) classifications for which separate regulations are adopted by the
22 Board of Fisheries or for which separate gear licenses were required by former
23 AS 16.05.550 - 16.05.630; and

24 (ii) distinct subclassifications of gear such as "power" troll gear
25 and "hand" troll gear;

Would it help to
amend (c) to change
references to "cost of
operating" to a reference
to the statute that
lists all the things cost
recovery can be used for.
(Debt retirement, etc).

We didn't mean to
imply any restriction
to only operating costs

Concern with word "surplus"

Add definition of "stock"
16.05.940

✓



Alaska State Senate

Office of the President

Senator Richard I. Eliason, President

Questions :

Other statutes
use "natural"

16.10.400 (g)

16.10.420 (10)

Is that consistent
w/ wild?

Should wild ~~be~~ &
enhanced by defined
in this bill

Cost recovery "fishery"
fit under definition

- Corrected copy -
Page 2 was incorrect

AMENDMENT

TO: CS FOR SENATE BILL NO. 457

IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - SECOND SESSION

A BILL

FOR AN ACT ENTITLED

"An Act relating to management of wild and enhanced stocks of
anadromous fish; and amending the definition of "fishery."

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

* Section 1. AS 16.05 is amended by adding a new section to
read:

ARTICLE 5. MANAGEMENT OF FISHERIES.

Sec. 16.05.730. MANAGEMENT OF WILD AND ENHANCED STOCKS OF
ANADROMOUS FISH. (a) Fisheries in the state shall be managed
consistent with [to achieve] sustained yield for wild fish stocks
and may be managed consistent with [to achieve] sustained yield of
enhanced fish stocks.

(b) In allocating enhanced fish stocks, the board shall
consider the need of fish enhancement projects to obtain brood
stock. The board may direct the department to manage fisheries in
the state to achieve an adequate return of enhanced fish stocks to
enhancement projects for brood stock; however, management to
achieve an adequate return to enhancement projects for brood stock
may not be inconsistent with [prevent achievement of] sustained
yield for wild fish stocks.

(c) The board may consider the need of enhancement projects authorized under AS 16.10.400 and contractors authorized who operate state-owned enhancement projects under AS 16.10.480 to harvest and sell fish produced by the enhancement project that are surplus to needs for brood stock to offset the cost of operating the enhancement project. The board may exercise its authority under this title as it considers necessary to direct the department to provide a reasonable return of surplus fish to the enhancement project to offset the cost of operating the enhancement project if the return of surplus fish to the enhancement project or the harvest of surplus fish by the enhancement project is not inconsistent with [does not prevent achievement of] sustained yield for wild fish stocks. The board may adopt criteria for determining the reasonable needs of enhancement projects for surplus fish and may adopt a management plan to provide surplus fish to an enhancement project.

(d) In this section, "enhancement project" means a project, facility, or hatchery for the enhancement of fishery resources of the state for which the department has issued a permit.

* Section 2. AS 16.05.940(12) is repealed and reenacted to read:

-- see CSSB 457 for the language of this section --



Alaska State Legislature

Please enter into the record my testimony to the SENATE RESOURCES
committee name
committee on CS for SB 457, dated 4-1-92.
bill/subject

NORAA is in support of CS-SB457. With respect to SEC. 16.05.730 at (c) Beginning at line 9, I am NOT sure that the Board is the best qualified group for adopting criteria for determining reasonable economic needs of lottery programs. For Regional Associations where Fishermen control and approve budgets, this provision is NOT NECESSARY. I believe that for the "MOM & POP" there should be criteria developed. The DEED is NOT necessarily the group qualified to do a review. Perhaps a way to approach the problem is by requiring significant participation by Fishermen or Regional ASSN Fisherman directors in approving MOM & POP Budget and Financial Plans.

Signed: _____

Testifier

Representing (Optional)

1308 Sawmill Creek Rd Sitka

Address

747-6850

Phone No.



TELECOPY COVER SHEET

Ketchikan Legislative Information Office
Office - (907) 225-9675 Fax - (907) 225-2346TO: (S) RESOURCE CMTE

ATTN: _____ FAX: _____ PHONE: _____

FROM: Ken Anthony PHONE: _____INSTRUCTIONS: Written Testimony on SB457 - will mail
original -SENT: Date 4-1-92 Time 3:30p.m.

DISPOSAL OF ORIGINAL: Discard _____ Hold for Pickup _____

NUMBER OF PAGES: 3 (NOT counting cover sheet)TRANSMITTED BY: Rae

2nd AFTERNOON, Chairman & members of Resource Committee

I have ~~have~~^a great apprehension about private hatchery priorities which are controlled primarily by commercial fishermen, being at odds with traditional sport fishing time and area. I am afraid a cost recovery reason could be used to lump power trollers and sport fishing boats on the same time period and fishery area in areas such as Pt. Barrow, Clover Pass and Vallenar, effect shutting down most sport fishing in the Ketchikan area. While I have no objection to inner Carrol Inlet or Neets Bay non-fishing areas, the Carrol inlet site is in close proximity to the state run Deer Pt. and Herring Bay hatcheries ~~and the area~~ ^{and the area} to their fish ~~will~~^{might} like will be curtailed. In addition wild stock is caught at these areas and has been before ~~fish hatcheries were~~ ^{from this area}. I would hate to see sport fishing held hostage to the fiscal budgeting of commercial fishing interests.

In addition, any general lumping of fishing time for commercial and sport fishing would be greatly to the detriment of the far less efficient sports fishermen.

fishermen. I have been
 but I have not the money
 to pay for the many
 at present. I hope I may
 be able to pay by not

I sympathize with many
KSS & have been
looking at various ways to earmark or
contribute money to it. Got recovery itself makes
sense.

However, this legislation may be very unfair and damaging to sportfishing by not excluding it by retaining the word "commercial" in managins lib...

THANK YOU.

COOK INLET
AQUACULTURE ASSOCIATIONHC 2, BOX 849
SOLDOTNA, AK 99609-8707
(907) 283-5761

Fax # 283-9433

FACSIMILE COVER PAGE

THIS TRANSMISSION CONSISTS OF 2 PAGES INCLUDING COVER PAGE.FAX TO: Molly McCammonFAX #: 465-4928 ATTN: _____FROM: Tom Mearns

SPECIAL REMARKS: Sorry about ranting over STOCK
definition - my faxed copy did not include
definition section. Propose deleting language
on next page - I think eliminations make
your intent more clear because I really do not
Time: 3:20 pm Date: 14 Apr 92

Know what "surplus" means here. The whole focus
of this section is not fish that escaped the fishery and
are surplus to broodstock needs - Instead the focus
is whether management plans will allocate fish to
a particular hatchery for purposes of providing
revenue. Had another suggestion re pt sent 9x10

Thanks
JM

(c) The board may consider the need of enhancement projects authorized under AS 16.10.400 and contractors who operate state-owned enhancement projects under AS 16.10.480 to harvest and sell fish produced by the enhancement project ~~(that are surplus to the needs for~~ ^{to offset the cost of operating the enhancement project.} The board may exercise its authority under this title as it considers necessary to direct the department to provide a reasonable return of ~~surplus~~ fish to an enhancement project to offset the cost of operating the enhancement project if the return of ~~surplus~~ fish to the enhancement project or the harvest of ~~surplus~~ fish by the enhancement project does not prevent achievement of sustained yield for wild fish stocks.

The board may adopt criteria for determining the reasonable ^{financial} needs of enhancement projects for ~~surplus~~ fish and may adopt a fishery management plan to provide ~~surplus~~ fish ^{for fulfillment of those financial needs.} ~~to an enhancement project.~~

(d) In this section, "enhancement project" means a project, facility, or hatchery for the enhancement of fishery resources of the state for which the department has issued a permit.

* Sec. 2. AS 16.05.940(12) is repealed and reenacted to read:

(12) "fishery" means a specific administrative area in which a specific fishery resource is taken with a specific type of gear; however, the Board of Fisheries may designate a fishery to include more than one specific administrative area, type of gear, or fishery resource; in this paragraph,

(A) "gear" means the specific apparatus used in the harvest of a fishery resource; and

(B) "type of gear" means an identifiable classification of gear and may include

(i) classifications for which separate regulations are adopted by the Board of Fisheries or for which separate gear licenses were required by former AS 16.05.550 - 16.05.630; and

(ii) distinct subclassifications of gear such as "power" troll gear and "hand" troll gear;

FAX
765-4988

Attachments
to Chapter VILETTER
BD. OF FISHERIES FROM

May 6, 1991

The Honorable Richard Eliason
President
Alaska State Senate
P.O. Box V
Juneau, AK 99811

Dear President Eliason:

This letter is in response to a request by the Senate Resources Committee and the Special Senate Fisheries Committee when Board of Fisheries members appeared before the committee in March. We appreciated the opportunity to sit down with the committee and discuss items which will improve the board's ability to serve the people of Alaska.

In managing fisheries that involve hatchery raised salmon, the Board of Fisheries has encountered problems due to ambiguities in the current Alaska statutes. These problems commonly arise when the management of hatchery stocks conflicts with either the health of wild stocks or with the opportunity of fishermen to harvest wild stocks. Essentially, the statutes are not clear on the status of wild stock management.

State statutes also are not clear about the state's duty to provide fish for hatchery broodstock and cost recovery, and about the hatcheries' obligations to contribute to the common property fisheries. We perceive that the development of state policy toward hatcheries may have created a conflict of interest. On one hand, the state manages fisheries as a common property resource for the benefit of all user groups. On the other hand, the state loans money to hatcheries with the expectation that the hatcheries will receive enough fish to be able to repay these loans.

The board has the following comments on the existing statutes:

1. AS 16.10.375 Regional Salmon Plan. Should new language require a review or synthesis of the regional plans to give a statewide perspective on hatchery production?

SB
457

President Richard Eliason
May 6, 1991
Page Two

2. AS 16.10.380 Regional Associations. One of the great strengths of the regional associations is the representation of all user groups on their boards of director. However, the PNP's have no such requirement. Should all hatcheries and enhancement activities in a region be under the control of the regional associations?

Should state laws apply to all hatcheries and enhancement activities in Alaska and not just private non-profit hatcheries? Other activities that might be covered include state-owned hatcheries, regional hatcheries, and the U.S. Fish and Wildlife Service, the U.S. Forest Service, and the National Marine Fisheries Service. Should all these activities be included in the Regional Comprehensive Plan?

Should the role of the regional associations be to coordinate region wide production and allocation subject to biological review by the Regional Planning Team and allocative review by the Board of Fisheries?

Given an expanded role for the regional associations, should their means and levels of funding be re-examined by the legislature?

3. AS 16.10.400 Permits for Salmon Hatcheries. The legislature should re-examine (g) of this section: "During the development of a comprehensive plan for a region no permit may be issued for a hatchery unless the commissioner determines that such an action would result in substantial public benefits and would not jeopardize natural stocks."

The first ten words of this section, "During. . . region . . .", suggest that once the plan is completed, the prohibited actions could be allowed. Perhaps this wording should be deleted. Also, we believe that there should be more specific grounds and procedures for terminating hatchery permits after they have been issued.

President Richard Eliason
May 6, 1991
Page Three

Legislators should note that 5 AAC 40.860 provides generic standards for performance review of hatchery success in producing smolt from broodstock. There are no statutory standards, however, for performance review of hatchery contribution to common property fisheries. If a hatchery cannot demonstrate that it is providing "substantial public benefit", is the state required to continue to provide for returns to the hatchery for broodstock or cost recovery purposes?

In this subsection, "substantial public benefit" is not clearly defined. The board recommends that the legislature consider linking the number of eggs taken as broodstock or the number of smolt released by a hatchery to that hatchery's required contribution to the common property fisheries.

The board may contribute to clarifying "substantial public benefit" by requiring the marking of hatchery fish. While we believe that the board has the authority to require this, it would be helpful to have this authority specifically provided by statute. Should the cost of implementing a marking program be borne by the producers of hatchery fish or by the state?

The last five words of this subsection, "... would not jeopardize natural stocks", is one of only two places (the other is AS 16.10.420(16)) which declares that it is the legislature's intent that the conduct of the entire state hatchery system is conditional on the protection of natural stocks. Perhaps because our hatcheries have flourished over time, and given some of the intense debate occurring in Oregon, Washington and Canada on how hatchery stocks have impacted natural systems, it is especially timely for the legislature to review the treatment natural stocks receive.

4. The necessity of protecting Alaska's vigorous natural stock populations is recognized by Department of Fish and Game regulations and policies. The regulations are in 5 AAC 40. For example, some of the strongest language exists in 5 AAC 40.220(b)(1), "the proposed hatchery returns may not unreasonably or adversely affect management of natural stocks. . .". Additional language exists in 5 AAC 40.005(a), (c), and (e), 5 AAC 40.007(b), 5 AAC 40.170 (2), 5 AAC 40.220 (b)(1), (3) and (7), and 5 AAC 40.860 (b)(2) and (4). As this issue of natural stock protection is examined by the legislature, the board recommends that the legislature seek input from the Commissioner of the Department of Fish and Game.

President Richard Eliason
May 6, 1991
Page Four

5. The legislature may wish to further clarify their intent in additional and more concise definitions of terms used in Title 16. For example, the following terms should be clarified: "escapement", "brood stock", "cost recovery", "substantial public benefit", and "private non-profit."

Should escapement apply strictly to natural stocks returning to natural systems?

Should broodstock be defined as the number of eggs authorized by permit to meet the production levels of the hatchery and to contribute to the common property fisheries? Some wording to this effect would be valuable in light of AS 16.10.420 and AS 16.10.450 which allow for the sale of salmon and salmon eggs for cost recovery. Fish which return to the hatchery for broodstock should be differentiated from fish which return and may be taken for cost recovery.

Does the legislature wish to rank or prioritize escapement to natural systems compared to return of broodstock to hatcheries?

"Cost recovery" is another term which warrants some further clarification. However, a clear definition of broodstock, coupled with a definition of substantial public benefits in terms of what is contributed to common property fisheries from broodstock, would provide a de facto identification of fish available for cost recovery as long as identification of hatchery stocks can be achieved.

These concerns of the Board of Fisheries are presented for your consideration. Your interest, and past support, in these resource issues has been greatly appreciated.

Should you have further questions, please feel free to call me.

Sincerely,

Michael R. Martin
Chair
Alaska Board of Fisheries

cc: Board of Fisheries members
Carl Rosier, Commissioner, ADF&G

Memorandum

TO: Mary McDowell
FROM: *Geron Bruce* Geron Bruce

DATE: March 21, 1992

SUBJECT: Language changes proposed by ADPFG to AS 457

***** TRANSMITTAL MEMO *****	
TO: <i>Mary McDowell</i>	NO. OF PAGES 1
DEPT: _____ FAX #: <i>4928</i>	
FROM: <i>Geron Bruce</i> PHONE: _____	
CO: _____ FAX #: <i>2332</i>	
Post-It brand fax transmittal memo 7871	

Sec. 16.05.730. MANAGEMENT OF WILD AND HATCHERY STOCKS OF ANADROMOUS FISH. (a) [The Board of Fisheries] Salmon fisheries in the state shall [manage fisheries in the state] be managed to achieve sustained yield for wild [anadromous fish] salmon stocks.

(b) In [managing] allocating hatchery produced [anadromous fish] salmon stocks, the board shall consider the need of [anadromous fish] salmon hatcheries to obtain brood stock. The board may [manage] direct the department to manage salmon fisheries in the state to achieve an adequate return of hatchery produced [anadromous] salmon stocks to hatcheries for brood stock; however, management to achieve an adequate return to hatcheries for brood stock may not prevent achievement of sustained yield for wild [anadromous fish] salmon stocks.

(c) The board may consider the need of hatcheries authorized under AS 16.10.400 to harvest and sell fish produced by the [] that are surplus to the needs for brood stock to offset the cost of operating the hatchery. The board may exercise its authority under this title as it considers necessary to direct the [] to provide a reasonable return of surplus fish to a hatchery offset the cost of operating the hatchery, if the return of surplus fish to the hatchery, or the harvest of surplus fish by the hatchery, does not prevent achievement of sustained yield for wild salmon [anadromous fish] stocks. The board may adopt criteria for determining the reasonable needs of hatcheries for surplus fish and may adopt a fishery management plan to provide surplus fish to a hatchery.

AMENDMENT

OFFERED IN THE SENATE
TO: W.O. 7-LS2170A

Page 1, line 8, following "stocks.":

Insert "The Board of Fisheries may adopt goals consistent with this section for management of hatchery produced anadromous fish stocks."

s- 23

This is the language
that George U. came up with
to consider adding to Wildstock
priority bill to make it
more clear in section (a)
(standing alone) that hatchery
stocks have a different status
than wild stocks.

What do you think?
Bill itself to be introduced
today & will be SB 457.
Hope it can be scheduled in
Sen. Resources soon.

Mary McD.

Other things to consider:

- Should we take out "anadromous" ?
Ask Geo. why it's there

• Definition of "fishery"
need to fix to cover
personal use fishery (gear
& area isn't distinct so
defin. might miss it) ↓
also "cost recovery fishery"

Somers -

Should (a) be
amended to say
goal is maximum
use while still
achievably sustained
yield ?

AMENDMENT

OFFERED IN THE SENATE

TO: W.O. 7-LS2170A

Page 1, line 8, following "stocks":

Insert "The Board of Fisheries may adopt goals consistent with this section for management of hatchery produced anadromous fish stocks."

3-23

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What do you think?
Bill itself ~~was~~ introduced Monday
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Sen. Resources soon.

Mary McD.

ALASKA STATE LEGISLATURE SENATE

SENATOR RICHARD I. ELIASON

PRESIDENT OF THE SENATE
LABOR & COMMERCE COMMITTEE
RESOURCES COMMITTEE
RULES COMMITTEE
CHAIRMAN, SPECIAL COMMITTEE ON
DOMESTIC & INTERNATIONAL
COMMERCIAL FISHERIES



P.O. BOX 143
SITKA, ALASKA 99835

P.O. BOX V
JUNEAU, ALASKA 99811
(907) 485-4918

FAX (907) 485-4928

MEMORANDUM

TO: Sen. Jones, Chairman
Senate Resources Committee

FROM: Sen. Eliason, Chairman
Senate Special Committee on Domestic and International
Commercial Fisheries

DATE: March 23, 1992

RE: Scheduling of SB 457

SB 457, sponsored by the Special Fisheries Committee, has been referred to the Senate Resources Committee. The introduction of this bill is the first action to be taken in response to the Draft Report of the Salmon Enhancement Review Project and the public comments regarding that report. It clarifies the fisheries management responsibilities of the Board of Fisheries regarding sustained yield of wild stocks and providing for broodstock and cost recovery fish for hatcheries. The adoption of statutory language spelling out a clear "wildstock priority" has been the action most frequently requested by the public throughout the Salmon Enhancement Program Review Project. The bill is drafted to basically codify the goals under which the Board of Fish has voluntarily operated over the years.

I would very much appreciate your scheduling SB 457 as soon as possible.

Thank you for your consideration.

Memorandum

TO: Mary McDowell
 FROM: *Geron* Geron Bruce

DATE: March 21, 2002

SUBJECT: Language changes proposed by ADPFG to AS 457

***** TRANSMITTAL *****
 TO: *Mary McDowell*
 DEPT: _____ FAX #: *4928*
 FROM: *Geron Bruce* PHONE: _____
 CO: _____ FAX #: *2332*
 Post-it brand fax transmittal memo 7871

NO. OF
PAGES

1

Uttermost
fax:
2029

Sec. 16.05.730. MANAGEMENT OF WILD AND HATCHERY STOCKS OF ANADROMOUS FISH. (a) [The Board of Fisheries] ~~Salmon~~ fisheries in the state shall [manage fisheries in the state] be managed to achieve sustained yield for wild [anadromous fish] ~~salmon~~ stocks.

enhanced fish (b) In [managing] ~~allocating hatchery produced~~ [anadromous fish] ~~salmon~~ stocks, the board shall consider the need of [anadromous fish] ~~salmon~~ *enhancement projects & facilities* hatcheries to obtain brood stock. The board may [manage] ~~direct the department to manage salmon~~ fisheries in the state to achieve an adequate return of ~~hatchery produced~~ *enhanced fish* [anadromous] ~~salmon~~ stocks to ~~hatcheries~~ *enhancement projects & facilities* for brood stock; however, management to achieve an adequate return to ~~hatcheries~~ *enhancement projects & facilities* for brood stock may not prevent achievement of sustained yield for wild [anadromous fish] ~~salmon~~ stocks.

Do some amendments here (c) The board may consider the need of ~~hatcheries~~ *enh. project* authorized under AS 16.10.400 to harvest and sell fish produced by the hatchery that are surplus to the needs for brood stock to offset the cost of operating the hatchery. The board may exercise its authority under this title as it considers necessary to direct the department to provide a reasonable return of surplus fish to a hatchery to offset the cost of operating the hatchery, if the return of surplus fish to the hatchery, or the harvest of surplus fish by the hatchery, does not prevent achievement of sustained yield for wild ~~salmon~~ [anadromous fish] stocks. The board may adopt criteria for determining the reasonable needs of hatcheries for surplus fish and may adopt a fishery management plan to provide surplus fish to a hatchery.

may be managed to achieve sustained yield of enhanced stocks.

add reference to state contracted out

Ask Geron whether "wild" should be defined. What about placement in title 16?

AMENDMENT

OFFERED IN THE SENATE

TO: W.O. 7-LS2170A

Page 1, line 8, following "stocks.":

Insert "The Board of Fisheries may adopt goals consistent with this section for management of hatchery produced anadromous fish stocks."

*"This is the language
that George U. came up with
to consider adding to wildstock
priority bill to make it
more clear in section (a)
(standing alone) that hatchery
stocks have a different status
than wild stocks.
What do you think?"*

AMENDMENT

OFFERRED IN THE SENATE

TO: SENATE BILL 457

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

A BILL

FOR AN ACT ENTITLED

"An Act relating to management of wild and hatchery stocks of anadromous fish; and amending the definition of "fishery."

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

* Section 1. AS 16.05 is amended by adding a new section to read:

ARTICLE 5. MANAGEMENT OF FISHERIES.

Sec. 16.05.730. MANAGEMENT OF WILD AND HATCHERY STOCKS OF ANADROMOUS FISH. (a) The Board of Fisheries shall manage fisheries in the state to achieve maximum use of [sustained yield for] wild anadromous fish stocks consistent with sustained yield.

(b) In managing hatchery produced anadromous fish stocks, the board shall consider the need of anadromous fish hatcheries to obtain brood stock. The board may manage fisheries in the state to achieve an adequate return of hatchery produced anadromous fish stocks to hatcheries for brood stock; however, management to achieve an adequate return to hatcheries for brood stock may not prevent achievement of maximum use of [sustained yield for] wild anadromous fish stocks consistent with sustained yield.

(c) The board may consider the need of hatcheries authorized under AS 16.10.400 to harvest and sell fish produced by the

hatchery that are surplus to needs for brood stock to offset the cost of operating the hatchery. The board may exercise its authority under this title as it considers necessary to provide a reasonable return of surplus fish to a hatchery to offset the cost of operating the hatchery if the return of surplus fish to the hatchery or the harvest of surplus fish by the hatchery does not prevent achievement of maximum use of [sustained yield for] wild anadromous fish stocks consistent with sustained yield. The board may adopt criteria for determining the reasonable needs of hatcheries for surplus fish and may adopt a management plan to provide surplus fish to a hatchery.

* Section 2. AS 16.05.940(12) is repealed and reenacted to read:

-- see original SB 457 for the language of this section --

PURPOSE OF THE AMENDMENT

The original wording of SB 457 referenced the term "sustained yield" as the benchmark for management of wild anadromous fish stocks. The committee recognizes that "sustained yield" may mean different things to different people. Some may see it as a requirement for managing wild anadromous fish stocks to assure escapement and perpetuation of healthy runs, but not necessarily including a particular level of harvest. Others may interpret "sustained yield" as incorporating the notion of harvest, and develop an expectation of what level of yield the state must sustain. In order to clarify the intent of this bill, particularly with respect to subsection (a), the committee has incorporated the principle of "maximum use" found in article VIII, section 1 of the Alaska Constitution. The committee's intent is that fisheries in the state be managed to maximize the use of and benefit from wild anadromous fish stocks on a sustained yield basis. Once that obligation is met, the board is further authorized in paragraphs (b) and (c) to manage fisheries to achieve adequate returns of hatchery produced anadromous fish for brood stock and cost recovery.

AMENDMENT

OFFERED IN THE SENATE

TO: SB 457

Page 2, line 10, after "gear":

Insert "for a specific purpose"

Page 2, line 14:

Delete "and"

Page 2, following line 14:

Insert a new subparagraph to read:

"(B) "specific purpose" includes commercial use, subsistence use, personal use, or recreational use; and"

Reletter the following subparagraph accordingly.

AMENDMENT

OFFERED IN THE SENATE

TO: SB 457

Page 2, line 10, after "gear":

Insert "for a purpose expressed in statute or regulation"



Alaska State Senate

Office of the President

Senator Richard I. Eliason, President

Molly, Ginny, Doug-

S.E. Seiners just sent this suggested amendment to SB 457. I understand that they want to re-iterate the constitutional direction to maximize use of resources but this makes it look like the emphasis & purpose of the bill is to mandate maximum use

rather than priority of
wild stocks over hatchery
stocks. I'm not sure the
goal of stressing this
priority is very clear
in either SB457 or
this proposed amendment.
What do you think?

-Mary



Alaska State Legislature

SENATOR RICHARD I. ELIASON

President of the Senate

P.O. Box V
Juneau, Alaska 99811
(907) 465-3755

M E M O R A N D U M

TO: Participants in the Legislative Review of Alaska's Salmon Enhancement Program

FROM: Senator Dick Eliason, Chairman *Dick Eliason*
Senate Special Committee on Domestic and International Commercial Fisheries

DATE: March 24, 1992

RE: Legislation regarding wildstock priority, broodstock, and cost recovery fish

The Senate Special Committee on Domestic and International Commercial Fisheries, in conjunction with the review it has been conducting of the state's salmon enhancement program, has just introduced Senate Bill 457. The bill was drafted in response to public comment received regarding the draft report of the review project. We welcome comments and suggestions regarding the specific language in the bill.

A note of explanation: The last section of SB 457 is "house-keeping" language amending the statutory definition of "fishery." The current definition of "fishery," which should have been corrected long ago to be consistent with other statutes, uses the word "commercial." While references to personal use, sport, and subsistence "fisheries" are used throughout state law, this definition has never been corrected to match usage of the term. Amending the definition is appropriate in this bill to ensure that the Board of Fisheries will manage ALL fisheries, not just commercial fisheries, to achieve sustained yield of wild stocks.

A hearing on SB 457 is scheduled in the Senate Resources Committee on Wednesday, April 1. The meeting begins at 1:30 p.m. and will be teleconferenced. I encourage your participation in the teleconference. If you would prefer to submit written testimony on the bill you can send it to my office (Sen. Eliason, State Capitol, Juneau, AK 99801-1182), or fax it (465-4928), and I will get copies to the Resources Committee.

Many knowledgeable Alaskans have spent a good deal of time and effort reading, considering, and providing comments about the Draft Report of the Salmon Enhancement Program Review. We very much appreciate this valuable public input and interest, and look forward to your continued involvement in the Legislature's efforts to study and improve the state's enhancement program.

Sen. Eliason's Comments to Senate Resources Committee
on new CSSB 457 (Resources) (Bill Version Dated 4-3-92)

Before you today is the New Committee Substitute for SB 457, which has been drafted since our hearing on this bill last Wednesday.

Also before you is a one-page summary of the changes that have been made to the bill to incorporate the suggestions, and address the concerns that were expressed during last Wednesday's meeting.

This new CS was faxed Friday morning to all Legislative Information Offices that participated in the Wed. teleconference, and to a number of the groups and individuals who testified. So far we have had a lot of favorable comment about this amended version , and I believe that this CS better accomplishes the intended goals of the bill.

In your folders are letters that have been faxed as comment on the new CS from United Fishermen of Alaska, Southeast Seiners Association, and Prince William Sound Aquaculture Corporation. These groups had planned to testify at the Friday teleconference which was cancelled due to the extended Senate caucus that day. All of these groups support the language in the new version, and feel their concerns have been adequately addressed.

I believe the Dept. of Fish and Game is here to comment on the bill.

COMMENTS BY FISH AND GAME

DISCUSSION

MOTION TO ADOPT CS SB 457 (Resources), (April 3 version)

* NOTE ATTACHMENT OF ZERO FISCAL NOTE FROM FISH AND GAME

IF NO APPARENT DISCOMFORT BY THE PUBLIC, FISH AND GAME, OR
COMMITTEE, MOTION TO MOVE BILL.

SB 457 "RELATING TO MANAGEMENT OF WILD AND ENHANCED STOCKS OF FISH"

Testimony by Senator Dick Eliason
before the House Resources Committee
April 29, 1992

The Senate Special Committee on Domestic and International Commercial Fisheries has been working for nearly a year on a review of the Alaska Salmon Enhancement Program. SB 457 is the first piece of legislation to result from the Review Project.

The subject of this bill, establishing a "wild stock priority," is the action most requested by those who have submitted comments during the review process. Also, it provides the statutory clarification which was requested last year by the Board of Fisheries.

The goal of SB 457 is to make clear that the sustained yield of wild stocks is the top priority of state fish management. A number of developments have pointed to the value of establishing this priority in law. During the 20 years since Alaska's salmon enhancement statutes were enacted, hatcheries in the state have become very successful at producing huge numbers of salmon. Fisheries management has become increasingly complex as consideration must be given to harvest and escapement of both wild and hatchery stocks.

During recent years we have also experienced poor salmon market conditions; questions about ocean carrying capacity; rising

concerns over the genetic diversity of salmon, intermingling of wild and hatchery fish, and the potential genetic and disease problems generated by fish farming.

We have also witnessed the disastrous plunge in the viability of salmon stocks along the west coast of the lower 48 states and the resulting threat of fishing closures under the Endangered Species Act.

Factors such as these have made Alaskans more and more aware of the critical need to make a priority of taking care of our wild salmon stocks.

Our state Constitution mandates the management of fish on the sustained yield principal. But the Constitution was written before the evolution of our highly productive enhancement program. The question then arises as to whether the constitutional mandate for sustained yield applies equally to wild fish and "enhancement fish."

What if providing for broodstock to a hatchery would jeopardize the sustained yield of a wild stock? Is the obligation to provide adequate escapement of wild salmon to their stream of origin equal to providing broodstock to a hatchery?

The Board of Fisheries and the Department of Fish and Game have been dealing with these questions for a number of years. They have

managed fisheries under a self-imposed policy of making wild stock escapement a higher priority than providing for hatchery broodstock or cost recovery fish.

SB 457 essentially puts that policy into law by clarifying what the state's responsibilities are in managing wild and hatchery stocks.

The bill establishes that the state has an OBLIGATION to manage for sustained yield of wild stocks, but that enhancement project stocks do not have that same level of MANDATORY protection. The bill states that the Board of Fisheries MUST CONSIDER the needs of enhancement projects for broodstock, and MAY consider their cost recovery needs, and then MAY provide for broodstock and cost recovery, IF doing so would be consistent with the sustained yield of wild stocks. This clarifies the different levels of consideration the Board must give to wild and enhanced stocks.

CS SB 457 (Resources) has the support of the Departments of Fish and Game and Law, members of the Board of Fisheries, The United Fishermen of Alaska, other commercial fishing organizations, and regional aquaculture associations.

The bill has a zero fiscal note, and passed both the Senate Resources Committee and the full Senate unanimously. No public opposition to the Committee Substitute version has been expressed.

CSSB 457 establishes sound statutory guidelines for the management of fish stocks based on a priority for our wild stocks. It is the result of the cooperative efforts of people involved in fishing, aquaculture, fish management, and the Legislature to learn from the mistakes made in other places, to recognize Alaska's fish stocks as a treasured heritage to be protected, and to acknowledge that the proper role of our fish enhancement program is to enhance, but not replace or displace, wild stocks.



Alaska Trollers Association

130 Seward St., No. 213
Juneau, Alaska 99801
(907) 586-9400

April 3, 1992

Senator Dick Eliason, President
Alaska State Senate
Pouch V
Juneau, AK 99811

Dear Senator Jones:

On behalf of the Alaska Trollers Association (ATA), I would like to issue support for the April 3, 1992 committee substitute for SB 457. This bill seeks to affirm Alaska's commitment to its fisheries resource by mandating a wild stock management priority; a policy which ATA has endorsed for many years.

Salmon fishermen throughout the state have been the beneficiaries of more stable fisheries due to hatchery programs. In addition, many wild stocks have enjoyed reduced fishing pressure because of the presence of hatchery fish. Unfortunately, one side-effect of hatchery production has been the confusion which has arisen, due to the lack of a definitive management policy regarding wild stocks.

The success of the fishing industry is deeply rooted in the health of our natural runs of fish. Our members recognize an obligation to sustain healthy populations of fish and do not wish to see enhanced runs given preferential treatment over wild. Also, our fishermen are concerned that without clear statutory wording, the potential exists whereby traditional fisheries could be disrupted to accommodate the needs of hatchery facilities.

ATA believes that by adopting the language in SB 457 the intent of the state, to protect wild stocks of fish above all others, is made sufficiently clear to the Board of Fisheries and the Department of Fish and Game. Without such language, increased levels of frustration, and subsequent polarization of fishing and hatchery interests, is likely. This would be unfortunate, given the obvious benefits that have been realized through our enhancement programs. Finally, it should also be noted that the language is not so restrictive as to prevent the Board of Fisheries from choosing to provide adequate passage of hatchery fish for cost recovery, so long as wild stock needs are given first priority.

-2-

Thank you for your efforts on this important piece of legislation. If I can be helpful on this or any other issue, please do not hesitate to contact me.

Sincerely,



Dale A. Kelley
Executive Director

vessel employed in an activity authorized by a permit issued under AS 16.40.100 or 16.40.120. (§ 28 art I ch 94 SLA 1959; am § 1 ch 7 SLA 1972; am § 2 ch 104 SLA 1972; am § 4 ch 82 SLA 1974; am §§ 16, 17 ch 206 SLA 1975; am § 1 ch 20 SLA 1976; am § 13 ch 151 SLA 1978; am § 4 ch 23 SLA 1983; am § 23 ch 132 SLA 1984; am § 8 ch 145 SLA 1988)

Effect of amendments. — The 1988 amendment, effective June 9, 1988, added subsection (g).

Sec. 16.05.940. Definitions. In AS 16.05 — AS 16.40

(1) "aquatic plant" means any species of plant, excluding the rushes, sedges and true grasses, growing in a marine aquatic or intertidal habitat;

(2) "barter" means the exchange or trade of fish or game, or their parts, taken for subsistence uses

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature;

(3) "a board" means either the Board of Fisheries or the Board of Game;

(4) "commercial fisherman" means an individual who fishes commercially for, takes, or attempts to take fish, shellfish, or other fishery resources of the state by any means, and includes every individual aboard a boat operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, whether participation is on shares or as an employee or otherwise; however, this definition does not apply to anyone aboard a licensed vessel as a visitor or guest who does not directly or indirectly participate in the taking; "commercial fisherman" includes the crews of tenders or other floating craft used in transporting fish, but does not include processing workers on floating fish processing vessels who do not operate fishing gear or engage in activities related to navigation or operation of the vessel; in this paragraph "operate fishing gear" means to deploy or remove gear from state water, remove fish from gear during an open fishing season or period, or possess a gill net containing fish during an open fishing period;

(5) "commercial fishing" means the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels; the failure to have a valid subsistence permit in possession, if required by statute or regulation, is considered prima facie evidence of commercial fishing if commercial fishing gear as specified by regulation is involved in the taking, fishing for, or possession of fish, shellfish, or other fish resources;

(6) "commissioner" means the commissioner of fish and game unless specifically provided otherwise;

(7) "department" means the Department of Fish and Game unless specifically provided otherwise;

(8) "domestic mammals" include musk oxen, bison, and reindeer, if they are lawfully owned;

(9) "domicile" means the true and permanent home of a person from which the person has no present intention of moving and to which the person intends to return whenever the person is away; domicile may be proved by presenting evidence acceptable to the boards of fisheries and game;

(10) "fish" means any species of aquatic finfish, invertebrate, or amphibian, in any stage of its life cycle, found in or introduced into the state, and includes any part of such aquatic finfish, invertebrate, or amphibian;

(11) "fish derby" means a contest in which prizes are awarded for catching fish;

(12) "fishery" means a specific administrative area in which a specific fishery resource is commercially taken with a specific type of gear; however, the Board of Fisheries may designate a fishery to include more than one specific administrative area, gear type, or fishery resource; in this paragraph "gear" and "type of gear" have the meanings given in AS 16.43.990;

(13) "fishing derby association" means a civic, service, or charitable organization in the state, not for pecuniary profit, whose primary purpose is to promote interest in fishing for recreational purposes and which has been in existence for five years before applying for a permit under this chapter, but does not include an organization formed or operated for gaming or gambling purposes;

(14) "fish or game farming" means the business of propagating, breeding, raising, or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means having the fish or game under positive control, as in a pen, pond, or an area of land or water that is completely enclosed by a generally escape-proof barrier; in this paragraph, "fish" does not include shellfish, as defined in AS 16.40.199;

(15) "fish stock" means a species, subspecies, geographic grouping or other category of fish manageable as a unit;

(16) "fur dealing" means engaging in the business of buying, selling, or trading in animal skins, but does not include the sale of animal skins by a trapper or hunter who has legally taken the animal, or the purchase of animal skins by a person, other than a fur dealer, for the person's own use;

(17) "game" means any species of bird, reptile, and mammal, including a feral domestic animal, found or introduced in the state, except domestic birds and mammals; and game may be classified by

regulation as big game, small game, fur bearers or other categories considered essential for carrying out the intention and purposes of AS 16.05 — AS 16.40;

(18) "game population" means a group of game animals of a single species or subgroup manageable as a unit;

(19) "hunting" means the taking of game under AS 16.05 — AS 16.40 and the regulations adopted under those chapters;

(20) "nonresident" means a person who is not a resident of the state;

(21) "nonresident alien" means a person who is not a citizen of the United States and whose permanent place of abode is not in the United States;

(22) "operator" means the individual by law made responsible for the operation of the vessel;

(23) "personal use fishing" means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources, by Alaska residents for personal use and not for sale or barter, with gill or dip net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(24) "person with physical disabilities" means a person who presents to the department either written proof that the person receives at least 70 percent disability compensation from a government agency for a physical disability or an affidavit signed by a physician licensed to practice medicine in the state stating that the person is at least 70 percent physically disabled;

(25) "resident" means a person who for the preceding 12 consecutive months has maintained a permanent place of abode in the state and who has continually maintained a voting residence in the state; and in the case of a partnership, association, joint stock company, trust, or corporation, "resident" means one that has its main office or headquarters in the state; however, a member of the military service who has been stationed in the state for the preceding 12 consecutive months is a resident for the purposes of this paragraph, and the dependent of a resident member of the military service, who has been living in the state for the preceding year is a resident for the purposes of this paragraph; and a person who is an alien but who for one year has maintained a permanent place of abode in the state is a resident for the purposes of this paragraph;

(26) "rural area" means a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area;

(27) "seizure" means the actual or constructive taking or possession of real or personal property subject to seizure under AS 16.05 — AS 16.40 by an enforcement or investigative officer charged with enforcement of the fish and game laws of the state;

(28) "sport fishing" means the taking of or attempting to take for personal use, and not for sale or barter, any fresh water, marine, or anadromous fish by hook and line held in the hand, or by hook and line with the line attached to a pole or rod which is held in the hand or closely attended, or by other means defined by the Board of Fisheries;

(29) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources by a resident domiciled in a rural area of the state for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(30) "subsistence hunting" means the taking of, hunting for, or possession of game by a resident domiciled in a rural area of the state for subsistence uses by means defined by the Board of Game;

(31) "subsistence uses" means the noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption; in this paragraph, "family" means persons related by blood, marriage, or adoption, and a person living in the household on a permanent basis;

(32) "take" means taking, pursuing, hunting, fishing, trapping, or in any manner disturbing, capturing, or killing or attempting to take, pursue, hunt, fish, trap, or in any manner capture or kill fish or game;

(33) "taxidermy" means tanning, mounting, processing, or other treatment or preparation of fish or game, or any part of fish or game, as a trophy, for monetary gain, including the receiving of the fish or game or parts of fish or game for such purposes;

(34) "trapping" means the taking of mammals declared by regulation to be fur bearers;

(35) "vessel" means a floating craft powered, towed, rowed, or otherwise propelled, which is used for delivering, landing, or taking fish within the jurisdiction of the state, but does not include aircraft. (§ 2 art I ch 95 SLA 1959; am §§ 1 — 4 ch 131 SLA 1960; am § 1 ch 21 SLA 1961; am §§ 1, 2 ch 102 SLA 1961; § 9 art III ch 94 SLA 1959; am § 23 ch 131 SLA 1960; am § 1 ch 160 SLA 1962; am §§ 13, 14 ch 31 SLA 1963; am § 2 ch 32 SLA 1968; am § 3 ch 73 SLA 1970; am § 1 ch 91 SLA 1970; am § 4 ch 110 SLA 1970; am § 1 ch 90 SLA 1972; am § 5 ch 82 SLA 1974; am §§ 26, 82 ch 127 SLA 1974; am §§ 18 — 20 ch 206 SLA 1975; am § 12 ch 105 SLA 1977; am §§ 14, 15 ch 151 SLA 1978; am § 1 ch 78 SLA 1979; am § 1 ch 24 SLA 1980; § 4 ch 74 SLA 1982; am § 24 ch 132 SLA 1984; am §§ 9 — 11 ch 52 SLA 1986; am § 5 ch 76 SLA 1986; am § 1 ch 114 SLA 1988; am § 9 ch 145 SLA 1988; am § 3 ch 6 SLA 1989; am § 15 ch 211 SLA 1990)

Revisor's notes. — Paragraph (24) was enacted as (35). Renumbered in 1989.

Effect of amendments. — The first 1988 amendment substituted all of the language at the end of paragraph (4) beginning with "'commercial fisherman' includes" for "and the term 'commercial fisherman' includes the crews of tenders or other floating craft used in transporting fish."

The second 1988 amendment, effective June 9, 1988, substituted "that is completely enclosed by a generally escape-proof barrier; in this paragraph, 'fish' does not include shellfish, as defined in AS 16.40.199" for "which is completely en-

closed by a generally escape-proof barrier" in paragraph (14).

While neither amendment gave effect to the other, both have been given effect in this section as set out above.

The 1989 amendment, effective June 11, 1989, added paragraph (24).

The 1990 amendment, effective January 1, 1991, inserted "the preceding" near the beginning of paragraph (25) and made a punctuation change near the end of that paragraph.

Legislative history reports. — For legislative letter of intent in connection with the amendment to (4) of this section by § 1, ch. 114, SLA 1988 (CSSB 309 (Res)), see 1988 Senate Journal 2027.

NOTES TO DECISIONS

Rural residency requirement unconstitutional. — The requirement contained in the 1986 subsistence statute (ch. 52, SLA 1986), that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates Alaska Const., art. VIII, §§ 3, 15, and 17.

McDowell v. State, 785 P.2d 1 (Alaska 1989)

Quoted in United States v. Skinna, 915 F.2d 1750 (9th Cir. 1990).

Cited in Arkanakyak v. State, Com. Fisheries Entry Comm'n, 759 P.2d 513 (Alaska 1988).

Chapter 10. Fisheries and Fishing Regulations.

Article

3. Herring Spawn (§§ 16.10.164, 16.10.165)
6. Purchase of Fish (§§ 16.10.265, 16.10.267, 16.10.269, 16.10.290)
7. Commercial Fishing Loan Act (§§ 16.10.310, 16.10.320, 16.10.335, 16.10.338, 16.10.340, 16.10.350, 16.10.353)
8. Salmon Hatcheries (§§ 16.10.400, 16.10.410, 16.10.450, 16.10.480)
9. Fisheries Enhancement Loan Program (§§ 16.10.505, 16.10.510, 16.10.555, 16.10.600)
10. High Seas Interception of Salmon (§§ 16.10.750 — 16.10.800)

Article 3. Herring Spawn.

Section

164. Policy on utilization of pollock
165. Utilization of pollock taken in a commercial fishery

Sec. 16.10.164. Policy on utilization of pollock. The legislature declares that stripping roe from pollock without utilizing the flesh is wasteful and does not constitute utilization of this resource for the maximum benefit of the people. Therefore, it is the policy of the state that

- (1) roe stripping be eliminated to the fullest extent possible; and
- (2) pollock taken in a commercial fishery should be utilized for human consumption to the fullest extent practicable. (§ 2 ch 116 SLA 1990)

Article 8. Salmon Hatcheries.**Section**

400. Permits for salmon hatcheries
 410. Hearings before permit issuance
 450. Sale of salmon and salmon eggs by hatchery

Section

480. Contracts for the operation of state hatcheries

Sec. 16.10.400. Permits for salmon hatcheries. (a) The commissioner or a designee may issue a permit, subject to the restrictions imposed by statute or regulation under AS 16.10.400 — 16.10.470, to a nonprofit corporation organized under AS 10.20, after the permit application has been reviewed by the regional planning team, for

- (1) the construction and operation of a salmon hatchery;
- (2) the operation of a hatchery under AS 16.10.480.

(b) The application for a permit under this section shall be on a form prescribed by the department and be accompanied by an application fee of \$100. The commissioner may waive the submission of an application for a permit to operate a hatchery under AS 16.10.480.

(c) A hatchery permit is nontransferable. If a permit holder sells or leases a hatchery for which a permit is issued under this section, the new operator shall apply for a new permit under this section.

(d) [Repealed, § 19 ch 154 SLA 1977.]

(e) A qualified regional association formed under AS 16.10.380, if it has become a nonprofit corporation under AS 10.20, has a preference right to a permit under (a)(1) of this section if its proposed hatchery is provided for in the comprehensive plan for that region developed under AS 16.10.375 and the fresh water source exceeds one cubic foot per second minimum flow. Another local nonprofit hatchery corporation approved by a qualified regional association has an identical preference right.

(f) Except for permits issued before June 16, 1976, a permit may not be issued for construction or operation of a hatchery on an anadromous fish stream unless the stream has been classified as suitable for enhancement purposes by the commissioner. The commissioner shall undertake to make such classifications in conjunction with the development of the comprehensive plan under AS 16.10.375.

(g) During the development of a comprehensive plan for a region no permit may be issued for a hatchery unless the commissioner determines that such an action would result in substantial public benefits and would not jeopardize natural stocks. (§ 2 ch 111 SLA 1974; am § 3 ch 161 SLA 1976; am §§ 3, 19 ch 154 SLA 1977; am §§ 2 — 4 ch 14 SLA 1988)

Effect of amendments. — The 1988 amendment, effective March 31, 1988, in subsection (a), divided the formerly undivided language into an introductory para-

graph and paragraph (1), and added paragraph (2); added the second sentence in subsection (b); and, in subsection (e), inserted "under (a)(1) of this section" in the

AS 16.10.400-490

first sentence and substituted "Another" for "Any other" in the second sentence.

Opinions of attorney general. — Since the conditions for issuance of a hatchery permit do not appear to be inconsistent with the operation of a fish processing and marketing facility in conjunction with the hatchery, a nonprofit hatch-

ery can also process and market fisheries' products, but any profit would have to be used for expansion or improvement of facilities, hatcheries research or other authorized purposes of the regional association within which the corporation is located. June 11, 1984, Op. Att'y Gen.

Sec. 16.10.410. Hearings before permit issuance. (a) At least 30 days before the issuance of a permit under AS 16.10.400, a public hearing shall be held in a central location in the vicinity of the proposed hatchery facility.

(b) Notice of the hearing shall be published in a newspaper of general circulation once a week for three consecutive weeks, with completion of the notice at least 10 days before the hearing.

(c) The hearing shall be conducted by the department. At a hearing for a permit under AS 16.10.400(a)(1), the applicant, shall present a plan for the proposed hatchery, describing the capacity of the hatchery and other relevant facts that may be of interest to the department or the public. Interested members of the public shall be afforded an opportunity to be heard.

(d) The department shall record and consider objections and recommendations offered by the public at the hearing conducted under this section. It shall respond in writing, within 10 days after the hearing is held, to any specific objections offered by a member of the public at the hearing. (§ 2 ch 111 SLA 1974; am § 5 ch 14 SLA 1988)

Effect of amendments. — The 1988 amendment, effective March 31, 1988, repealed and reenacted subsection (c), which

formerly related to the transferability of the hatchery permit.

Sec. 16.10.450. Sale of salmon and salmon eggs by hatchery.

(a) Except as otherwise provided in a contract for the operation of a hatchery under AS 16.10.480, a hatchery operator who sells salmon returning from the natural waters of the state, or sells salmon eggs to another hatchery operating under AS 16.10.400 — 16.10.470, after utilizing the funds for reasonable operating costs, including debt retirement, expanding its facilities, salmon rehabilitation projects, fisheries research, or costs of operating the qualified regional association for the area in which the hatchery is located, shall expend the remaining funds on other fisheries activities of the qualified regional association.

(b) Fish returning to hatcheries and sold for human consumption shall be of comparable quality to fish harvested by commercial fisheries in the area and shall be sold at prices commensurate with the current market. (§ 2 ch 111 SLA 1974; am § 5 ch 154 SLA 1977; am § 6 ch 14 SLA 1988)

Effect of amendments. — The 1988 amendment, effective March 31, 1988, designated the formerly undesignated two sentences as subsections (a) and (b), added "Except as otherwise provided in a con-

tract for the operation of a hatchery under AS 16.10.480" at the beginning of subsection (a), and made a series of minor stylistic changes throughout the section.

Sec. 16.10.480. Contracts for the operation of state hatcheries.

(a) If the department determines that it is unable to continue operating a state-owned hatchery or that it is in the best interest of the state to provide for the operation of the hatchery by another person or by another person in cooperation with the state, the department may enter into a contract for the operation or cooperative operation of the hatchery.

(b) Notwithstanding AS 36.30, when selecting a contractor under (a) of this section, the department shall give a preference to the regional association organized under AS 16.10.380 that is located in the region in which the hatchery is located. If the department determines that the preferred regional association does not meet the criteria established by the department for the contract, the department may not award the contract to the preferred regional association and shall procure the contract under AS 36.30 after considering the recommendations of the preferred regional association.

(c) A contract entered into under this section must provide that the hatchery will be operated under AS 16.10.400 — 16.10.445 and 16.10.460 — 16.10.470 and the regulations adopted under those sections.

(d) The department may issue to a contractor who operates a hatchery under this section a permit to harvest adult salmon during the term of the contract in a quantity sufficient to allow the contractor to recover all or part of the contractor's costs of operating the hatchery.

(e) A contract under this section for the operation of a hatchery may not affect the state's ownership of the hatchery and does not affect the state's responsibility to manage the resource.

(f) The operation of a hatchery under a contract authorized by this section shall be conducted in accordance with the fisheries management and production goals of the department, and must be consistent with the Comprehensive Regional Salmon Plan approved under AS 16.10.375. During the term of the contract, the department may order changes in the operation of the hatchery that are necessary to ensure consistency with the production goals of the Comprehensive Regional Salmon Plan. The contract must specify the species to be raised and the production goals for each species, and these specifications must comply with the Comprehensive Regional Salmon Plan. The department may terminate a contract if the contractor fails to operate the hatchery in accordance with the requirements established by and under this subsection. (§ 1 ch 14 SLA 1988)

DEPARTMENT OF FISH AND GAME

POSITION PAPER

Bill Number: SB 457

Sponsor: Senate Rules Committee by Request of Senate Special
Committee on Domestic and International
Commercial Fisheries

Bill Title: "An act relating to management of wild and hatchery
stocks of anadromous fish; and amending the definition of
'fishery.'"

Department Position: Support

Legislative Intent: The purpose of this legislation would be to
specify in Alaska statute that in managing stocks of enhanced and
wild fish, sustained yield of wild fish stocks should receive the
number one priority. This legislation would also clarify the
authority of the Board of Fisheries to deal with the brood stock
and cost recovery needs of enhancement programs.

Effects of legislation on department programs: This legislation
would not change any department programs. The effect of this
legislation would be to put into statute the current policy of wild
stock priority that the department follows in the management of
wild and enhanced stocks.

There has been a considerable amount of confusion and controversy
surrounding the management and allocation of hatchery stocks.
This legislation would have the benefit of clarifying for the
public what the policy is going to be in the management of wild and
enhanced stocks.

Commissioner's Signature Carl L. Rosen

Date 4/1/92

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSIONBILL NO. SB 457Revision Date: 3/32/92Department Affected: Fish and GameTitle: Management of Wild and HatcheryBRU: Commercial FisheriesSalmon StocksComponent: Commercial FisheriesSponsor: Senate RulesRequestor: Senate Resources

COMPONENT SERIAL NO.

4 5 9

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL	0	0	0	0	0	0
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REVENUE FUND SOURCE:	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

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

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Geron Bruce GBPhone: 465-4100Division: Commissioner's OfficeDate: 4/1/92Approved by Commissioner: Carl R. RosenAgency: Department of Fish and GameDate: 4/1/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. OSC., & Impacted Agency(ies).

CHAPTER V. LEGAL ISSUES RAISED BY BOARD OF FISHERIES

In a May 6, 1991 letter to Senate President Richard Eliason, Fisheries Board Chairman Michael R. Martin stated the following:

In managing fisheries that involve hatchery raised salmon, the Board of Fisheries has encountered problems due to ambiguities in the current Alaska statutes. These problems commonly arise when the management of hatchery stocks conflicts with either the health of wild stocks or with the opportunity of fishermen to harvest wild stocks. Essentially, the statutes are not clear on the status of wild stock management.

State statutes are also not clear about the state's duty to provide fish for hatchery broodstock and cost recovery, and about hatcheries' obligations to contribute to the common property fisheries. We perceive that the development of state policy toward hatcheries may create a conflict of interest. On the one hand, the state manages fisheries as a common property resource for the benefit of all user groups. On the other hand, the state loans money to hatcheries with the expectation that the hatcheries will receive enough fish to be able to repay these loans.

While Chairman Martin went on to note other concerns,¹ *an overriding problem for the board appeared to be the perceived statutory ambiguities which lead to difficulty in resolving conflict between wild stock protection and broodstock/cost recovery.*

ALASKA STATUTES AND ADF&G REGULATIONS

The board was created "for purposes of the conservation and development of the fishery resources of the state . . ." (AS 16.05.221 (a)). In order to carry out that charge, the board may "adopt regulations it considers advisable in accordance with the Administrative Procedures Act (AS 44.62)." (AS 16.05.251(a)).²

¹These included potential changes to the statutes relating to regional salmon plans (AS 16.10.375), regional associations (AS 16.10.380), and definition of various words and phrases used in Title 16.

²AS 16.05.251 (b) lists the purposes for which the board may exercise this power, including

- . . . (2) establishing open and closed seasons and areas for the taking of fish;
- (3) setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish;
- (4) establishing the means and methods employed in the pursuit, capture and transport of fish; . . .
- (6) classifying as commercial fish, sport fish, personal use fish, subsistence fish, or predators or other categories essential for regulatory purposes;

The board has adopted a number of regulations relating to private nonprofit hatcheries. Codified at 05 AAC 40.005 - 05 AAC 40.900, they include: delegating to the commissioner the authority to specify gear type and fishing periods for hatchery cost recovery; requiring hatchery permit holders who harvest salmon to comply with fish purchaser reporting requirements; allowing hatchery permit holders who harvest salmon for broodstock exemptions from the salmon "waste" statute and the regulations concerning "closed waters" and vessel area registration; designating special harvest areas; procedures for permit application, application review, public hearings, review and determination, and reconsideration; establishing regional comprehensive planning teams and procedures to be followed by them; prohibiting permit transfers; requiring hatchery management plans, inspections, and performance reviews; establishing criteria for the sale of surplus salmon eggs.

A number of these regulations contain references to wild stock protection.³ However, any regulation may be successfully challenged in court if it falls outside the statutory authority granted to the state agency that adopted it,⁴ or if it conflicts with other statutes,⁵ or the constitution.

The statutes governing the private nonprofit hatchery system are AS 16.10.375 - AS 16.10.470. They provide for: regional salmon plans; regional associations; criteria for the issuance of hatchery permits; public hearings prior to permit issuance; permit conditions; criteria for permit alteration, suspension or revocation; board regulation authority; department assistance and cooperation for permit applicants and holders; salmon egg sources; salmon egg sales; hatchery inspection; and an annual report to the department by permittees.

There are only two direct references in statute to the protection of wild stocks from harm due to hatchery operations. The first, AS 16.10.400(g) ("Permits for salmon hatcheries"), provides:

During the development of a comprehensive plan for a region, no permit may be issued for a hatchery unless the commissioner determines that such an action would

(7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation and stocking of fish;

(8) investigating and determine the extent and effect of disease, predation, and competition among fish in the state, exercising control measures considered necessary to the resources of the state;

(9) prohibiting and regulating live capture, possession, transport, or release of native or exotic fish or their eggs; . . .

(12) regulating commercial, sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries...

AS 16.05.251(b).

³/See e.g., 5 AAC 40.005 (c) (segregation of hatchery fish from natural runs), 5 AAC 40.170 (2) (regional planning team review of hatchery permit application to determine extent of wild stock protection).

⁴/See, Beran v. State, 705 P.2d 1280 (Alaska App. 1985)

⁵/Id.

result in substantial public benefits and would not jeopardize natural stocks.
(emphasis added)

The second, AS 16.10.420(10) ("Conditions of a permit"), states:

The department shall require, in a permit issued to hatchery operator, that . . . a hatchery be located in an area where a reasonable segregation from natural stocks occurs, but, when feasible, in an area where returning hatchery fish will pass through traditional salmon fisheries.

The board is concerned that these statutes require the department to make a judgment concerning the potential harm to wild stocks only prior to the issuance of a hatchery permit; the inference being that once a judgment is made and a hatchery permit is issued, there is no statutory "protection" for wild stocks that are jeopardized by hatchery-related dangers arising after a permit is issued.⁶ This raises the possibility that a management regime which protects wild stocks to the detriment of hatchery operations would conflict with existing statutes that indicate the state should manage hatchery fish for broodstock and cost recovery.

An additional concern, not raised in Chairman Martin's letter, is whether the state constitution requires that hatchery fish be managed for broodstock and cost recovery.

RECENT LEGAL OPINIONS

Hatchery Fish and "Sustained Yield"

Article VIII, section 4, of the Alaska Constitution states:

Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial users.

The Alaska Supreme Court has stated that wild salmon, while they are in the natural waters of the State, "belong" to the State. Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 914-915 (Alaska 1961). Because wild salmon belonged to the State while in our waters, they are subject to Article VIII, Section 4, of the Constitution, and thus must be managed on the sustained yield principle. Whether hatchery-reared salmon share the same status is less clear, and has been the subject of disagreement among attorneys who have recently written on that issue. The issue is important in the context of Chairman Martin's concerns because if hatchery fish must be managed on the sustained yield principle, that implies the Board of Fish *must* manage fisheries to provide hatcheries with broodstock, and possibly cost-recovery fish, even if the board does not believe that to be in state's best interest.

In an August 1990 letter to Alaska Department of Fish & Game Commissioner Don Collinsworth, Assistant Attorney General Steve White concluded that the Department of Fish & Game and the Board of Fish had the legal authority, and were in fact directed by law, to manage fisheries so that salmon hatcheries receive broodstock and cost recovery fish for their operations. He based these conclusions in part on the assumption that the

⁶/See Martin letter, p. 2.

law, to manage fisheries so that salmon hatcheries receive broodstock and cost recovery fish for their operations. He based these conclusions in part on the assumption that the above quoted section of the Alaska Constitution mandates that hatchery fish be managed in the same manner as wild stocks. Two other attorneys, George Utermohle of the Legislative Affairs Agency's Legal Services Division, and Juneau attorney Michael Stanley, later called that assumption into question. Sometime after that, Anchorage attorney A. William Saupe analyzed the three prior opinions and concluded that Mr. White's initial assumption was correct.⁷ What follows is a summary, extracted from the four opinions, of the arguments on both sides of the question of whether sustained yield management requirement of art. VIII, sec. 4 of the Alaska Constitution applies to hatchery-raised fish.

First is the issue of "ownership." On its face, sec. 4 of art. VIII applies only to resources "belonging" to the state. Are hatchery-raised fish in that category? Stanley and Utermohle argue that they may not be.

Stanley points out that the framers of the Alaska Constitution did make distinctions between resources "occurring in their natural state" and those that are "subject to intensive culture," at least for the purpose of exempting the latter from the requirements of art. VIII, sec. 3 (the "common use clause").⁸ Because humans play a substantial role in the growth and development of hatchery fish, Stanley reasons that they may not be the "natural resources" the drafters of article VIII had in mind.

George Utermohle points to the fact that the legislature, when it created the private nonprofit hatchery system, used the following language (AS 16.10.440(a)) to provide for the common use of hatchery fish:

Fish released into the natural waters of the state by a hatchery operated under AS 16.10.400 - 16.10.470 are available to the people for common use and are subject to regulation under applicable law in the same way as fish occurring in their natural state until they return to the specific location designated by the department for harvest by the hatchery operator.

Utermohle finds the above language significant in a number of respects: first, while the statute provides for the common use of hatchery fish, it is silent as to state ownership and makes no mention of sustained yield; second, the fact that hatchery fish are to be treated "in the same way" as fish occurring in their natural state "until they return to the specific location. . ." suggests that the legislature did not consider them a common property resource belonging to state, but merely felt they should be treated as if they were until they returned to the hatchery for harvest; finally, Utermohle suggests that the provision for harvest by the hatchery operator indicates "some lingering private property interest in the hatchery fish by the hatchery," another indicator that these fish may not "belong" to the state for purposes of the sustained yield section of art. VIII.

In his lengthy memorandum to PWSAC President John McMullen, attorney A. William Saupe disagreed with the arguments made by Stanley and Utermohle that the sustained yield clause may not apply to hatchery fish.

⁷/Copies of the four legal opinions are attached to this memorandum.

⁸/Art. VIII, sec. 3 provides: "Common Use. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for their common use."

Initially, Saupe relies on legislative history to refute the "ownership" argument. He quotes this passage from a Legislative Research Agency memorandum by Linda J. Snow (July 31, 1991) to Senator Eliason:

Consensus is that the legislature had always intended that the fish from PNP hatcheries belong to the common property fishery until such time as they return to the hatchery, and then they belong to the hatchery for broodstock and cost recovery. Testimony by Senator Dick Eliason at a 1975 Senate Resources Committee hearing on SB 180 indicates that the initial concept of a private hatchery system considered profit-making corporate ownership. However, a profit-making corporation might advance a claim to exclusive ownership of everything it produced. Thus, it was felt that private, nonprofit ownership of hatcheries would be more consistent with the concept of publicly-owned hatchery fish. This opinion is echoed by former Representative Terry Gardiner.

At a March 7, 1977 House Resources Committee hearing, Jack Milnes, Executive Director of Souther Southeast Regional Aquaculture Association testified: "I wish to recognize the fact that these are common property fish, that they belong to the state of Alaska and to the people of Alaska and therefore they should be protected by the representatives of the people of the state of Alaska." At a 1979 Senate Resources Committee hearing on HB 48, Don Clocksin, attorney with Alaska Legal Services, discussed the question of ownership of hatchery fish. In his testimony, he asked "When are fish no longer common property fish?" He felt that constitutionally, they were to be considered common property fish at all times. Consequently, it appears there was never any question that hatchery fish were common property of the people of the state while in Alaska waters, and they may or may not be the property of the PNP hatchery operator at the hatchery, but that they be allowed to harvest a sufficient number for broodstock and cost recovery.

(Emphasis his).

Saupe also relies on certain portions of the commentary of the Committee on Resources of the Alaska Constitutional Convention. The first concerns the common use clause:

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. (emphasis his).

Saupe asserts that this passage indicates the framers' belief that fish reserved for common use "belonged" to the state. Because hatchery fish are reserved for common use by AS 16.10.440 (a), Saupe reasons that they must be owned by the state and be subject to the sustained yield principle.

The second commentary is the sustained yield clause itself:

Sustained yield is recognized as a principle applicable to the administration of plant and animal life subject to the immediate authority of the state. (emphasis his).

Because hatchery fish are subject to the authority of the state by AS 16.10.440(a), Saupe reasons, they are subject to the sustained yield clause.

This conclusion, he asserts, "also comports with common sense" because

[i]f they did not belong to the State, it could not reserve hatchery fish for use by others without paying for them. Moreover, if the mere expectation that a hatchery will later be allowed to harvest some unidentified fraction of the returning fish constitutes an ownership interest in all of its fish, then every other limited entry permit holder could be said to have the same "lingering property interest," leading to the false conclusion that none of the fish in Alaska's waters ever belong to the State or are subject to the sustained yield principle of management.

A more reasonable interpretation of these related statutory and constitutional provisions is that, once released, hatchery fish become like wild stocks in every legal respect. They belong to the state, are reserved to the people for common use and must be managed for sustained yield. . .

Saupe, pp. 10-11.

However, even if the state "owns" the hatchery fish, it does not automatically follow that the state must manage those fish on a sustained yield basis. As George Utermohle notes, the drafters of our constitution chose to make sustained yield requirement subject to "beneficial uses". The commentary on Article VIII, Natural Resources, at page 98, states:

This principle [sustained yield] is qualified in terms of "the highest beneficial public use" in recognition of its not being in the public interest to preserve certain parasitic or predatory organisms destructive of more beneficial plant and animal life.

And, during the debate on the sustained yield clause, Delegate Riley explained:

. . . we have in mind no narrow definition of "sustained yield," as is used for example, in forestry, but the broad premise that insofar as possible a principle of sustained yield shall be used with respect to administration of those resources which are susceptible of sustained yield, and where it is desirable. For example, predators would not be maintained on a sustained yield basis. (Alaska Constitutional Convention Proceedings, p. 2451.)

Utermohle argues that:

The delegates understood that the concept of preferences among beneficial uses would allow the state to make reasoned decisions to prefer certain renewable resources over other renewable resources to achieve a more beneficial public purpose. The authority to establish preference among beneficial uses may permit the state to harvest hatchery fish without providing for a sustained yield from the hatchery, provided that those who have vested rights in hatchery fish are compensated for those rights that are taken by the state.

The ability of the state to establish preferences among beneficial users is reflected in AS 16.10.430(b) which allows the commissioner of Fish and Game to terminate the operation of a hatchery in the best interests of the public, if the adverse effects of the operation of the hatchery are irreversible and cannot be mitigated. (Utermohle memo, pp. 3-4.)

Saupe, on the other hand, argues that AS 16.10.430(b) is not merely a reflection of the state's ability to establish preferences among beneficial uses but is in fact the only basis upon which a hatchery permit may be terminated. He also argues that the contribution made by PWSAC to the growth of the commercial fishing industry in Alaska demonstrates its beneficial use to the state, and that "short of the extreme situation envisioned by AS

14.10.430(b) it is hard to conceive how denial of a reasonable hatchery harvest in favor of other beneficial uses could achieve a greater public purpose." Saupe memo, p. 14.

It is unfortunate that our supreme court has never defined "sustained yield," much less taken up the question whether hatchery raised fish must be managed on that principle. Suffice to say that knowledgeable people disagree on this issue and it would probably take a constitutional amendment to guarantee an unassailable legal conclusion one way or the other.

No one would seriously argue that the preservation of wild stocks is not a "beneficial use" of the fishery resource, and there apparently is a concern that managing hatchery fish for broodstock and cost recovery may, in some instances, be harmful to that beneficial use. The difficulty with such a conclusion is that it probably raises more questions than it answers. How significant must the harm be? Can it be clearly substantiated? Is not the continued health and development of hatchery raised fish also a "beneficial use" of the resource?

As the above arguments, conclusions and questions demonstrate, there is no clear answer to the question whether there is a constitutional mandate that hatchery fish be managed on a sustained yield basis. That is not to say, however, that the legislature should not exercise its constitutional law making authority in this area. As Chairman Martin's letter makes clear, the Board of Fisheries is struggling with statutory ambiguities, and the board is obviously looking for legislative action.

Allocating for Broodstock and Cost Recovery

As noted earlier, assistant attorney general Steve White concluded that the board and the department are authorized and directed by law to allocate fishery resources for broodstock. He also concluded that the board has the authority, but is not required, to manage for cost recovery. White memo., p. 7. Going a step further, Mr. Saupe reached the conclusion that the board and the department must manage for both broodstock and cost recovery. Saupe memo., p. 16. In reaching their conclusions, White and Saupe both rely on the notion that hatchery fish must be managed on the principle of sustained yield, discussed above, and on the a number of statutes and court decisions which point to legislative approval for such activity.

As noted above, the board is to provide for "the conservation and development of of the fishery resources of the state." AS 16.05.221(a). The Alaska Supreme Court, in Kenai Peninsula Fishermens Coop Ass'n v. State, 628 P. 2d 897, 903 (Alaska 1981), defined "conservation" as "controlled utilization of a resource to prevent its exploitation, destruction or neglect." Steven White argues that, since managing for broodstock helps to perpetuate the fishery resource (i.e., prevents its "exploitation, destruction or neglect"), managing for broodstock is analogous to managing for escapement of wild fish. Therefore, the board has the power to adopt regulations that will provide for hatchery broodstock. White memo., p. 2.

Saupe argues that, in addition to the constitutional mandates, managing for broodstock is required by AS 16.10.443, which states:

Department assistance and cooperation. (a) Before and after permit issuance under AS 16.10.440 - 16.10.470, the department shall make every effort, within the limits of time and resources, to advise and assist applicants or permit holders, as appropriate, in the planning, construction, or operation of salmon hatcheries.

Saupe concludes that, because broodstock recovery is essential to hatchery operations, and the department is required to assist in hatchery operations, any regulation or action of the department that denies broodstock recovery would be invalid as inconsistent with the above-quoted statute. Saupe memo., p. 15.

Whether the board has the authority to manage for cost recovery is less clear than it is for broodstock. The board does have the authority to allocate fish to various user groups.⁹ However, private nonprofit hatcheries are not specifically designated in law as a user group. Nevertheless, Steve White has concluded that private nonprofit hatcheries could be considered a "subgroup" of commercial users. Because the Alaska Supreme Court has upheld the board's power to allocate among subgroups (e.g., drift gillnetters and set gillnetters),¹⁰ White concludes that the board could make a valid allocation to hatchery operators as a "subgroup."¹¹

Michael Stanley, on the other hand, argues that the statutory definition of "commercial fishing" leads to a different conclusion. AS 16.05.940(5) states:

the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels . . .

Stanley asserts that hatchery operators do not sell cost recovery fish "for profit." He does acknowledge that cost recovery sales may be "in commercial channels," but argues that a reading of that phrase broad enough to include hatchery operators would also have to include other users, such as salmon derby operators. The inference he makes is that the legislature did not intend hatchery operators to be included in either definition, and therefore hatchery operators cannot be allocated to as a subgroup. Stanley also points to the statutory definition of "commercial fisherman, AS 16.10.940 (5), which states that they are "individuals," meaning natural persons and not corporations.

Saupe, on the other hand, argues that cost recovery is essential to sustain hatchery yields and to promote aquaculture, two requirements of the state constitution.¹² He also points to a number of statutes which he believes evince a legislative mandate for cost recovery. Principal among these is AS 16.10.450 (a), which provides:

⁹/See AS 16.05.251(e).

¹⁰/Meier v. State, 739 P.2d 172, 174 (Alaska 1987)

¹¹/White op., p. 3.

¹²/Along with the sustained yield requirement already discussed, Saupe relies on art. VIII, sec. 15, which states:

No Exclusive Right of Fishery. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the state to limit entry into any fishery for the purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State. (emphasis added).

Sale of salmon and salmon eggs by hatchery. (a) Except as otherwise provided in a contract for the operation of a hatchery under AS 16.10.480, a hatchery operator who sells salmon returning from the natural waters of the state, or sells salmon eggs to another hatchery operating under AS 16.10.400 - 16.10.470, after utilizing the funds for reasonable operating costs, including debt retirement, expanding its facilities, salmon rehabilitation projects, fisheries research, or costs of operating the qualified regional association for the area in which the hatchery is located, shall expend the remaining funds on other fisheries activities of the qualified regional association.

Also cited by Saupe as evidence of the legislature's mandate for cost recovery: AS 16.43.420 (Limited Entry Act provision allowing sale of fish caught under special harvest area entry permit); AS 16.10.430 (b) (allowing a holder of a terminated hatchery permit to harvest salmon during the termination period); AS 16.05.020 (requiring the commissioner of Fish & Game to "improve and extend" the fish resources of the state in the interest of the state's economy and general well-being).

Restricting Hatchery Output

The Saupe memorandum also discusses the authority of the board to restrict individual hatchery output. Based in part on Linda Snow's legislative history memorandum, and in part on a review of the board's authorizing statute, Saupe concluded that there is "little or no basis for regulation of hatchery output by the board." Saupe memo., p. 28. He asserts that AS 16.10.440 (b), which allows the board to amend the terms of a hatchery permit,¹³ speaks only to regulation of harvest, not production. Saupe memo., p. 30.

As to whether the board can set regional production limits, such as by capping the hatchery sockeye output in Prince William Sound to maintain historical levels relative to Bristol Bay sockeye production, Saupe is not as sure. However, he does suggest that the board's authority to regulate propagation and stocking¹⁴ is a "very slender thread from which to hang an unprecedented, statewide regulatory program of production allocations." He also asserts that serious practical and policy problems would arise when the board attempts to allocate between regions of the state.¹⁵

¹³/AS 16.10.440(b) allows the board to amend "the terms of the permit relating to the source and number of salmon eggs, the harvest of fish by hatchery operators, and the specific locations designated by the department for harvest."

¹⁴/AS 16.05.251(7)

¹⁵/Saupe memo., p. 31-32.

CONCLUSIONS

This chapter illustrates some of the ambiguities in Alaska law relating to the authority of the Board of Fisheries to manage hatchery fish and leads to several conclusions:

1. There is no specific statutory mandate directing the board to give wild stocks preferential management treatment relative to hatchery raised fish.
2. The Alaska Constitution may require that hatchery fish be managed to allow for broodstock and cost recovery by the hatcheries, but that requirement may be invalidated by a determination that the sustained yield of hatchery fish is not as "beneficial" a "use" of the fishery resource as that of protecting the health of the wild stocks.
3. Existing statutes appear to allow the board to allocate to hatcheries fish for broodstock, but are less clear as to the authority for cost recovery.
4. Existing statutes are not clear on the board's authority to restrict hatchery production on a local or regional basis.

OPTIONS FOR POSSIBLE CONSIDERATION

- *Placing a wild stock priority into state statutes; or alternatively, making the status of wild and hatchery stocks of equal priority, or leaving the statutes ambiguous.*
- *Clarifying in state statutes whether or not the Board of Fisheries is required to provide for hatchery broodstock or for cost-recovery fisheries.*
- *Clarifying the Board of Fisheries' authority to restrict hatchery production.*

Attachments
to Chapter II.

LETTER FROM
BD. OF FISHERIES

May 6, 1991

The Honorable Richard Eliason
President
Alaska State Senate
P.O. Box V
Juneau, AK 99811

Dear President Eliason:

This letter is in response to a request by the Senate Resources Committee and the Special Senate Fisheries Committee when Board of Fisheries members appeared before the committee in March. We appreciated the opportunity to sit down with the committee and discuss items which will improve the board's ability to serve the people of Alaska.

In managing fisheries that involve hatchery raised salmon, the Board of Fisheries has encountered problems due to ambiguities in the current Alaska statutes. These problems commonly arise when the management of hatchery stocks conflicts with either the health of wild stocks or with the opportunity of fishermen to harvest wild stocks. Essentially, the statutes are not clear on the status of wild stock management.

State statutes also are not clear about the state's duty to provide fish for hatchery broodstock and cost recovery, and about the hatcheries' obligations to contribute to the common property fisheries. We perceive that the development of state policy toward hatcheries may have created a conflict of interest. On one hand, the state manages fisheries as a common property resource for the benefit of all user groups. On the other hand, the state loans money to hatcheries with the expectation that the hatcheries will receive enough fish to be able to repay these loans.

The board has the following comments on the existing statutes:

1. AS 16.10.375 Regional Salmon Plan. Should new language require a review or synthesis of the regional plans to give a statewide perspective on hatchery production?

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2. AS 16.10.380 Regional Associations. One of the great strengths of the regional associations is the representation of all user groups on their boards of director. However, the PNP's have no such requirement. Should all hatcheries and enhancement activities in a region be under the control of the regional associations?

Should state laws apply to all hatcheries and enhancement activities in Alaska and not just private non-profit hatcheries? Other activities that might be covered include state-owned hatcheries, regional hatcheries, and the U.S. Fish and Wildlife Service, the U.S. Forest Service, and the National Marine Fisheries Service. Should all these activities be included in the Regional Comprehensive Plan?

Should the role of the regional associations be to coordinate region wide production and allocation subject to biological review by the Regional Planning Team and allocative review by the Board of Fisheries?

Given an expanded role for the regional associations, should their means and levels of funding be re-examined by the legislature?

3. AS 16.10.400 Permits for Salmon Hatcheries. The legislature should re-examine (g) of this section: "During the development of a comprehensive plan for a region no permit may be issued for a hatchery unless the commissioner determines that such an action would result in substantial public benefits and would not jeopardize natural stocks."

The first ten words of this section, "During. . . region . . .", suggest that once the plan is completed, the prohibited actions could be allowed. Perhaps this wording should be deleted. Also, we believe that there should be more specific grounds and procedures for terminating hatchery permits after they have been issued.

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Legislators should note that 5 AAC 40.860 provides generic standards for performance review of hatchery success in producing smolt from broodstock. There are no statutory standards, however, for performance review of hatchery contribution to common property fisheries. If a hatchery cannot demonstrate that it is providing "substantial public benefit", is the state required to continue to provide for returns to the hatchery for broodstock or cost recovery purposes?

In this subsection, "substantial public benefit" is not clearly defined. The board recommends that the legislature consider linking the number of eggs taken as broodstock or the number of smolt released by a hatchery to that hatchery's required contribution to the common property fisheries.

The board may contribute to clarifying "substantial public benefit" by requiring the marking of hatchery fish. While we believe that the board has the authority to require this, it would be helpful to have this authority specifically provided by statute. Should the cost of implementing a marking program be borne by the producers of hatchery fish or by the state?

The last five words of this subsection, ". . . would not jeopardize natural stocks", is one of only two places (the other is AS 16.10.420(10)) which declares that it is the legislature's intent that the conduct of the entire state hatchery system is conditional on the protection of natural stocks. Perhaps because our hatcheries have flourished over time, and given some of the intense debate occurring in Oregon, Washington and Canada on how hatchery stocks have impacted natural systems, it is especially timely for the legislature to review the treatment natural stocks receive.

4. The necessity of protecting Alaska's vigorous natural stock populations is recognized by Department of Fish and Game regulations and policies. The regulations are in 5 AAC 40. For example, some of the strongest language exists in 5 AAC 40.220(b)(1), "the proposed hatchery returns may not unreasonably or adversely affect management of natural stocks. . . ." Additional language exists in 5 AAC 40.005(a), (c), and (e), 5 AAC 40.007(b), 5 AAC 40.170 (2), 5 AAC 40.220 (b)(1), (3) and (7), and 5 AAC 40.860 (b)(2) and (4). As this issue of natural stock protection is examined by the legislature, the board recommends that the legislature seek input from the Commissioner of the Department of Fish and Game.

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May 6, 1991
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5. The legislature may wish to further clarify their intent in additional and more concise definitions of terms used in Title 16. For example, the following terms should be clarified: "escapement", "brood stock", "cost recovery", "substantial public benefit", and "private non-profit."

Should escapement apply strictly to natural stocks returning to natural systems?

Should broodstock be defined as the number of eggs authorized by permit to meet the production levels of the hatchery and to contribute to the common property fisheries? Some wording to this effect would be valuable in light of AS 16.10.420 and AS 16.10.450 which allow for the sale of salmon and salmon eggs for cost recovery. Fish which return to the hatchery for broodstock should be differentiated from fish which return and may be taken for cost recovery.

Does the legislature wish to rank or prioritize escapement to natural systems compared to return of broodstock to hatcheries?

"Cost recovery" is another term which warrants some further clarification. However, a clear definition of broodstock, coupled with a definition of substantial public benefits in terms of what is contributed to common property fisheries from broodstock, would provide a de facto identification of fish available for cost recovery as long as identification of hatchery stocks can be achieved.

These concerns of the Board of Fisheries are presented for your consideration. Your interest, and past support, in these resource issues has been greatly appreciated.

Should you have further questions, please feel free to call me.

Sincerely,

Michael R. Martin
Chair
Alaska Board of Fisheries

cc: Board of Fisheries members
Carl Rosier, Commissioner, ADF&G

MEMORANDUM

State of Alaska

Department of Law

TO: Hon. Don W. Collinsworth
Commissioner
Department of Fish and Game

DATE: August 1, 1990

FILE NO 663-90-0327

TEL NO 465-3600

SUBJECT ADF&G authority to manage
fisheries for hatchery
broodstock and cost
recovery

Stephen M. White

FROM: Stephen M. White
Assistant Attorney General
Natural Resources Section

You have asked whether the Department of Fish and Game has legal authority to manage fisheries so that salmon hatcheries receive broodstock and cost recovery fish for their operations. You also asked whether the department is required to manage fisheries for these results. Your staff has also asked us to compare the department's authority with that of the Board of Fisheries.

I. ANALYSIS

A. Factual and Legal Background

There are two types of salmon hatcheries in Alaska. These are private, nonprofit hatcheries and state-owned hatcheries.

The regulation of private, nonprofit hatcheries is provided for in AS 16.10.400 - 16.10.470. These hatcheries have received a significant amount of public funds, principally in the form of loans from the state's fisheries enhancement revolving loan fund established by AS 16.10.507. 1/ Until fish raised by private, nonprofit hatcheries return to a location where they can be harvested by the hatchery operators, these fish "are available to the people for common use and are subject to regulation under applicable law in the same way as fish occurring in their natural state." AS 16.10.440(a).

The only law that deals with state-owned hatcheries is the one that gives the commissioner of the Department of Fish and Game authority to design and construct public hatcheries. AS 16.05.050(3).

1/ According to the Department of Commerce and Economic Development, the current amount owed to the state by private, nonprofit hatcheries is approximately \$63.1 million.

B. Board of Fisheries' Authority to Manage for Hatchery Returns

1. Board's authority to manage for broodstock fish

The Board of Fisheries was created "for purposes of the conservation and development of the fishery resources of the state." AS 16.05.221(a) (emphasis added). The board has authority to "adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for . . . regulating commercial, sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries." AS 16.05.251(a)(12) (emphasis added).

The Alaska Supreme Court has defined "conservation" as "controlled utilization of a resource to prevent its exploitation, destruction, or neglect." Kenai Peninsula Fisherman's Coop. Ass'n v. State, 628 P.2d 897, 903 (Alaska 1981). We believe that the board's authority to conserve the fishery resource of the state, that is, to prevent its "exploitation, destruction, or neglect," is an expression of the constitutional requirement that fish be "utilized, developed, and maintained on the sustained yield principle." Alaska Const. art. VIII, § 4.

We understand that the term "broodstock" means the portion of returning fish that a hatchery uses to provide eggs for raising its next contribution to the common-property fishery. Because broodstock helps to perpetuate the fishery resource, we believe that managing for broodstock is analogous to managing for escapement of wild fish to achieve sustained yield. It follows, therefore, that the Board of Fisheries is empowered to adopt regulations that will provide brood stock to the hatcheries. Furthermore, because management for sustained yield is required by article VIII, section 4, of the Alaska Constitution, we believe that the law directs the board to manage for this result.

2. The Board's Authority to Manage for Cost Recovery Fish

We understand that "cost recovery fish" are the portion of returning fish that a private, nonprofit hatchery harvests and sells to help meet its financial obligations. We also understand that state-owned hatcheries do not presently harvest fish for cost

Hon. Don W. Collinsworth, Commissioner
Department of Fish and Game
AGO file: 663-90-0327

August 1, 1990
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recovery. Thus, the question of managing fish for cost recovery concerns only private, nonprofit hatcheries. 2/

As noted above, the Board of Fisheries has authority to adopt regulations for development as well as for conservation of the fisheries. AS 16.05.221(a); AS 16.05.251(a)(12). The Alaska Supreme Court has defined "development" as "management of a resource to make it available for use." Kenai Peninsula, 628 P.2d at 903.

We have previously advised that this authority empowers the board to allocate fish that are beyond those needed to assure sustained yield. This power is established by AS 16.05.251(d), which mandates that the board provide "a fair and reasonable opportunity for the taking of fishery resources" by fishery user groups and by AS 16.05.251(e), which requires that the board adopt criteria for making allocations among these groups. 1990 Inf. Op. Att'y Gen. (Jan. 12; 663-90-0227); 1989 Inf. Op. Att'y Gen. (Apr. 7; 663-89-0465).

The courts have endorsed various forms of allocation. These have included allocations between the various overall user groups identified in the fish and game code -- personal use, sport, and commercial fishers. For example, in the Kenai Peninsula case, the Alaska Supreme Court said that the board could establish priorities of use between recreational and commercial fishers. Kenai Peninsula, 628 P.2d at 903. In other cases, the courts have upheld regulations that allocate harvest between competing subgroups of a particular user group. For example, the court upheld the board's allocation of fish between drift gillnet fishers and set gillnet fishers, both of whom are commercial users. Meier v. State, 739 P.2d 172, 174 (Alaska 1987).

Private, nonprofit hatcheries are not identified in the law as an overall user group. Nevertheless, we know of no reason why they could not be considered a subgroup of commercial users and thus be targeted for allocations like any other distinct subgroup of commercial harvesters.

The law establishes seven criteria that the board may consider when making allocations. AS 16.05.251(e). See also 05 AAC 39.205, 05 AAC 75.017, and 05 AAC 77.007. We have

2/ If state-owned hatcheries, operated by the state or by private contractors, harvest cost-recovery fish, this would raise issues that are beyond the scope of this memorandum. In that event, we would be pleased to provide you with further analyses of those issues.

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previously noted that the board is not limited to just these factors. We cautioned, however, that if the board considers additional factors, it should insure that the resulting allocation satisfies constitutional requirements of substantive due process and of equal protection. 1990 Inf. Op. Att'y Gen. (Jan. 12; 663-90-0227). 1/

To satisfy substantive due process, an allocation cannot be arbitrary and it must further a legitimate governmental purpose. Mobile Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92 (Alaska 1974). To satisfy equal protection, a distinction between competing users must be "based on a legitimate public purpose and . . . be reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the [allocation scheme]." State v. Ostrovsky, 667 P.2d 1184, 1193 (Alaska 1983) (citation omitted).

Earlier we noted that private, nonprofit hatcheries have received substantial loans from the state. We assume that cost recovery fish are a significant, if not essential, source of income for meeting these hatcheries' debt service. If the borrowers do not receive sufficient cost recovery fish, it may not only threaten their ability to contribute to the common-property fishery, but also their ability to repay state loans. Accordingly, we believe that preventing the economic failure of borrower hatcheries would certainly be a "legitimate government purpose."

We also believe that distinguishing between private, nonprofit hatcheries, who make a direct contribution to sustained yield, and other users who do not make such a contribution bears a "fair and substantial relationship" to the goals of sustaining common-property fisheries and replenishing the loan fund. Thus, we believe that an allocation to provide cost recovery fish would satisfy the requirements of substantive due process and equal protection.

We note, however, that none of the present criteria in AS 16.05.251(e) precisely describe the positive attributes of hatcheries. Factors (5) (economic importance) and (6) (regional importance) could, under narrow circumstances, justify an

1/ We also opined that allocations must satisfy the provisions of article VIII of the Alaska Constitution. Specifically, these are section 1 (maximum use), section 2 (maximum benefit), section 3 (common use), section 15 (no exclusive right of fishing), and section 17 (equal application). 1990 Inf. Op. Att'y Gen. (Jan. 12; 663-90-0227). We do not believe that an allocation for cost-recovery would violate any of these sections.

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allocation that provides for cost recovery. ^{4/} Although the board is not limited to using these criteria, they still affect the public and implement a legislative mandate. Thus, any unlisted criteria that the board wishes to use should be adopted by regulation. See Kenai Peninsula, 628 P.2d at 905, 906. In other words, if the board intends to allocate for cost recovery, it should adopt by regulation criteria that more closely describe the special attributes of private, nonprofit hatcheries.

The board's authority to allocate for cost recovery, then, is based upon characterizing private, nonprofit hatcheries as another type of commercial subgroup. But, there is nothing in the law that requires the board to allocate to a particular group or subgroup. Accordingly, we do not believe that the board is required by law to allocate cost recovery fish to this subgroup.

C. Department's Authority to Manage for Hatchery Returns

1. Department's authority to manage for broodstock

The commissioner of the Department of Fish and Game has limited tools for managing commercial fisheries independently of the board. This authority is contained in AS 16.05.060(a). It allows the commissioner to use emergency orders "when the circumstances require" to summarily open and close seasons or areas or to summarily change weekly closed periods.

The law does not define what circumstances will enable the commissioner to use his or her emergency order power. However, we have previously advised that in light of the commissioner's statutory charge to "manage, protect, maintain, improve, and extend the fish . . . resources of the state," emergency orders can be issued to protect sustained yield, based on conservation concerns. AS 16.05.020(2); 1989 Inf. Op. Att'y Gen. (Apr. 7; 663-89-0465).

Earlier we recognized an analogy between managing escapement of wild stocks for conservation/sustained yield and managing for hatchery broodstock in order to serve the same purposes. Thus, we believe that the department, acting through the commissioner's power to issue emergency orders, can independently

^{4/} For example, if (1) a certain fishery were an important segment of an economy, (2) a hatchery made a critical contribution to the perpetuation of this fishery, and (3) the hatchery could not survive to make this contribution without an allocation of cost-recovery fish, the board could conclude that the allocation would be very important to that economy.

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manage fisheries to provide broodstock to hatcheries. In the same way that the Alaska Constitution directs the Board of Fisheries to manage for the return of broodstock, we believe that the law also directs the department to manage for the same result.

2. Department's authority to manage for cost recovery fish

The law is not clear on the question of whether the department, through the commissioner's emergency order power, is authorized to independently manage fisheries for cost recovery fish. It is also not clear whether it is required to do so.

On one hand, it can be argued that the commissioner's statutory charge in AS 16.05.020(2) to "maintain and improve" the resource authorizes actions that will enable private, nonprofit hatcheries to survive. Unless they are able to meet financial obligations, hatcheries will not be able to raise broodstock, and thereby not be able to contribute to the "maintenance and improvement" of the resource. It can also be argued that it is unlikely that the legislature would have created a program for financing the hatcheries and yet not intended for fisheries to be managed so that these hatcheries could pay back their loans and contribute to the fishery resource.

On the other hand, cost recovery fish, unlike broodstock fish, do not directly contribute to the perpetuation of the resource. They are sold to meet economic needs of a user subgroup. Thus, they can be likened to fish that exceed the amount needed for sustained yield and are thus available for allocation among various users.

In the past, we have opined that the commissioner probably cannot allocate fish through his or her emergency order power. Only the board can allocate fish among competing fisheries or user groups. 1990 Inf. Op. Att'y Gen. (Jan. 12; 663-90-0227); 1989 Inf. Op. Att'y Gen. (Apr. 7; 663-89-0465). According to this argument, the department could not independently manage fish for cost recovery because it is not authorized to allocate fish among users. 5/

5/ Although it is not clear whether the department, independent of the board, is authorized or required to allocate fish for cost recovery, we note that there are several ways that the department, in conjunction with the board, could manage for this purpose. First, under AS 16.05.270 the board could delegate to the department its own authority to allocate for certain fisheries. Next,
(continued...)

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The arguments on both sides of this question depend upon implication and analogy. The law does not clearly point to one answer or the other. Although we believe we could defend an emergency order that was issued to provide cost recovery fish, we hesitate to predict the outcome of any challenge. Accordingly, if the department wishes to independently manage for cost recovery fish, we recommend that it seek clear authority from the legislature to do so.

II. CONCLUSION

The Board of Fisheries and the Department of Fish and Game are authorized, and in fact are directed, to manage fisheries so that broodstock returns to hatcheries. The board can manage through its power to adopt regulations and the commissioner, when he or she acts independently of the board, can manage through the power to issue emergency orders. The authority of both is based upon statutory provisions for managing for conservation and on constitutional mandates for managing for sustained yield.

The board has the statutory authority to manage fisheries so that cost recovery fish return to a private, nonprofit hatchery. However, it is not clear that the present allocation criteria recognize the special attributes of hatcheries. If the board adopts such criteria, the board's regulatory authority to manage for cost recovery would be clear as well. On the other hand, there is no basis to conclude that the board is required to allocate fish for this purpose.

Absent the board's delegation of allocation authority to the department, it is not clear that the latter is authorized or required to independently manage for cost recovery, even by emergency order. Although we believe we could defend such an action, we could not predict the outcome of such suit. Therefore, we recommend that the department seek legislation that more clearly establishes this power.

We hope this answers your questions. Please do not hesitate to contact us if we can be of further help.

SMW:tg

5/ (...continued)

the board could by regulation direct the department to manage a particular fishery for this purpose. Examples of this are in 5 AAC 24.365 and 5 AAC 24.366. Finally, the board could by regulation establish an allocation framework that the department could implement through emergency orders.

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cc: Bonnie Harris, Assistant Attorney General
Anchorage

(

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ATTORNEY AT LAW

PHONE (907) 586-6077
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DATE: February 28, 1991

TO: Kate Troll, Executive Director
Southeast Alaska Seiners

FROM: Michael A. D. Stanley *MA*

SUBJ: Department of Law Opinion Re Management Of Fisheries
For Hatchery Broodstock And Cost Recovery

You have asked me to review an opinion authored by Assistant Attorney General Stephen White, dated August 1, 1990, concerning the legal authority of the Board of Fisheries ("Board") and the Alaska Department of Fish and Game ("ADF&G") to manage fisheries for return of hatchery broodstock and cost recovery.

This memo is not intended as a lengthy analysis of Mr. White's conclusions or the issues presented, but is instead meant to identify questions raised by his opinion.

Briefly stated, White's conclusions are as follows:

1. The Board has the authority and, under article VIII, section 4 of the Alaska Constitution (the sustained yield clause), the obligation to manage fisheries to provide broodstock to hatcheries.
2. The Board has the authority to allocate fish to nonprofit hatcheries for cost recovery, as a subgroup of commercial users.
3. Like the Board, ADF&G has the authority and the obligation to use its management powers -- i.e., its emergency order authority -- to assure return of broodstock to hatcheries.
4. ADF&G does not have clear authority to use its emergency order authority to manage for cost recovery, which is a form of allocation among competing users, but could achieve such result
 - a. by working in conjunction with the Board (e.g., receiving a delegation of the Board's authority or implementing a Board regulation requiring such allocation), or
 - b. by seeking legislation that clearly establishes such power.

DISCUSSION

The difficulty I have with Mr. White's opinion is not so much what he says, but what he doesn't say; that is, assumptions or legal inferences that are implicitly made but not discussed. Once these are understood, it can be seen that his conclusions regarding the Board's and ADF&G's authority to manage for broodstock and cost recovery are subject to some question.

1. Are Hatchery Stocks Subject To Article VIII?

White's memo is premised on the assumption that hatchery fish are necessarily subject to the provisions of article VIII of the Alaska Constitution. This leads him, among other things, to conclude that the Board and ADF&G are required to manage fisheries for return of hatchery broodstock, just the same as they are required to manage for escapement of wild stocks. I believe there is reason to question this assumption.

Article VIII does not use a single term for what it covers, but all seem to have a similar meaning: "natural" resources, resources in their "natural state," and "replenishable resources belonging to the state." The question is, do these terms encompass man-made hatchery fish? Put another way, does the state "own" hatchery fish in the same way as it "owns" wild fish and game. If the answer to that question is no, then it may well be that hatchery fish are not subject to the requirements of article VIII at all.

I have not studied this "ownership" question for hatchery stocks at length, but I have run across items that suggest they might be different from wild stocks. For instance, in the commentary on what became section 3 of article VIII (the common use clause), the framers indicate that it "does not apply to the domestication of fur-bearing animals or other animals subject to intensive culture, to fish in private ponds, or to registered trap lines if authorized by law." Commentary on Article on State Lands and Natural Resources, January 16, 1956, Alaska Constitutional Convention Proceedings, Part 6, Appendix V, p. 98 (emphasis mine). Although the examples mentioned do not include hatchery fish, a common thread is creatures which man plays a substantial role in propagating.

Further, it could be argued that the legislature itself, when it passed the statutes authorizing private nonprofit hatcheries, did not view hatchery fish as subject to article VIII. As White points out, AS 16.10.440(a) provides that hatchery fish are "available for common use and are subject to regulation under applicable law in the same way as fish occurring in their natural state." However, this legislation would not have been necessary if hatchery fish were already believed to be subject to article VIII. The very fact that

AS 16.10.440 was enacted suggests that, in a constitutional sense, hatchery fish may be different from wild stocks.

Similarly, the sustained yield clause surely prohibits the Board or ADF&G from extinguishing a wild run. Yet, under certain circumstances hatchery permits may be revoked and production stopped. AS 16.10.430. Assuming hatchery fish were subject to section 4's command to sustain production, wouldn't terminating operation of a hatchery likewise be a constitutional violation? The answer may be that section 4 does not apply to hatchery fish.

The point simply is, White's conclusion that the Board and ADF&G are constitutionally mandated to manage for broodstock, just as they are required to manage for escapement of wild stocks, is subject to some question or, at the least, further analysis.

2. Are Nonprofit Hatcheries Engaged In Commercial Fishing?

In concluding that the Board can allocate fish to private nonprofit hatcheries for cost recovery, White states that "we know of no reason why they could not be considered a subgroup of commercial users and thus be targeted for allocations like any other distinct subgroup of commercial users." He conspicuously fails to refer to the definition of "commercial fishing" in articulating this premise. "Commercial fishing" is defined in AS 16.05.940(5) as

the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels...

Nonprofit hatcheries do not take cost recovery fish "for profit." Are such fish nonetheless taken "with the intent" of disposing of them "by sale...or in commercial channels?" Although it could be argued that they are, that leads to a fairly expansive definition of commercial fishing. Salmon derbies possess fish with the intent of selling them; are they engaged in commercial fishing, too? Could the Board make an allocation to a fishing derby as subgroup of commercial users? At some point such an interpretation of "commercial fishing" becomes rather strained.

The definition of "commercial fisherman" in AS 16.10.940(4) may also provide guidance. That term is defined in terms of an "individual" -- i.e., a natural person -- and would not appear to include a nonprofit corporation.

Thus, there is a question whether nonprofit hatcheries are indeed engaged in "commercial fishing." If not, then White's conclusion that they may be the recipients of an allocation is undermined.

3. May Nonprofit Hatcheries Receive An Allocation?

The conclusion that the Board can allocate hatchery fish to a hatchery for cost recovery is, as White's memo states, "based upon characterizing private, nonprofit hatcheries as another type of commercial subgroup." I discussed above my doubts that hatcheries can really be said to be engaged in "commercial fishing."

There is another basis for questioning whether hatchery fish can be the subject of a specific allocation to a hatchery. AS 16.10.440(a) provides that hatchery fish are subject to regulation in the same manner as wild stocks "until they return to the specific location designated by the department for harvest by the hatchery operator." This suggests two things: (1) it is the department, not the Board, which is responsible for "allocating" hatchery fish to a hatchery through designation of special harvest areas, and (2) such allocation occurs only after those fish have traversed the common property fisheries and returned to the specific location designated for hatchery harvest. This statutory scheme is circumvented if the Board takes it upon itself to make an allocation to a hatchery prior to those fish returning to the designated area, while they are still in the common property fisheries.

Similarly, the statute which governs allocation of fisheries resources -- AS 16.05.251(e) -- does not really square with the idea of an allocation to a hatchery. The various factors which may be considered as allocation criteria are all tied to the term "fishery." But the definition of "fishery" in AS 16.05.940(12) does not include a hatchery. This suggests that a hatchery was never intended as the recipient of an allocation by the Board under AS 16.05.251(e).

Thus, the structure of applicable legislation suggests that hatchery operators may receive an allocation only through the procedures set forth in AS 16.10.440 (after leaving the common property fisher and in an area designated by ADF&G) and not from the Board pursuant to AS 16.05.251(e).

I must emphasize that the foregoing -- especially the discussion of the constitutional issue -- are not intended as definitive legal advice on whether the Board or ADF&G have the authority and/or the obligation to manage fisheries in order to assure the return of broodstock to nonprofit hatcheries or to provide for cost recovery. More analysis remains to be done. But I do think that this points up some significant problems with the Department of Law's opinion.

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MEMORANDUM

April 8, 1991

SUBJECT: Sustained Yield Management of Salmon Produced by Private Nonprofit Hatcheries (Work Order 7LS0990)

TO: Senator Dick Eliason

FROM: George Utermoile, *GU*
Legislative Counsel

You have asked whether the state must manage salmon produced by private nonprofit hatcheries according to principles of sustained yield.

The Department of Law in its consideration of this issue has concluded that the sustained yield section of the Alaska Constitution (art. VIII, sec. 4) is applicable to private hatchery stocks of salmon and that the Board of Fisheries is required to manage private hatchery stocks of salmon according to sustained yield principles in order to provide broodstock to the hatcheries. Memorandum to Don W. Collinsworth file no. 663-90-0327, August 1, 1990. The Department of Law reached this conclusion by finding that the return of hatchery-bred salmon to the hatchery for use as broodstock, like the escapement of wild salmon to the spawning grounds, is necessary to achieve sustained yield of the salmon resource.

The sustained yield section can be reasonably construed as supporting the conclusion reached by the Department of Law, however the section is also open to other interpretations which would support different conclusions. Article VIII, sec. 4 states:

SUSTAINED YIELD. Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Of particular significance is the fact that this section applies to fish "belonging to the State" and that utilization, development, and maintenance of fish on the sustained yield principle is "subject to preferences among beneficial uses."

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Fish belonging to the state are clearly to be managed according to sustained yield principles. The general rule is that salmon while in state water are property of the state and are held in trust for the benefit of all people of the state. Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 914-915 (Alaska 1961). Part of the state's trust responsibility includes the management of salmon according to sustained yield principles. However it is unclear whether the sustained yield requirement applies to salmon raised by a private nonprofit hatchery, because the ownership of hatchery salmon is uncertain.

Private nonprofit salmon hatcheries are authorized under AS 16.10.375 - 16.10.470. AS 16.10.375 - 16.10.470 that does not answer the question of who owns hatchery stocks of salmon, though a number of provisions do suggest that some property interest in hatchery salmon stocks may pass to the hatchery under the terms of the hatchery permit. There are at least four references to salmon eggs or fry being sold to or by a hatchery. AS 16.10.420(3), (7), and (8); 16.10.450. The ability to sell salmon eggs and fry implies an ability to transfer property rights in the eggs and fry.

AS 16.10.440, which provides for the common use of hatchery fish while the fish are in the natural water of the state, is silent as to whether hatchery fish belong to the state. AS 16.10.440(a) provides

Fish released into the natural waters of the state by a hatchery operated under AS 16.10.400 - 16.10.470 are available to the people for common use and are subject to regulation under applicable law in the same way as fish occurring in their natural state until they return to the specific location designated by the department for harvest by the hatchery operator.

The phrase "occurring in their natural state" used in AS 16.10.440(a) mirrors the language of the common use section of the state constitution (art. VIII, sec. 3) in order to assure that while in the water of the state hatchery fish are to be subject to common use. However providing that hatchery fish are available for common use neither implies state ownership of the hatchery fish nor entails a concomitant responsibility to manage hatchery fish for sustained yield, because the requirements for common use and sustained yield are separate provisions of the constitution.

AS 16.10.440(a) does not use the important phrase "belonging to the state" which would invoke the sustained yield section. According to AS 16.10.440(a), hatchery fish are to be treated "in the same way as fish occurring in their natural state until they return to the specific location. . ."; this language does not say that hatchery fish are a common property resource belonging to the state, but only that they are to be treated as though they were a common property resource until they return to the designated location, at which time the fish become subject to private use by the hatchery. This language suggests some form of lingering private property interest in

hatchery fish by the hatchery even after the hatchery releases the fish into the wild. If there is a latent private property interest in hatchery fish while they are in the wild, then those fish may not necessarily be fish belonging to the state. If the fish do not belong to the state then they are not subject to the requirements for sustained yield management under the state constitution. This could permit the state through the Board of Fisheries and the Department of Fish and Game to manage fisheries through which hatchery fish pass without regard to assuring a sustained yield escapement to the hatchery.

Even if the hatchery fish do belong to the state for the purposes of the sustained yield section, the requirement of the sustained yield section of the state constitution is not absolute, because the management of fish and other replenishable resources belonging to the state shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses. The delegates to the Alaska Constitutional Convention considered this qualifying language to be necessary because they found that the sustained yield principle becomes meaningless and ineffective, if it is not qualified by the concept of beneficial use. Alaska Constitutional Convention Proceedings, Delegate Riley, p. 3054-55. The delegates to the convention did not discuss in detail how they felt the concept of preferences among beneficial uses would be applied in the context of sustained yield management of replenishable resources, except to say that certain kinds of resources (e.g. predators and parasites) should not be maintained on a sustained yield basis. Alaska Constitutional Convention Proceedings, Delegate Riley, p. 2451; Commentary on Article on State Lands and Natural Resources, 6 Proceedings of the Alaska Constitutional Convention at 98. However the delegates did discuss the concept of beneficial uses in regard to water rights. Section 13 of article VIII, relating to water rights, contains the same "subject to preferences among beneficial uses" language that is contained in the sustained yield section. The delegates understood preference among beneficial uses to allow the state to choose among competing beneficial uses of water in order to achieve the greatest public good, even if it meant eliminating other existing, vested beneficial uses of water, provided that the owner of those rights are compensated for the loss of the rights. Commentary on Article on State Lands and Natural Resources, 6 Proceedings of the Alaska Constitutional Convention at 102. Thus the delegates understood that the concept of preferences among beneficial uses would also allow the state to make reasoned decisions to prefer certain renewable resources over other renewable resources to achieve a more beneficial public purpose. The authority to establish preference among beneficial uses may permit the state to harvest hatchery fish without providing for a sustained yield from the hatchery, provided that those who have vested rights in hatchery fish are compensated for those rights that are taken by the state.

The ability of the state to establish preferences among beneficial uses is reflected in AS 16.10.430(b) which allows the commissioner of fish and game to terminate the

Senator Dick Eliason

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operation of a hatchery in the best interests of the public, if the adverse effects of the operation of the hatchery are irreversible and cannot be mitigated.

If I can provide further assistance, please advise.

GU:pl

91-235.plm

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October 17, 1991

PRINCE WILLIAM
SOUND AQUACULTURE

OCT 21 1991

Mr. John McMullen, President
Prince William Sound Aquaculture Corporation
Box 1110
Cordova, AK 99574

RE: Proposed Hatchery Regulations
Our File No. 91-7618

Dear John:

Enclosed is the long memorandum that I promised on the cost recovery and production limitations issues that you raised. I would be happy to discuss these matters with PWSAC at any time that is convenient for you.

In addition to the questions addressed in the enclosed memorandum, you also asked whether the Board of Fisheries could change the Prince William Sound Allocation Policy this year, out of its normal sequence. My understanding is that the policy has been implemented in the form of regulations, which are codified at 5AAC 24.370. To my knowledge, there is no absolute bar that would prevent the Board from amending or repealing its regulations at any time, so long as it fulfills the statutory requirements for promulgating regulations. Those detailed requirements are included in the Administrative Procedures Act.

However, any new regulations must be consistent with existing statutes, within the scope of the authorizing statute, and reasonably necessary to carry out the purpose of the statute. As with any law or regulation, any amending regulations must also be "reasonable and not arbitrary." Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971).

Given the substantial public testimony in favor of the allocation policy, and the exhaustive back-up documentation that supported the allocation regulations adopted last year, it seems highly unlikely that the Board could make significant amendments that would be "reasonable and not arbitrary." An extensive record would have to be developed showing a dramatic change in circumstances and public support in order to support a change in the policy.

Mr. John McMullen

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October 17, 1991

Even if such a record were to be made, any new regulations would have to preserve PWSAC's ability to continue a reasonable level of broodstock and cost recovery, for all of the reasons stated in my memorandum. For the same reasons, any new policy that attempted to limit PWSAC's salmon production would be vulnerable to legal challenge.

If you have further questions, please give us a call.

Very truly yours,

ASHBURN & MASON



A. William Saupe

AWS/nk

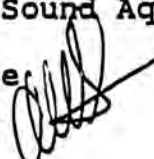
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MEMORANDUM

TO: John McMullen, President
Prince William Sound Aquaculture Corporation

FROM: A. William Saupé
Ashburn & Mason 

DATE: October 16, 1991

RE: Regulation of Private Hatcheries

I. Issues Presented

You have asked us to research several legal issues that go to heart of PWSAC's ability to conduct its business as it has for the past 14 years. First, you asked for the legal basis for of PWSAC's right to conduct broodstock and cost recovery harvests, and an analysis of the degree to which the Department of Fish and Game (the "Department") and the Board of Fisheries (the "Board") can regulate broodstock recovery and cost recovery by private non-profit hatcheries. In that connection, you requested an analysis of an Attorney General's Opinion by Stephen White (Op. No. 663-90-0327, August 1, 1990) and two other opinions on the same topic. One is a memorandum written to Senator Eliason by George Utermohle, Legislative Counsel, dated April 8, 1991, and the other is a

John McMullen, President
RE: Regulation of Private Hatcheries
October 17, 1991

February 28, 1991 memorandum from Michael A. D. Stanley to Kate Troll, Executive Director of the Southeast Alaska Seiners.

You also asked for an evaluation of the extent of the Board's authority to regulate hatchery production levels on a regional or individual hatchery basis, with specific reference to AS 16.05.440(b), regarding salmon egg take.

The analysis and arguments that we would make follow.

II. Brief Conclusion

Based upon the relevant provisions of the Alaska Constitution, applicable statutes, and related legislative history, we would argue that PWSAC has a constitutional and statutory right to continue a reasonable level of broodstock and cost recovery harvest. Any regulation by the Board or Department that significantly restricted PWSAC's ability to continue its present broodstock and cost recovery practices would be inconsistent with an extensive statutory scheme that explicitly authorizes broodstock and cost recovery by private non-profit hatcheries and regional aquaculture associations. Any such restriction would also conflict with Article VIII, Section 4, of the Alaska Constitution (requiring fish resources belonging to the State to be "utilized,

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developed, and maintained on the sustained yield principle"), Article VIII, Section 15 of the Alaska Constitution (prohibiting any exclusive right or special privilege of fishery, except insofar as limited entry may be imposed by the State "to promote the efficient development of aquaculture in the State").

On the related question of the Board's authority to restrict hatchery production (as distinct from its authority to regulate harvests), the Board is statutorily authorized to regulate such things as the "propagation and stocking of fish" (AS 16.05.251(7)), and the "source and number of salmon eggs" taken by a hatchery (AS 16.10.440(b)), which suggests that it might have some measure of control over individual hatchery output. However, the available legislative history strongly suggests that the legislature never intended to give the Board the power to limit hatchery production on either a local, regional or statewide basis. Nothing in the current law would permit regional production ceilings designed to restore historical market share percentages, which we understand to have been proposed.

If the Board does have power to regulate production, at some point it would come into conflict with the constitutional provisions mentioned above and the numerous other statutes, such as

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the statutes creating the FRED Division, the Limited Entry Act, and the State Hatchery Loan Program, which together evidence a strong policy in favor of hatchery development as well as enhancement and extension of the State's fisheries. Because there are no court decisions interpreting the Board's power to regulate propagation or egg take, and because the Alaska Supreme Court has not elucidated either the meaning of the constitutional reference to "efficient development of aquaculture," or the meaning and application of the sustained yield concept, there is no sure way to know precisely where the collision might occur until a specific restriction is imposed and challenged in court.

It would seem reasonable to conclude, however, that in the absence of a strong factual showing that hatchery production posed a serious genetic or disease threat to wild salmon stocks or perhaps was causing severe economic distress, neither the Department nor the Board could legally restrict PWSAC's output below a level necessary to sustain hatchery yields, to efficiently develop aquaculture, to repay state loans and to recover its costs.

III. Discussion

A. The Board And The Department Are Required By The

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Alaska Constitution And Numerous Statutes To Manage
For Broodstock Recovery

In its August 1990 opinion, the Attorney General's Office advanced the argument that the Board is obligated to manage Alaska's fisheries to provide for broodstock recovery by hatcheries. Analogizing broodstock fish to wild stock escapement, the Assistant Attorney General Stephen White reasoned that Article VIII, Section 4 of the Alaska Constitution mandates that conclusion. That section provides as follows:

Sustained Yield. Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Alaska Const. Art. VIII, §4. White implicitly assumes that hatchery fish "belong to the State" and argues that without broodstock harvests, hatchery stocks obviously could not be sustained.

In an opinion on this subject requested by Senator Eliason, Legislative Counsel George Utermohle questioned White's conclusion that the sustained yield principle applies to hatchery

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fish, on the grounds that they may not "belong to the State." He bases his argument entirely on AS 16.10.440(a), which provides:

Fish released into the natural waters of the state by a hatchery operated under AS 16.10.400 - 16.10.470 are available to the people for common use and are subject to regulation under applicable law in the same way as fish occurring in their natural state until they return to the specific location designated by the department for harvest by the hatchery operator.

AS 16.10.440(a).

Utermohle points out that the phrase "occurring in their natural state" used in this section mirrors the language of the common use clause of the constitution (Art. VIII, Sec. 3).¹ He then argues that merely providing that hatchery fish are available for common use "neither implies state ownership of the hatchery fish nor entails a concomitant responsibility to manage hatchery fish for sustained yield, because the requirements for common use and sustained yield are separate provisions of the constitution." Next, Utermohle asserts that AS 16.10.440(a) does not use the phrase "belonging to the state," which would invoke the sustained

¹Article VIII, Sec. 3 provides: "Common Use. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

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yield clause. Instead, he argues that the statute requires only that hatchery fish be treated in the same way as fish occurring in their natural state until they return to the specific hatchery location. Utermohle Memo. p. 2.

From this phrasing in AS 16.10.440(a), Utermohle reasons that there may be "some form of lingering private property interest in the hatchery fish even after the hatchery releases the fish into the wild." Id. at 3. If the fish do not "belong to the State," Utermohle concludes that they are not subject to the sustained yield requirement and neither the Board nor the Department is required to manage hatchery fish to assure a sustained yield escapement to the hatcheries.

Utermohle's ownership argument does not stand up to closer analysis and is contradicted by the available legislative and constitutional history. Certainly PWSAC has understood since its creation in 1975 that once it releases its fish, it no longer owns or controls them. From the point of release forward, they are "fish occurring in their natural state" and, as Utermohle acknowledges, Article VIII, Section 3 of the constitution reserves them to the people for common use. This is consistent with the general rule, which he also cites, that salmon while in state water

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are property of the state and held in trust for the benefit of all people of the state. Metlakatla Indian Community v. Egan, 362 P.2d 901, 914-915 (Alaska 1961).

That hatchery fish belong to the State is also consistent with the views of the legislature that created the nonprofit hatchery program. In her July 31, 1991 memorandum to Senator Eliason, Linda J. Snow, a Legislative Analyst, wrote as follows:

Consensus is that the legislature had always intended that the fish from PNP hatcheries belong to the common property fishery until such time as they return to the hatchery, and then they belong to the hatchery for broodstock and cost recovery. Testimony by Senator Dick Eliason at a 1975 Senate Resources Committee hearing on SB 180 indicates that the initial concept of a private hatchery system considered profit-making corporate ownership. However, a profit-making corporation might advance a claim to exclusive ownership of everything it produced. Thus, it was felt that private, nonprofit ownership of hatcheries would be more consistent with the concept of publicly owned hatchery fish. This opinion is echoed by former Representative Terry Gardiner.

At a March 7, 1977 House Resources Committee hearing, Jack Milnes, executive director of Southern Southeast Regional Aquaculture Association testified: "I wish to recognize the fact that these are common property fish, that they belong to the state of Alaska and to the people of Alaska and therefore they should be protected by the representatives of the

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people of the state of Alaska." At a 1979 Senate Resources Committee hearing on HB 48, Don Clockson, an attorney with Alaska Legal Services discussed the question of ownership of hatchery fish. In his testimony, he asked "When are fish no longer common property fish?" He felt that constitutionally, they were considered to be common property at all times. Consequently, it appears there was never any question that hatchery fish were common property of the people of the state while in Alaska waters, and they may or may not be the property of the PNP hatchery operator at the hatchery, but that he is allowed to harvest a sufficient number for broodstock and cost recovery.

Snow Memo. p. 14 (attached as Attachment A) (emphasis added). These statements effectively answer the "ownership" issue. When the legislature created private hatcheries, it intended that the fish would belong to the State, contrary to Utermohle's supposition.

The commentary of the Committee on Resources of the Alaska Constitutional Convention is also significant on this point. Referring specifically to the "common use" clause, which Utermohle seeks to distinguish from the sustained yield clause, the commentary states in relevant 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.

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Alaska Constitutional Convention Proceedings, Part 6, p. 98 (emphasis added). Thus, the framers of the common use clause thought that the fish being reserved for common use "belonged" to the State. Hatchery fish are reserved for common use by AS 16.10.440(a) and the common use clause itself. Therefore, they must belong to the State and be subject to the sustained yield principle.

Also significant is the commentary to the sustained yield clause, which states in relevant part:

Sustained yield is recognized as a principle applicable to the administration of plant and animal life subject to the immediate authority of the state.

Id. (emphasis added). Because hatchery fish are subjected to the authority of the State by AS 16.10.440(a), among other provisions, it follows that they are subject to the sustained yield clause.

This conclusion also comports with common sense. If they did not belong to the State, it could not reserve hatchery fish for use by others without paying for them. Moreover, if the mere expectation that a hatchery will later be allowed to harvest some unidentified fraction of the returning fish constitutes an ownership interest in all of its fish, then every other limited entry permit holder could be said to have the same "lingering

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property interest," leading to the false conclusion that none of the fish in Alaska's waters ever belong to the State or are subject to the sustained yield principle of management.

A more reasonable interpretation of these related statutory and constitutional provisions is that, once released, hatchery fish become like wild stocks in every legal respect. They belong to the State, are reserved to the people for common use and must be managed for sustained yield. Therefore, broodstock recovery must be permitted by the Board and the Department at a level sufficient to produce a sustained yield of hatchery stocks.

Even if this is true, Utermohle goes on to argue that the sustained yield principle in Article VIII, Section 4 is not absolute and is "subject to preferences among beneficial uses." He suggests that this phrase implies the power on the part of State regulators to deny hatchery harvests altogether, in order to achieve a "more beneficial public purpose." According to Utermohle, the ability of the State to establish preferences among beneficial uses is reflected in AS 16.10.430(b), which allows the Commissioner of Fish and Game to terminate the operation of a

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hatchery if its adverse effects are irreversible and cannot be mitigated. Utermohle Memo., p. 4.²

A more plausible interpretation of AS 16.10.430(b) is that the listed conditions under which a hatchery operation may be terminated are the only bases upon which termination is permitted. In other words, unless there are irreversible adverse effects that cannot be mitigated, a licensed hatchery operation cannot be terminated, directly through a termination order, or indirectly through a denial of broodstock or cost recovery funds.

Utermohle's argument also overlooks, among other things, Article VIII, Section 15 of the constitution, which provides:

²AS 16.10.430(b) provides as follows: "If the commissioner finds that the operation of the hatchery is not in the best interests of the public, the commissioner may alter the conditions of the permit to mitigate the adverse effects of the operation, or, if the adverse effects are irreversible and cannot be mitigated sufficiently, initiate a termination of the operation under the permit over a reasonable period of time under the circumstances, not to exceed four years. During the period of time that the operation is being terminated, the permit holder may harvest salmon under the terms of the permit but may not release additional fish."

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No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

This provision strongly suggests that the framers of our constitution considered the efficient development of aquaculture to be an important value to be protected. It also indicates read to mean that the efficient development of aquaculture is one of the purposes of limited entry, a principle that is central to fisheries management in Alaska.

Hatchery harvests for broodstock (and cost recovery) are absolutely essential to conservation of the resource and to the efficient development of aquaculture. If deprived of broodstock (or the funds generated by cost recovery), PWSAC could not continue in existence, much less develop efficiently. Furthermore, other beneficial uses, such as the harvest of PWSAC produced fish by commercial, sport and subsistence users, would be seriously harmed, not helped by a restriction on broodstock harvest. Over the past 14 years, PWSAC has harvested an average of less than 30% of the

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salmon returning to its hatcheries. During the period from 1986 through 1990, PWSAC fish constituted 50 percent of the total commercial harvest. During that period PWSAC contributed an average of approximately \$15.4 million annually in value to the common property fishery, while costing the State little or nothing. PWSAC harvests have consistently sustained other user groups throughout the region, while causing no demonstrable harm to wild stocks. Short of the extreme situation envisioned by AS 16.10.430(b), it is hard to conceive how denial of a reasonable hatchery harvest in favor of other beneficial uses could achieve a greater public purpose.

Any regulation that severely limited or denied PWSAC's right to harvest a reasonable number of fish would violate both Section 4 (sustained yield) and infringe on the values reflected in Section 15 (limited entry and efficient development of aquaculture) of Article VIII and the Limited Entry Act, of which hatchery harvests are an integral part.

Utermohle's argument also overlooks an extensive web of statutory provisions that evidence an unwavering legislative intent to sustain and expand hatchery operations through hatchery harvests. A good example is the very provision that Utermohle

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cites, AS 16.10.440(a), which provides that hatchery fish are available for common use "until they return to the specific location designated by the department for harvest by the hatchery operator." This indicates a legislative expectation and intent that hatchery harvests are necessary.

The obligation of the Department to affirmatively assist with broodstock recovery is embodied in AS 16.10.443, which states:

Department assistance and cooperative. (a)
Before and after permit issuance under AS 16.10.440 - 16.10.470, the department shall make every effort, within the limits of time and resources, to advise and assist applicants or permit holders, as appropriate, in the planning, construction, or operation of salmon hatcheries.

As explained above, broodstock recovery is essential to hatchery operations. Without it, they could not exist. The Department is obligated under AS 16.10.443 to assist in the operation of hatcheries. Any departmental regulation, action or order that denied broodstock recovery would be inconsistent with this obligation and would be invalid.

Other relevant statutory provisions that establish the obligation of the Department and the Board to manage for hatchery harvests are discussed below, in relation to cost recovery.

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B. The Board And The Department Must Also
Manage For Cost Recovery Harvests

Assistant Attorney General White concluded that the Board and the Department "are authorized, and in fact directed, to manage fisheries so that broodstock returns to hatcheries." Both the reasons given by White and the additional reasons set forth above support this conclusion. On the related issue of whether the Board and the Department must manage for cost recovery, White is less certain. He believes that the arguments on both sides of the question "depend upon implication and analogy" and concludes that "the law does not clearly point to one answer or the other." White Memo., p. 7. However, we would argue that the Alaska Constitution and an extensive statutory scheme require the Board and the Department to manage for hatchery cost recovery.

As an initial matter, it is important to remember that the Board and the Department manage the fisheries primarily through regulations and orders. In order to be valid, a regulation must be within the scope of the authorizing statute and it must be "consistent with standards prescribed by other provisions of law." Beran v. State, 705 P.2d 1280 (Alaska App. 1985), citing AS 44.62.020. In Beran, the court struck down a Board regulation on

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the basis that it was inconsistent with other provisions of law and therefore invalid. *Id.* at 1289. If the Board or the Department were to issue regulations that curtailed PWSAC's ability to conduct a cost recovery harvest, the regulations would be inconsistent with numerous provisions of law and could be successfully challenged in court.

The first section of this memorandum focused on the requirements of Article VIII of our constitution. The same constitutional provisions that protect broodstock recovery also protect cost recovery, because cost recovery is also absolutely essential to sustain hatchery yields (Section 4) and to promote the efficient development of aquaculture (Section 15). This discussion will not repeat those arguments, but will focus instead on the legislative mandate for cost recovery. Numerous statutes express the legislative intent that hatcheries must be permitted to conduct cost recovery harvests in order to generate funds for operation, debt retirement, and expansion.

The most obvious such provision is AS 16.1C.450(a), which could hardly be clearer on this point. It states:

Sale of salmon and salmon eggs by hatchery.
(a) Except as otherwise provided in a contract for the operation of a hatchery under

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AS 16.10.480, a hatchery operator who sells salmon returning from the natural waters of the state, or sells salmon eggs to another hatchery operating under AS 16.10.400 - 16.10.470, after utilizing the funds for reasonable operating costs, including debt retirement, expanding its facilities, salmon rehabilitation projects, fisheries research, or costs of operating the qualified regional association for the area in which the hatchery is located, shall expend the remaining funds on other fisheries activities of the qualified regional association.

AS 16.10.450(a).³

The Limited Entry Act, AS 16.43.400, et. seq., permits the Commercial Fisheries Entry Commission to issue "special harvest area entry permits" to _____ of private, nonprofit hatchery permits issued by the _____ Section 420 of the Act, noted above in connection _____ ownership issue, specifically authorizes cost recovery harvest by permit holders, such as PWSAC:

Disposition of fish. Fish caught under the authority of a special harvest area entry

³The intent of this provision is reiterated in AS 16.40.210, the recently enacted statute that bans mariculture. It provides in section (b)(2) that "this section does not restrict the ability of a nonprofit corporation that holds a salmon hatchery permit under 16.10.400 to sell salmon returning from the natural waters of the state, as authorized under 16.10.450, or surplus salmon eggs, as authorized under 16.10.420 and .450."

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permit are the property of the permit holder. The permit holder may sell the fish if the proceeds are used in the manner described in AS 16.10.450.

AS 16.43.420. PWSAC, of course, holds a special harvest area entry permit under AS 16.43.400, and its cost recovery funds are used for the purposes listed in AS 16.10.450. It thus has a statutory right to cost recovery that cannot be curtailed through regulation.⁴

PWSAC also conducts cost recovery harvests at Main Bay and Cannery Creek under authority of contracts entered pursuant to AS 16.10.480, enacted by the legislature in 1988. That section authorizes the Department to enter into hatchery management contracts for certain state-owned hatcheries, which allow harvest of adult salmon "in a quantity sufficient to allow the contractor to recover all or part of the contractor's costs of operating the hatchery." While this provision is permissive, rather than

⁴It could also be argued that cost recovery is guaranteed to permit holders such as PWSAC by the Limited Entry Act itself. In Johns v. CFEC, 758 P.2d 1256, 1263 (Alaska 1988) the court stated: "The Limited Entry Act has two purposes - enabling fishermen to receive adequate remuneration and conserving the fishery," citing, Art. VIII, Sec. 15, Alaska Const., AS 16.43.010; CFEC v. Apokedak, 606 P.2d 1255, 1265 (Alaska 1980). Without cost recovery, PWSAC would not receive adequate remuneration or be able to help conserve the fishery.

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mandatory, it is further evidence of the legislature's expectation and intent to permit cost recovery harvests at state-owned but privately operated hatcheries.⁵

Another statutory provision that is quite clear on this point is AS 16.10.430(b), discussed above. This provision permits the Commissioner of Fish and Game to terminate a hatchery permit if he finds that continued operation is no longer in the public interest. Presumably, termination could be ordered if a hatchery failed to sustain itself economically, or more likely, if it produced diseased or genetically damaged fish that might threaten other stocks. See Snow Memo., pp. 12-13, 16. In any case, the relevant point is that termination is to be phased over time.

During the period of time that the operation is being terminated, the permit holder may harvest salmon under the terms of the permit but may not release additional fish.

AS 16.10.430(b). Logically, this provision can only contemplate cost recovery harvest. In the context of hatchery termination,

⁵Both the Main Bay and the Cannery Creek contracts provide that PWSAC shall have the right to conduct cost recovery harvests during the terms of the contracts.

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broodstock harvest would not be necessary since no new fish could be released.

Under AS 16.05.020, the Commissioner of Fish and Game is required to "manage, protect, maintain, improve, and extend the fish, game... of the state in the interest of the economy and general well-being of the State." The FRED Division has been charged with the duty, "through rehabilitation, enhancement and development programs" to do everything "necessary to insure perpetual and increasing production and use of the food resources of Alaska's waters and continental shelf areas." AS 16.05.092. Also significant is AS 16.10.443, cited above, which requires the Department to do everything possible to assist with hatchery operations. Any regulation or order that prevented a reasonable level of cost recovery would hardly be consistent with these duties on the part of the Commissioner or with the myriad of other statutes that authorize cost recovery harvests by hatcheries. Under Beran v. State, supra, and numerous other cases, regulations are invalid if they are inconsistent with other provisions of law.

The statutory provisions discussed above lead to the conclusion that the legislature intended cost recovery harvest to be the primary method of funding private nonprofit hatcheries. The

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Snow Memorandum on the legislative history of the hatchery program supports this conclusion:

At this time [1973-974], legislators were coming to the view that the private sector would be more efficient than the government in the operation of hatcheries. Also, nongovernmental hatcheries had much to recommend them from the perspective of public finance issues: the operation of private hatcheries could be funded from the harvest of returning fish and from tax assessments on the fishermen who had access to hatchery production, thus shifting the cost of the facilities from the shoulders of the general public to the people who derived benefits directly from them.

Snow Memo., p. 5. (emphasis added). Snow goes on to point out that in 1974 "there was great enthusiasm about the prospect of PNP hatcheries from fishermen's groups, education centers, Native corporations, and the legislature itself." Id.

An attorney for the Southeast Alaska Seiners, Michael D. Stanley, seems less enthusiastic about cost recovery. He has approached the issue from a different direction, acknowledging the Department's primary responsibility for control of hatchery harvests, but questioning whether the Board has the statutory authority to allocate fish to private hatcheries. See Memorandum from Michael Stanley to Kate Troll, Executive Director Southeast

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Alaska Seiners, dated February 28, 1991. Stanley bases his argument on AS 16.05.440(a), cited above at page 5. He focuses on the statutory language subjecting hatchery fish to regulation in the same manner as wild stocks, "until they return to the specific location designated by the department for harvest by the hatchery operator." From this he concludes (1) it is the Department, not the Board, which is responsible for "allocating" hatchery fish to a hatchery through designation of special harvest areas, and (2) such allocation occurs only after those fish have traversed the common property fisheries and returned to the specific location designated for hatchery harvest. Stanley Memo., p. 4.

One flaw in this reasoning is that it confuses allocation of fish to be harvested with designation of a special harvest area and harvest timing. There is no logical reason that the Board cannot allocate a portion of the return to a hatchery and the Department designate the specific time and place for the harvest of that allocation. In fact, my understanding is that that is how the system has always worked.

This scheme also appears to be in harmony with subsection (b) of AS 16.10.440, which gives the Board the authority "to amend by regulation... the terms of the permit relating to the harvest of

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fish by hatchery operators, and the specific locations designated by the department for harvest." This provision gives the Department primary responsibility to regulate cost recovery harvests, but also confers sufficient statutory authority on the Board to allocate fish to be harvested. The legislative history of AS 16.10.440, quoted at length below, indicates that the role of the Board extends to regulating the harvest of "those fish which are returning as a result of releases from natural systems and also from hatchery releases." House Journal, March 15, 1979, pp. 601-602.

Another difficulty with Stanley's theory that the Board does not have the power to allocate fish for hatchery harvest is that it seems to be inconsistent with two specific provisions of the Limited Entry Act, under which hatcheries are granted limited entry permits. AS 16.43.440 provides that: "use privileges granted under AS 16.43.400 - .440 are subject to the regulations of the Board of Fisheries." Also, AS 16.43.950 states that "... Holders of ... entry permits issued under this chapter are subject to all regulations adopted by the Board of Fisheries." These provisions

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also could be read to authorize the Board to allocate fish to hatcheries.⁶

As a final point in response to the Stanley Memorandum, the Board's primary authorizing statute, AS 16.05.251(a), is quite broad and seems to give the Board ample authority to allocate fish for cost recovery and broodstock harvest. Examples of the types of regulations the Board may adopt are found in Section 251(a)(6) (classifying as commercial fish, sport fish, personal use fish, subsistence fish, or predators or other categories essential for regulatory purposes); Section 251(a)(12) (regulating commercial, sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries); Section 251 (a)(14) (establishing nonexclusive, exclusive, and superexclusive registration and use areas for regulating commercial fishing.) See also, AS 16.05.251(e) (Board shall establish criteria for allocation of fishery resources among personal use,

⁶As we have argued elsewhere, the power of the Board to allocate to hatcheries does not include the power to deny a reasonable allocation altogether.

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sport and commercial fishing). These provisions are broad enough to allow the Board to allocate to hatcheries.

The idea that hatchery harvests do not qualify as "commercial fishing", and therefore not covered by these statutory sections, is directly contrary to the plain meaning of the definition found in the statute.

"Commercial fishing" means the taking, fishing for, or possession of fish... with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels;

As 16.05.940(4). There can be no doubt that PWSAC takes and possesses fish with the intent of disposing of them by sale in commercial channels, and is thus engaged in commercial fishing within the meaning of AS 16.05.251. Commercial fishing is precisely what a cost recovery harvest is. PWSAC's conduct in this regard is indistinguishable from that of any other commercial fisherman. (Ironically, one of the objections that is raised by hatchery opponents is that it is inappropriate, for some reason, for hatcheries to "compete" in the commercial market with other fishermen trying to sell their fish to the same customers).

If PWSAC is engaged in commercial fishing, AS 16.05.251 and the case law cited in the White Memorandum (e.g., Meier v.

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State Bd. of Fisheries, 739 P.2d 172 (Alaska App. 1987)) support the conclusion that the Board has ample power to make allocations for hatchery harvests. The Board not only has the authority, but it also has an obligation to do so. See, AS 16.05.251(d) (requiring the Board to provide a fair and reasonable opportunity for the taking of fishery resources by personal use, sport and commercial fishermen).

C. The Board's Power To Restrict Hatchery Output Is Unclear, But Must Be Limited By The Same Constitutional And Statutory Restrictions That Apply To Cost Recovery

Your second question concerns the extent of the Board's authority to regulate hatchery output, as opposed to allocation of harvests. The Snow Memorandum (Attachment A) addresses this issue. It directly responds to a question posed by Senator Eliason as to whether the legislature ever considered limiting hatchery production because of: (1) adverse impacts on wild stocks; or (2) adverse impacts on salmon market prices. Snow's answer is revealing. Her memorandum states as follows:

We found no discussion in the legislative record that hatchery production should be restrained to a predetermined level for either biological or economic reasons. While the legislature was presumably prepared to take whatever corrective measures were necessary in the face of persuasive evidence that the hatchery program

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was causing serious biological problems, there appears to have been no discussion of establishing a ceiling on the production of fish from hatcheries.

There also appears to have been no contemplation of imposing a ceiling on the production of hatchery fish to support market prices. According to Terry Gardiner, salmon stocks were so depressed in the 1970's that there was no thought given to the possibility of oversupply.

* * * *

Clem Tillion told us that the legislature did not anticipate dependence on hatchery salmon by Alaska's commercial fishermen, and if adverse impacts on salmon market price were suspected by any legislators, it was not a widespread feeling, for they did not take steps to be able to limit production if that occurred.

Snow Memo., pp. 13-14 (emphasis added).

Consistent with Snow's conclusions, a review of the Board's authorizing statute as well as the other statutes relating to hatcheries finds little or no basis for regulation of hatchery output by the Board.

You specifically asked whether AS 16.10.440(b), which provides, among other things, that the Board has the authority to regulate "the terms of [a hatchery] permit relating to the source and number of salmon eggs...",⁷ authorizes the Board to limit

⁷Section 440(b) goes on to say that the Board may not "adopt regulations or take any action regarding the issuance or denial of any permits required in AS 16.10.400 - 16.10.470." This suggests that the Board does not have the power to completely deny a cost

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hatchery production levels. The legislative history of this provision indicates that it does not. The Resources Committee's letter of intent on HB 359, which included the language in question, states as follows:

There are three other major changes made by the bill:

(1) Section 2 of the bill amends AS 16.10.440(a)(b). The amendment clarifies the role of the Board of Fisheries. The role of the Board of Fisheries as envisioned by the original legislation was to regulate the harvest of salmon returning to the waters of the state. That role extends to regulating those fish which are returning as a result of releases from natural systems and also from hatchery releases. There are provisions in other portions of the non-profit hatchery Act which allow the designation of specific locations for the harvest of salmon by the hatchery operator for sale, and use of the money from that sale, for the specific purposes as stated in AS 16.10.450. The added language clarifies that the Board of Fisheries may adopt regulations relating to the harvest of the fish by hatchery operators at the specifically designated locations. The Board of Fisheries in the past year or two has enacted regulations relating to those harvests for several of the private non-profit hatcheries in the state.

recovery harvest permit.

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House Journal, March 15, 1979, pp. 601-602 (emphasis added). The exclusive reference to regulation of harvest, and the absence of any mention of production controls, corroborates the conclusion reached by the Snow Memorandum that the legislature never intended to authorize the Board to limit hatchery production. The Board's traditional function has always been to allocate harvests.

The only other statutory provision that suggests otherwise is found at AS 16.05.251(7), which authorizes the Board to regulate the "propagation and stocking of fish," which tends to suggest the power to regulate production, not just harvest levels and allocations. The most plausible explanation of this language is that it was included to permit regulation of such activities as stocking lakes with trout or perhaps even raising fish in ponds. There is regrettably no legislative history available to aid in the interpretation of this language. Because it runs counter to the Board's traditional role and is inconsistent with the conclusions in the Snow Memorandum, it would be wrong to assign much importance to this provision.

Apart from the issue of whether the Board could regulate hatchery output on a local basis, you have asked also whether the Board has the authority to set regional production limits for the

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purpose of adjusting relative market shares between different regions of the State. Can the Board, for example, legally cap hatchery sockeye output in Prince William Sound to keep it at the historical position it has held in relation to Bristol Bay sockeye production?

There is no short and simple legal answer to this question. The authority to regulate propagation and stocking is a very slender thread from which to hang an unprecedented, statewide regulatory program of production allocation, which has not been specifically authorized or even contemplated by the legislature. Certainly any such regulatory regime would raise serious questions as to its consistency with the Board's statutory duty to "conserve and develop" the State's fisheries. Such a policy might further conflict with a number of the other statutory provisions already discussed. It would also run up against the sustained yield concept (Section 4) and the maximum use (Section 1) and maximum benefit (Section 2) policies at the heart of Article VIII of our constitution.

Perhaps more significant than the legal impediments, which are considerable, there would be serious practical and policy problems with any attempt by the Board to allocate production

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between regions of the State. For example, which historical moment would serve as the reference point for assignment of regional quotas? Would it be before or after establishment of the hatchery program? Would new hatchery programs (such as the Main Bay sockeye facility) be automatically precluded if they would alter the historical balance of harvest levels between regions? How could hatcheries plan their budgets and production levels from year to year, given the inherent unpredictability of natural returns? Would a direct consequence of such a policy be to reward stagnant regions and to stifle initiative on the part of any region that is efficient, well-organized and capable of growth? Would the anticompetitive aspects of regional limits outweigh the asserted benefits? What are the asserted benefits? Do they go beyond mere regional jealousy and have some statewide economic rationale? While the answers to these questions are unknown, it may be very difficult for the Board to identify a defensible, rational basis for any such plan.

(b) A vessel license is valid for one or two years. However, if the license is valid for one year and the license fee has been paid for an additional year, the commission shall, at the end of the first year, automatically issue another license to the licensee valid for one additional year. (§ 7 art III ch 94 SLA 1959; am § 20 ch 131 SLA 1960; am § 12 ch 31 SLA 1963; am § 10 ch 105 SLA 1977; am §§ 20, 21, ch 81 SLA 1984)

Effect of amendments. — The 1984 amendment deleted "Annual" at the beginning of the catchline, added subsection (b), and, in subsection (a), in the first sentence deleted "annual" following "Upon"

and inserted "for one year or \$40 for two years at the option of the owner," and added "or years the license is valid" at the end of the second sentence.

NOTES TO DECISIONS

Cited in *State v. Baranof*, Sup. Ct. Op. No. 2785 (File Nos. 7287, 7324), 677 P.2d 1245 (1984); *State v. F/V Baranof*, Sup.

Ct. Op. No. 2787 (File Nos. 7287, 7324), 677 P.2d 1256 (1984).

Sec. 16.05.536. Persons eligible for gear licenses. [Repealed, § 12 ch 71 SLA 1972.]

Secs. 16.05.540 — 16.05.610. Limitation on issuance of fishing gear licenses; issuance of licenses for various types of fishing gear. [Repealed, § 19 ch 105 SLA 1977.]

Sec. 16.05.620. Otter trawl license. [Repealed, § 2 ch 159 SLA 1968.]

Sec. 16.05.630. Shellfish pot license. [Repealed, § 19 ch 105 SLA 1977.]

Sec. 16.05.632. Identification of shellfish pots or buoys, or both, used in the taking of king crab and requirements for buoys. (a) Registration tags for the identification of shellfish pots or buoys, or both, used in the taking of king crab are required in areas in which the board has regulations limiting the total amount of shellfish pots allowed per vessel. Registration tags shall

(1) be issued by the department under regulations adopted by the board;

(2) be nontransferable;

(3) be individually numbered, designating the year of issuance;

(4) be permanently affixed to each shellfish pot or buoy, or both, used in the taking of king crab, whichever in the determination of the board is appropriate for identification, and in a manner determined to be appropriate by the board;

16.05.530 - 630
(Repealed)

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under this chapter, but does not include an organization formed or operated for gaming or gambling purposes;

(14) "fish or game farming" means the business of propagating, breeding, raising, or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means having the fish or game under positive control, as in a pen, pond, or an area of land or water which is completely enclosed by a generally escape-proof barrier;

(15) "fish stock" means a species, subspecies, geographic grouping or other category of fish manageable as a unit;

(16) "fur dealing" means engaging in the business of buying, selling, or trading in animal skins, but does not include the sale of animal skins by a trapper or hunter who has legally taken the animal, or the purchase of animal skins by a person, other than a fur dealer, for the person's own use;

(17) "game" means any species of bird, reptile, and mammal, including a feral domestic animal, found or introduced in the state, except domestic birds and mammals; and game may be classified by regulation as big game, small game, fur bearers or other categories considered essential for carrying out the intention and purposes of AS 16.05 — AS 16.40;

(18) "game population" means a group of game animals of a single species or subgroup manageable as a unit;

(19) "hunting" means the taking of game under AS 16.05 — AS 16.40 and the regulations adopted under those chapters;

(20) "nonresident" means a person who is not a resident of the state;

(21) "nonresident alien" means a person who is not a citizen of the United States and whose permanent place of abode is not in the United States;

(22) "operator" means the individual by law made responsible for the operation of the vessel;

(23) "personal use fishing" means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources, by Alaska residents for personal use and not for sale or barter, with gill or dip net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(24) "resident" means a person who for 12 consecutive months has maintained a permanent place of abode in the state and who has continually maintained a voting residence in the state; and in the case of a partnership, association, joint stock company, trust, or corporation, "resident" means one that has its main office or headquarters in the state; however, a member of the military service who has been stationed in the state for the preceding 12 consecutive months is a resident for the purposes of this paragraph, and the dependent of a resident member of the military service, who has been living in the

CHANGES PROPOSED TO SENATE BILL 457 BY THE DEPARTMENT OF FISH AND GAME

The department's proposed changes are underlined and the language that is deleted is set in brackets.

Sec. 16.05.730. MANAGEMENT OF WILD AND HATCHERY STOCKS OF ANADROMOUS FISH. (a) [The Board of Fisheries] Salmon fisheries in the state shall [manage fisheries in the state] be managed to achieve sustained yield for wild [anadromous fish] salmon stocks.

(b) In [managing] allocating hatchery produced [anadromous fish] salmon stocks, the board shall consider the need of [anadromous fish] salmon hatcheries to obtain brood stock. The board may [manage] direct the department to manage salmon fisheries in the state to achieve an adequate return of hatchery produced [anadromous] salmon stocks to hatcheries for brood stock; however, management to achieve an adequate return to hatcheries for brood stock may not prevent achievement of sustained yield for wild [anadromous fish] salmon stocks.

(c) The board may consider the need of hatcheries authorized under AS 16.10.400 to harvest and sell fish produced by the hatchery that are surplus to the needs for brood stock to offset the cost of operating the hatchery. The board may exercise its authority under this title as it considers necessary to direct the department to provide a reasonable return of surplus fish to a hatchery to offset the cost of operating the hatchery, if the return of surplus fish to the hatchery, or the harvest of surplus fish by the hatchery, does not prevent achievement of sustained yield for wild salmon [anadromous fish] stocks. The board may adopt criteria for determining the reasonable needs of hatcheries for surplus fish and may adopt a fishery management plan to provide surplus fish to a hatchery.

CS FOR SENATE BILL NO. 457 ()
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE SENATE SPECIAL COMMITTEE ON
DOMESTIC AND INTERNATIONAL COMMERCIAL FISHERIES

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to management of wild and enhanced stocks of fish; and amending the
2 definition of 'fishery.'"

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

4 * Section 1. AS 16.05 is amended by adding a new section to read:

5 ARTICLE 5. MANAGEMENT OF FISHERIES.

6 Sec. 16.05.730. MANAGEMENT OF WILD AND ENHANCED STOCKS OF FISH.

7 (a) Fisheries in the state shall be managed ^{CONSISTENT WITH} ~~to achieve~~ sustained yield for wild fish stocks and
8 may be managed to achieve sustained yield of enhanced fish stocks.

9 (b) In allocating enhanced fish stocks, the board shall consider the need of fish
10 enhancement projects to obtain brood stock. The board may direct the department to manage
11 fisheries in the state to achieve an adequate return of enhanced fish stocks to enhancement
12 projects for brood stock; however, management to achieve an adequate return of fish to
13 enhancement projects for brood stock may not prevent achievement ^{CONSISTENT WITH} ~~of~~ sustained yield for wild
14 fish stocks.

1 (c) The board may consider the need of enhancement projects authorized under
2 AS 16.10.400 and contractors who operate state-owned enhancement projects under AS 16.10.480
3 to harvest and sell fish produced by the enhancement project that are surplus to the needs for
4 brood stock to offset the cost of operating the enhancement project. The board may exercise its
5 authority under this title as it considers necessary to direct the department to provide a reasonable
6 return of surplus fish to an enhancement project to offset the cost of operating the enhancement
7 project if the return of surplus fish to the enhancement project or the harvest of surplus fish by
8 the enhancement project does not prevent achievement ^{of sustained yield} ~~of~~ sustained yield for wild fish stocks.
9 The board may adopt criteria for determining the reasonable needs of enhancement projects for
10 surplus fish and may adopt a fishery management plan to provide surplus fish to an enhancement
11 project.

12 (d) In this section, "enhancement project" means a project, facility, or hatchery for the
13 enhancement of fishery resources of the state for which the department has issued a permit.

14 * Sec. 2. AS 16.05.940(12) is repealed and reenacted to read:

15 (12) "fishery" means a specific administrative area in which a specific fishery
16 resource is taken with a specific type of gear; however, the Board of Fisheries may designate a
17 fishery to include more than one specific administrative area, type of gear, or fishery resource;
18 in this paragraph,

19 (A) "gear" means the specific apparatus used in the harvest of a fishery
20 resource; and

21 (B) "type of gear" means an identifiable classification of gear and may
22 include

23 (i) classifications for which separate regulations are adopted by the
24 Board of Fisheries or for which separate gear licenses were required by former
25 AS 16.05.550 - 16.05.630; and

26 (ii) distinct subclassifications of gear such as "power" troll gear
27 and "hand" troll gear;

Petersburg Vessel Owners Association

P.O. Box 232
Petersburg, Alaska 99833
Phone (907) 772-9323 Voice and Fax

March 23. 1992

Senator Dick Eliason, Chairman
Senate Special Committee on Domestic &
International Fisheries
P.O. Box V
Juneau, Alaska 99811

Dear Dick,

Now that the King and Tanner crab season has closed, PVOA members have had an opportunity to review the Legislative Hatchery Report. Our sincere thanks to you, your staff, and others who worked hard to make this report possible.

Without a doubt, PVOA's primary concern with regards to the State's hatchery program is the health and viability of our natural wild salmon stocks. Here in Southeast, fishermen have long recognized the importance of our wild salmon runs. It is extremely important to PVOA members that these stocks be given a priority. We suggest that statutory language be adopted which would give wild stocks preferential management treatment relative to hatchery raised fish.

We do not believe the State should have an obligation to guarantee either a return of broodstock nor stocks for cost recovery needs. However, we would recommend that the Department of Fish & Game continue to regulate commercial and sport fisheries to obtain escapement goals of wild stocks to natal streams. These same management techniques would also serve to protect a return of broodstock to hatchery sites. What is good for the wild stocks in their natal streams should also benefit the hatchery stocks at hatchery sites. Efforts should be made to protect broodstock but in no way to guarantee it.

Adopting a clear wild stock priority in State statute which clarifies the Board of Fisheries requirement for hatchery broodstock and cost recovery stocks is action that could easily be undertaken and quickly. The concept of statutory clarification of a wild stock priority which specifically indicates that the State has no obligation to guarantee a return of cost recovery stocks to hatcheries is supported not only by PVOA, but the United Fishermen of Alaska Board of Directors and Southeast Alaska Seiners as well.

Chapter VI of the review deals with the current planning and permitting process. PVOA would support the idea of the development of a statewide planning and production process.

Petersburg Vessel Owners

provided there is regional input. It is important to develop statewide goals and objectives. Each region is ultimately part of the whole picture, the direction a region takes directly and indirectly affects all other regions. State facilities, as well as PNPs, need to comply with a planning and permitting process, with the same requirements for monitoring and review.

Due to our concern for the negative impacts of hatchery production on wild stocks, we support many of the options listed in Chapter VII of the review. PVOA members specifically cited the following options:

- *Evaluation of how well the current hatchery program protects wild salmon from the negative effects of hatchery salmon.
- *Obtaining consensus about research priorities concerning the interaction of hatchery and wild fish, coordinating future studies, and deciding how and when to apply the results of those studies to current management practices.
- *Placing greater emphasis on management concerns in the permitting process in order to protect wild stocks.
- *Re-examination of escapement goals in order to maximize wild productivity.
- *Increased use of marking and tagging programs to monitor interactions between hatchery and wild populations.
- *Policy development to minimize inbreeding and straying, including an evaluation of remote releases.
- *Monitoring hatchery stocks to determine extent of straying and intermingling.

We are anxious to examine the recommended management actions resulting from the Cordova workshop. Please send us a copy of the proceedings when they become available.

PVOA members believe it is important for the State to initiate research to learn more about the dynamics of wild salmon stocks. We are troubled to learn about problems developing in Oregon and Washington concerning impacts of hatchery production on wild stocks. We are concerned about the State's lack of knowledge about wild salmon stocks. If sometime in the future, wild stocks are found to be in peril here in Alaska, the value of hatcheries may be very significant if they could be made into central incubation facilities.

We have several concerns with regards to Chapter VIII which deals with funding. PVOA believes it may be appropriate to consider restricting further hatchery development or increased production until the Legislative economic cost-benefit studies are complete and a full assessment of the hatchery program can be made. Members are particularly concerned that any major additional production should be discouraged unless new markets are established to handle the increase.

In addition, criteria is needed to show that a public benefit exists before granting permits and loans. A detailed cost/benefit analysis would be in order and a specific

indication of the "significant contribution" to the common property fisheries. For existing hatcheries which are not making a "significant contribution" to the common property fisheries, a mechanism must be developed to close such facilities. Fishermen cannot be expected to continue to fund those facilities if no one but the hatchery operators are receiving benefits.

In addition, we believe the following options have merit:

- *An analysis of the enhancement tax program is needed to determine 1) whether costs are distributed in proportion to benefits and 2) the impact of a mechanism to allow specific gear groups to opt out of the program or pay in proportion to the enhancement benefits they receive.
- *Development of an auditing mechanism to ensure that annual PNP operating costs, paid by loans, enhancement tax receipts, and cost recovery, are "reasonable".

Basically the Review contains a lot of good suggestions for improving our State hatchery program. Of course one of the tantamount problems is that of funding, for research, planning and the RPT process, hatchery operations, tagging and marking studies, etc.

Many of our members have commented that when the idea of a State hatchery program was first introduced they saw it as an opportunity to provide minimal steady production of salmon. A program that could help take the extreme highs and lows out of the annual salmon runs. Instead, we have a situation in which hatchery production has been a financial drain on fishermen in Southeast, we have a new group competing for markets, there are poor quality cost recovery fish being placed on the markets, efforts have been made to restrict traditional fishing opportunities in order to protect hatchery stocks, etc. And then on top of all this, no one foresaw farmed salmon being a factor to reckon with.

PVOA members are disenchanted with the direction of the State's hatchery program. We hope that you will take our suggestions under serious consideration. We are sincerely interested in continuing this important review process and are willing to assist you and your staff in any way possible.

Sincerely,



Kris Norosz
Director



Alaska Aquaculture

Incorporated

P.O. BOX 830 WRANGELL, ALASKA 99929
(907) 874-2250

SENATE SPECIAL COMMITTEE ON DOMESTIC AND INTERNATIONAL FISHERIES
FEBRUARY 25, 1992

Gentlemen,

Having not been able to testify during your teleconference, we would like to do so in writing at this time. We will address several issues that may or may not be easily categorized in your February 10 Draft Report, but are germane to the Alaskan Hatchery Program. Thank you first for providing this opportunity.

Alaska Aquaculture, Inc. is an independent PNP, (not a "Mom and Pop") operator, with a board of directors of licensed commercial fishermen that represents all the gear groups of Southeast Alaska. To our knowledge we are the only all-fishermen board. In behalf of our organization the following testimony is proffered.

1) The Draft report covered many valid points. However, the proposed ideas for action have not sufficiently recognized that the mission or mandate for the hatcheries is being accomplished, i.e. to successfully produce salmon to insure an adequate supply for common property harvest. They were not charged with suppressing the wild stocks to maintain price levels. Therefore, rather than focus on restricting production, the focus should be on recapturing market share by 1) improving the quality of product produced and 2) broadening the market by innovative product development. The inertia extant in the processing industry that wants more money for advertising Alaskan canned salmon in overseas markets, is what needs to move into the 20th Century before we see the 21st. New products that take advantage of the potential of pinks and chum need developmental moneys that the State could well afford to invest, rather than paying for canned salmon commercials in Japan and Taiwan.

2) As fishermen, we are not interested in micro-managing fish hatcheries, nor are we interested in seeing multi-million dollar facilities closed down prior to their being able to reach full production and make a contribution to the fishery. They should be encouraged to work with processors to develop better products, especially for pinks and chum, so that demand will increase. This may require novel and interesting new methods, and a strong partnership between government and the private sector. This should not be limited to the State and the Regional Associations. The Independents are a valuable part of the program and should not be treated as third class citizens any longer.

3) If the administration of the loan program is liberalized through legislation or administration, the financial support of independent PNPs must be recognized and provided for in that legislation, or its investment and the best interest of the State and user groups will be lost.

Under the present Hatchery Loan Program scenario, the PNPs have not shared in the millions of dollars of 3% moneys which is shared by the regional corporations, nor the millions of dollars of Federal Mitigation Funds. Given "most favored organization" status by the State

Alaska Aquaculture
Association

agencies, the Regional Aquaculture Associations are also able to generate funds through cost recovery harvest of returning fish. The sole source of funding for PNP operations is the cost recovery harvest! When production development is protracted over several life cycles of the fish being released, the disparity between PNPs and Regional Associations becomes more glaring. Because of this disparity PNP funding before reaching full production depends upon the funds in the revolving loan fund. Legislation providing forgiveness or additional deferment of loan payments by the major borrowers, i.e. the Regional Corporations, without recognizing and compensating for those losses to the revolving loan fund, would effectively eliminate the PNP segment of the State enhancement program.

4) We strongly endorse the idea of developing a Statewide set of goals and objectives for the enhancement programs. All segments of the producers should be allowed to give input, and it should have an aggressive forward looking posture.

5) We are concerned about the suggestion of eliminating the use of remote release sites. The argument against them is at best theoretical while their use is and has been, very effective in placing the right species and run timing in the right place for the benefit of the user groups and the hatchery operator. A central incubation facility can become much more cost effective and beneficial to the user groups by using remote release sites. Concerns about straying and deleterious genetics are based on hypothetical constructs yet to be substantiated.

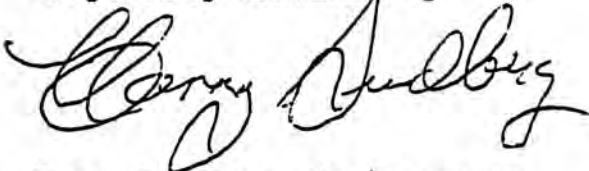
6) Managing for broodstock and cost recovery seems to have evolved into a hot potato where no one wants to make a decision for fear of upsetting one group or another. Ultimately, one needs to ask if loaning moneys to a hatchery operator, whether PNP or Regional Organization is based on the assumption that debt service would be met by cost recovery harvest, (and this is what the State has done) Then doesn't it follow that the intent of the State is for broodstock and cost recovery to be managed for? No operator can afford to continue operating if it doesn't have broodstock and independents cannot operate without cost recovery as it is their sole source of revenue! This issue must be addressed in an equitable manner that reflects a mutually beneficial relationship between the State and the private sector.

7) Several of the biological/genetics/management issues raised result in the possibilities of monitoring, surveying, identifying, etc. All of these action words come with price tags. Since we've mentioned tags, most of the problems outlined from determining the extent of and consequences of straying, to identifying genetic drift, require some form of hatchery stock identification as opposed to wild stock. Tagging costs money and tag recovery and analysis even more. Will we cease hatchery production until "concerned scientists" have resolved their concerns, or will we proceed and fund mass marking and recovery efforts? The 1985 genetics guidelines already mandates identification of areas where stocks are unique or of special "significance". Regional Comprehensive plans, which the public funded to be created and updated, talks of "sensitive zones". In reality little of this work has been done and little resources have been allocated for them to be done. Perhaps our biggest concern is not that the work isn't being done, but that decisions are being made using a policy that is

admittedly vague and inconsistent with animal genetics upon which it claims to draw reference. Even more disconcerting is that their application is applied unequally between State projects and PNP project proposals.

8) Our final comment is more philosophical than specific, but is of great concern: That there has developed an institutionalized dual class of citizenship between Regional Associations and Independent Hatchery operators, a direct result of poorly conceived legislation and the departmental regulation that political posture spawned. Those who have manipulated the fishing community to gain political advantage, have perpetuated the myth that independent operators are some how the enemy of the fishermen and that the Regional Associations, to which their three per cent moneys go are the only friends of the fleet. This fallacy breeds conflict, contention and disunity. We support any effort the legislature can take to move away from the perpetuation of this condition.

Respectfully Submitted by

A handwritten signature in cursive script, appearing to read "Harry Sundberg".

Harry Sundberg, Sec/Treasurer
Alaska Aquaculture, Inc.

Southern Southeast Regional Aquaculture Association, Inc.

2721 Tongass Avenue
Ketchikan, Alaska 99901

Phone: (907) 225-9605
Fax: (907) 225-1348



March 4, 1992

Senator Dick Eliason, Chairman
Senate Special Committee on
Domestic and International Fisheries
P.O. Box V
State Capital
Juneau, Alaska 99811

Re: Report of the Legislative Review of the Alaska Salmon Enhancement Program

Dear Senator Eliason:

Thank you for the opportunity to comment on the review of the Alaska salmon enhancement program. This was a timely and monumental task. I will address only a few points for your committee to consider.

Chapter IV -

1. Hatchery fish should be tagged (marked) with a representative number. Serious consideration should be given to mass marking.
2. Hatchery operators should pay for the marking, but the state should be responsible for the recovery and evaluation.
3. Marking will greatly reduce the mix-stock management problems.
4. Wild stock should be a priority for management.
5. The quality issue can be resolved by changing management practices.

Chapter V -

1. There should be management protection of hatchery broodstock in the near terminal area but there should be no consideration for cost recovery.

SSRAA

March 4, 1992

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2. **Enhancement should supplement the fisheries not dominate a fishery.**
3. **Economic development fisheries should be secondary to a wild stock priority or a supplement fishery.**

Chapter VI -

1. **Permits should be issued only if the enhancement effort provides a minimum of 60% (after broodstock) to the common property fishery.**
2. **If the permittee does not meet the 60% common property interception within four years after reaching the permitted capacity, the permit should be revoked.**
3. **Enhancement planning should be on a regional basis, not a state wide basis.**
4. **The state should increase funding for planning and expand the role of the regional planning teams, such as recommendations for allocating enhanced fish.**
5. **All permits, including state permits, should be subject to the same RPT review as PNP permits.**
6. **Regional associations should retain siting preference. By statutes, the regionals represent a broader public interest and represent all user groups. Non-regionals do not. Therefore, the public interest is best served by giving preference to regional PNP's.**
7. **A moratorium should be declared on increased production until the economic evaluation is completed.**

Chapter VII

1. **The state should fund research to study straying and genetic concerns. There is no consensus among top scientist on how the genetic policy should be changed.**
2. **The current genetic policy is the best in the nation. It should be changed only when science documents a change is needed.**
3. **The state should fund an ocean carrying capacity study.**
4. **Remote release sites should not be considered the same as a hatchery site. Terminal wipe-up fisheries do not impose genetic problems, if the site is suitably separated from wild stocks and the species are matched to the site according to the policy.**

March 4, 1992

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Chapter VIII

1. **DOCED should develop written policies or regulations on how low interest rates are to be established, and deferment periods should be based upon the species being reared.**
2. **DOCED currently applies the maximum interest rate and the minimum initial deferral period. This is creating excessive and unnecessary costs to the program.**
3. **The loan fund should be capped at its current level and let it revolve as intended.**
4. **A better distinction should be made between regional and non-regional PNP's. Currently, regionals only have 26.7% of the total debt and only 6.5% of their total revenue in operational loans. Also, regionals have not used the loan fund for operations for many years. The non-regionals have 53.9% of their total debt and 45.5% of their total revenue in operational loan. Also, the non-regionals have existed for as long as the regionals, but yet most of the non-regionals still depend on operational loans. There should be a limit on how long loans can be made for operations. A maximum of four years after reaching full production should be applied.**
5. **The regionals have the enhancement tax; therefore, it is understandable that the non-regionals would need more operating funds in the start up years. But it is unwise to put regionals on unsound financial basis to assure funds are available to the non-regionals for operative loans.**
6. **It should not be forgotten that should a non-regional default, the state will be the loser. However, if a regional defaults, the fishermen will continue the enhancement tax until the loan is paid. The state never loses on a regional loan; therefore, as a lending practice, DOCED should treat the non-regionals as a much higher risk and fund them more conservatively. This has not been DOCED's practice as evidenced by how highly leveraged the non-regionals are.**

Chapter X

1. **Incentives should be given to processors to develop new markets and new product forms to help the marketing issue.**
2. **The state should continue funding ASMI.**

Chapter XI

1. **Alaska must be more aggressive in getting the chinook quota increased from the U.S./Canada treaty.**

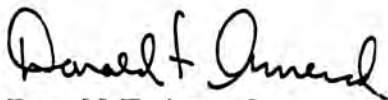
March 4, 1992

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2. Any user group which is impacted by a treaty quota should be assigned a percentage of the quota. Currently, commercial sport charters are not covered by a percentage of the chinook quota and are impacting the commercial trollers.
3. Any change in environmental regulations for fish hatcheries should be consistent with current, cost-effective technology. If more stringent regulations are developed, the state should provide the funds for existing hatcheries to come into compliance.

I hope my comments are helpful.

Sincerely,



Donald F. Amend
General Manager

75/14E

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February 24, 1992

Senator Dick Eliason, Chairman
Senate Special Committee on Domestic and International Fisheries
Alaska State Legislature
P.O. Box V
State Capitol
Juneau, Alaska 99811

Dear Senator Eliason:

Thank you for providing me the opportunity to review and comment on the Executive Summary of the "Draft Report of the Legislative Review of the Alaska Salmon Enhancement Program."

The Special Committee and others who prepared this Report performed a service not only to those directly involved in the Alaska Salmon Enhancement Program but also to the general public in both Alaska and other states and countries impacted by the program. If the achievements and potential of Alaska salmon ranching are to be realized, a better understanding must exist about the intent of the Alaska Legislature in establishing the program, how it has evolved, its current status and options for the future.

In your attachment letter you particularly requested comment on the lists of options following each chapter. My observations are on options and Report discussion of which I am knowledgeable.

I was employed from 1980-90 by the Alaska Department of Fish and Game (ADF&G) Division of Fisheries, Rehabilitation and Enhancement (FRED) as Salmon Rehabilitation and Enhancement Coordinator. In that position I administered the private non-profit (PNP) aquaculture program, regional planning teams (RPT) salmon production planning, and individual state and private hatchery management planning.

My position in FRED involved extensive policy planning for mixed stock fisheries and allocation of enhanced fish. The options developed for Chapter IV, FISHERIES MANAGEMENT, on pp. 6,7 highlight some of the policy issues I addressed. Options and conclusions about mixed-stock fishery management, and responsibility for funding such management tools as tagging have never been fully agreed-upon by either government or the users. Yet, fish tagging, other stock identification programs and the data they supply hold many of the answers about harvest quality and quantity.

The exchange between attorneys, reported in Chapter V, LEGAL ISSUES RAISED BY THE BOARD OF FISHERIES, on the subject of "...perceived ambiguities in Alaska statutes relating to wild stock and hatchery

fish management..." is interesting but too partisan to provide direction, except, maybe, for the August, 1990, letter prepared by Stephen White.

Throughout the development of the PNP hatchery program, protection of the wild stocks has always been the major consideration in permitting hatchery sites. Unfortunately, during the program's early days in the haste to produce fish, both the state and private sectors did not fully grasp the need to plan and control locations and magnitude of releases so that returns would not conflict with wild stock management, conservation and preservation. Until a few year ago when enhancement production from hatcheries or remote release sites took on major fisheries management and economic implications, the PNP and state programs, generally administered by mid-level management except when political considerations dictated higher-level involvement, functioned largely without Board of Fisheries or ADF&G top management direct involvement.

Alaska Statute (AS) 16.10.440 was amended in the 1970's to restrain the Board of Fisheries from being involved in the permitting process for PNP hatcheries. However, the Board clearly maintained under statute its authority to regulate hatcheries after they were permitted in order to control those areas about which there is now concern--fish production and harvest.

In my experience, the Board's only made one overt attempt to set policy under its statutory responsibility over the PNP program. During an informal work session, members agreed that PNP hatchery operators could conduct harvest activities in the "special harvest area"(SHA), designated in the PNP hatchery permit, until cost recovery needs were met. This conclusion was never recorded as an official action. So, to this day confusion remains about the aquaculture associations' jurisdiction over the SHA and their ownership of returning fish, even though the Board could have clarified that matter with formal action.

An effort was made in 1984 to address the question of SHA fish ownership and other hatchery-related issues by a joint committee of the ADF&G, the Alaska Department of Commerce and Economic Development, The Alaska Attorney General's Office and the aquaculture associations. This group agreed that the Board could clarify the management, escapement and allocation issues for all hatcheries through the process of setting policy and developing regulations that addressed any ambiguities in the PNP statutes.

Four issues concerning management of returns to PNP hatcheries were identified. They were:

1. Management of common property fisheries for mixed stocks containing hatchery returns;

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2. Management of segregated returns to PNP hatcheries;
3. Priority uses of fish in excess to corporate escapement goals at PNP hatcheries;
4. Methods and gear employed during PNP hatchery special harvest to satisfy corporate economic goals.

An issue paper, proposed policy and regulations to clarify the Board's role in the allocation of enhanced fish were prepared for Board consideration at its winter meeting at Sitka on February 1, 1985. Unfortunately, before they could be considered at the meeting at the meeting, at someone's request the materials were removed from the agenda. Almost five years passed before the issues again surfaced, this time in a crisis mode.

Then in 1989 the Board directed the Prince William Sound Aquaculture Corporation (PWSAC) to develop a plan for allocating all enhanced salmon in the Area E management district. Through this act the Board appears to have delegated enhanced fish allocation planning to a user group association with directions to develop management plans for enhanced fish, even though management planning traditionally and statutorily has been the responsibility of the ADF&G and the Board.

I don't agree that the Board of Fisheries needs "...statutory policy ...to make decisions that would favor wild stocks over hatchery fish or vice-versa..." or that "...statutes are unclear about recovery, and about the hatchery's obligation to contribute to the common property fisheries." I believe the Board and ADF&G have ample authority to manage and allocate hatchery returns if the Board, ADF&G and the aquaculture associations, as representatives of the user groups, cooperated in developing the necessary policies and regulations to clarify and implement existing statutes.

Based on the above observations, in my judgement neither the conclusions or options of Chapter V on pp. 10,11 are valid.

Chapter VI, PLANNING AND PERMITTING PROCESS, addresses the areas with which I am most familiar. I believe all the options listed for this chapter on page 16 have merit except for the following:

- Widening the scope of the RPT review, including recommendations for allocation of enhancement production.
- Exempting the alteration, suspension, or revocation of an enhancement permit for violations from the Administrative Procedures Act.
- Clarifying Board of Fisheries authority to regulate hatchery

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production levels.

My reasons for not supporting the above options, in order of their listing, are:

The user representatives usually control the RPT's. Such has been the case particularly in recent years, as the aquaculture associations have become more financially affluent, and the ADF&G has cut travel funds so that departmental participation in the planning process has been limited. Another reason for spotty ADF&G participation was that the ADF&G administration for some years did not view the RPT as being a key participant in fishery development, production and management.

Depending on what weight the Board would give RPT recommendations on allocation, the general public might view the result of this RPT involvement in allocation decisions as having the "Fox guarding the henhouse," or the users assuming the Board's responsibility for fishery allocation and the ADF&G responsibility for fishery management.

Taking the permit violation review process out of the Administrative Procedures Act could cause an operator to claim lack of due process and open the State to legal action.

Finally, as I said earlier, the Board of Fisheries already has the authority and responsibility to regulate hatchery production levels, at least in matters when they would impact fishery management decisions or endanger conservation or preservation of wild stocks.

I would make one observation on the text in Chapter VI on page 14 under "5. Allocation Issues." The subsection entitled "Problems and Issues" speaks of the allocation plan developed by PWSAC. Actually, what PWSAC produced is an allocation policy which was then translated by the Prince William Sound RPT into a plan to the extent that it "allocates" through management practices portions of the enhanced fish to various user groups.

Such a plan can only peripherally address the problems of management and harvest of hatchery returns that occurred in Prince William Sound in 1991 and to a lesser extent in 1990. Only the Hatchery Basic and Annual Management Plans, developed in cooperation between ADF&G and PWSAC, have the economic and management tools to deal with the difficult issues of terminal harvest, contribution to the common property, and enhanced fish stocks conflicting with wild stocks harvest or conservation.

In fact after thinking about and rereading the Allocation Issues subsection, I find it confusing and in need of clarification and

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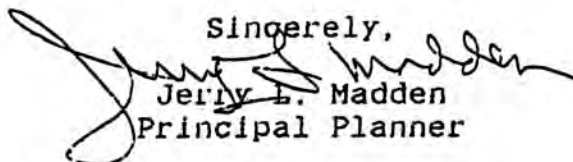
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further consideration. When the forthcoming economic analysis is available, it may clarify this and other areas of the Report.

I have no comment on the remaining chapters and their options except that the Report seems to have addressed all major areas of concern with the ALASKA SALMON ENHANCEMENT PROGRAM. To my knowledge this is the first time the program has been brought into perspective in one study. I anticipate participating in the teleconferenced hearings.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jerry L. Madden", is written over the typed name and title.

Jerry L. Madden
Principal Planner

SOUTHEAST ALASKA SEINERS ASSOCIATION

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March 9, 1992

Senator Dick Eliason, Chair
Senate Special Committee on
Domestic and International Fisheries
P.O. Box V
State Capitol
Juneau, Alaska 99811

Dear Dick,

In addition to the oral testimony given by Jim Bacon, President of Southeast Alaska Seiners (SEAS), I am submitting more detailed comments on behalf of SEAS. To assist in your review, I will address my comments to the list of possible options in the Executive Summary.

Wild Stock Priority

The top hatchery priority for SEAS is to seek statutory clarification on giving wild stocks preferential management treatment relative to hatchery raised fish.

Support:

Placing a wild stock priority into state statutes which clarifies Board of Fisheries requirement for hatchery broodstock and cost recovery stocks.

Rationale for Action:

- * The lack of statutory direction prevented the Board of Fisheries in 1991 from acting on a wild stock preference proposal for Southeast Alaska.
- * Legislative history indicates that legislative intent was to protect wild stocks.
- * In some regions of the state there already is serious concern for the negative impact of hatchery production on wild stocks.
- * UFA Board of Directors recently passed a motion supporting statutory clarification for a wild stock management priority which clearly identifies that the state has no obligation for assuring a hatchery's cost recovery.

Recommendation:

Add a new section to AS 16, Chapter 10, Article 8 which states:

Obligation for Management of Hatchery Stocks. In managing commercial and sport fisheries that involve hatchery raised fish, the department shall grant a preference to the protection and sustained yield of wild stocks. In managing for a wild stock preference the department recognizes an obligation to manage commercial and sport fisheries to return broodstock to the hatchery site in the same manner as it regulates fisheries to obtain a return to spawners to natural streams. While the department will not institute any irregular restriction on the traditional fisheries, it will strive for an escapement of spawners sufficient for stocking the hatchery. In managing for a wild stock preference, the department does not recognize any obligation to manage commercial and sport fisheries to return cost recovery stocks to the hatchery site. This however, does not prevent the Board of Fisheries from promulgating regulations at the request of regional non-profit associations to alter commercial and sport fisheries for a return of cost recovery stocks.

Southeast Alaska Seiners
Assoc - Lmn

Hatchery Permitting

Another major concern of SEAS is to tighten up the permitting and funding programs for hatcheries.

Support:

As part of permit review and solicitation of state loans, adding new criteria to show public benefit, including marketability, a detailed cost/benefit analysis instead of a financial analysis, an indication of a 70% contribution to be made to the common property fishery, and ability to mark and recover fish. Institute a 10 year permit renewal requirement that would include the same criteria.

Rationale for Action:

- * Regional hatchery associations have over time developed internal policy that reflects the criteria mentioned above. It would be sound state policy to extend this "check" to all hatcheries.

- * UFA supports the Regional Planning Teams adopting a guideline of 70% contribution to common property fisheries in their evaluations of hatcheries.

- * If all hatcheries had gone through this type of review when initially applying for a permit, much of this hatchery overview might have been unnecessary.

- * With the potential risk of impacts on the state's common property fisheries, a mechanism for the timely revocation of a permit is necessary.

Biological Concerns

While legislators can not be expected to evaluate and assess the genetic health and biological diversity of wild stocks that have been co-existing with hatchery stocks, general policy and priority direction can be given to ADF&G and other research institutions. Given the experience in the State of Washington, more effort should be taken in Alaska to protect the biological health of wild stocks. To this end, SEAS supports these options listed in the Executive Summary:

- * Evaluation of how well the current hatchery program protects wild salmon from possible negative effects of hatchery salmon.

- * Conducting research to define the minimum conditions for imprinting for remote release programs.

- * Placing a greater emphasis on management concerns in the permitting process in order to protect wild stocks.

- * Increased use of marking and tagging programs to monitor interactions between hatchery and wild populations.

- * Review of current and future programs for their compliance with the state genetics policy.

Production Review

Given the results of last summer's pink salmon season, i.e. lack of sound markets, and small weight of pinks across the state, SEAS believes it is fair to surmise that the impacts of major hatchery production are no longer confined to one region of the state. Yet, there is no mechanism for a statewide review and modification when hatchery production crosses the threshold of inter-regional impacts. This matter was the subject of a vigorous debate at UFA's fall 1991 meeting. One of the outcomes of that meeting was a letter to Commissioner Rosier asking for a production overview through the Regional Planning Teams. UFA has yet to receive a response from Commissioner Rosier. Before commenting further on other possible options, we would like to learn how and when ADF&G will address this critical concern. Perhaps, the Committee could pursue this further with ADF&G.

Fair Funding

Because of the structure within Regional Aquaculture Associations, it may have been assumed that the user groups that pay the lion's share of tax revenues would receive a sizeable share of the returning fish value. This has not been the case for all regions. In fact, in some cases just the opposite is occurring because it is easy to vote to spend someone else's money. As such we support this option:

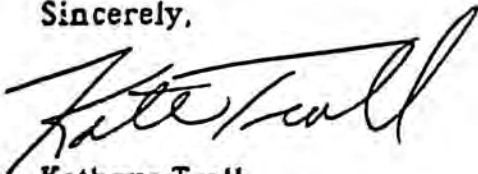
Support: Analysis of the enhancement tax program to determine the impact of a mechanism to allow specific gear groups to opt out of the program or pay in proportion to the enhancement benefits they receive.

While I recognize that the legislative overview will continue on for some time, SEAS urges the Senate Special Committee on Domestic and International Fisheries, to immediately address the outstanding need for wild stock statutory clarification. The Board of Fisheries has requested this direction. More importantly Alaska's wild salmon heritage deserves this critical recognition.

In closing, I must commend the legislative staff that put this concise but comprehensive report together. The Executive Summary did an excellent job of laying out a very complicated issue in a simplified, informed manner. Not only did I enjoy reading the Draft Report, but I learned a lot too. Please extend my appreciation for their efforts.

Thank you for the opportunity to provide input. Please call if you have questions or desire more feedback.

Sincerely,



Kathryn Troll
Executive Director

c.c. SEAS Board of Directors