



THE STATE  
of **ALASKA**  
GOVERNOR SEAN PARNELL

RL18

Commercial Fisheries Entry Commission

8800 Glacier Highway, Suite 109  
PO Box 110302  
Juneau, Alaska 99811-0302  
Main: 907.789.6160  
Licensing: 907.789.6150  
Fax: 907.789.6170

To: Monica Wellard, Executive Director  
Alaska Board of Fisheries  
Alaska Department of Fish & Game

Date: March 13, 2013

From: Commercial Fisheries Entry Commission  
Bruce Twomley, Chairman  
Benjamin Brown, Commissioner

Subject: Proposals to the Board:  
2012/2013 Statewide Finfish meeting

This memorandum provides comments by the Commercial Fisheries Entry Commission (CFEC) on proposals that the Alaska Board of Fisheries (Board) will consider at their March, 2013 Statewide Finfish meeting in Anchorage.

**Proposal 222**

This proposal, submitted by the Alaska Department of Public Safety, suggests adding provisions to state regulations with the goal of allowing prosecutors and the judicial system more flexibility in addressing what are often deemed minor offenses. Specifically, the proposal would establish new regulations under 5 AAC 39 that would require CFEC permit holders to present personal identification. This would allow a violation of the regulation to be prosecuted as a non-criminal offense.

CFEC supports this proposal. We believe the proposal is well-intentioned and serves the public better than the status quo. It helps achieve consistency among regulations and can potentially bring elements of fairness into the judicial process.

**Proposal 225**

This proposal asks for a statewide policy on CFEC permit stacking. It suggests a set of goals and objectives and a process framework for examining future proposals related to permit stacking. CFEC is neutral with respect to Proposal 225, but we have some cautionary words. Our comments fall into two categories.

**1. A Regulation is Unnecessary to State the Broad, Constitutional Requirements that Govern Fleet Consolidation, Including Stacking.**

Our comments are directed to stacking (an individual holding two entry permits for the same fishery and authorized by the Board of Fisheries to exercise additional fishing privileges). However, our comments apply as well to dual permit proposals (two permit holders on the same vessel authorized to exercise additional fishing privileges) -- but with somewhat less force, because dual permit operations represent

a lesser degree of fleet consolidation (two individual permit holders remain entitled to fish a unit of gear whenever they choose).

Article VIII, section 15, of the Alaska Constitution already governs limited entry and fleet consolidation, and provides (with emphasis added to the second sentence comprising the 1972 constitutional amendment that authorized limited entry) as follows:

**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 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.**

Limited entry is an exclusive right of fishery and would be prohibited in Alaska without the 1972 amendment to Article VIII, Section 15. Fleet consolidation (for example, stacking where two permit holders are consolidated into one) makes an exclusive right of fishery more exclusive, and, therefore, must satisfy the same constitutional requirements.

In the face of a constitutional challenge, the Alaska Supreme Court upheld a commission decision to establish a maximum number and limit entry to a fishery<sup>1</sup> by applying the terms of the amendment:

*The CFEC's action was justified by resource conservation reasons. Imposing a limited entry system for these reasons is expressly authorized by article VIII, section 15 of the Alaska Constitution.*

More recently, the Alaska Supreme Court upheld a commission optimum number decision<sup>2</sup> in the following terms:

*CFEC had evidence that the stock strength of the fishery was declining, and ADF&G thought that even seventy-three permits would be too many. The fishery, as well as the fishers' livelihood, depends on a sustainable catch. Thus, CFEC wrote that it believed that "conservation of this resource is the primary consideration." Its decision to set the optimum number at seventy-three, therefore, is reasonable and not arbitrary, and is also consistent with the statute and reasonably necessary to its purposes . . .*

From these cases we can say that, under the amendment, a conservation<sup>3</sup> ground is solid support for a limited entry or a fleet consolidation decision. We are not aware of a court case addressing the phrase "preventing economic distress among fishermen," but fishermen can be persuasive on this subject. And we can infer from the words chosen that the phrase means something more serious than the comfort and convenience of fishermen.

These constitutional principles govern limited entry and fleet consolidation with or without a regulation. A regulation is not necessary to state these broad, general principles. And a regulation may be unwise.

<sup>1</sup> *Johns v. Commercial Fisheries Entry Commission*, 758 P.2d 1256, 1264 (Alaska 1988).

<sup>2</sup> *Simpson v. State, Commercial Fisheries Entry Commission*, 101 P.3d 605, 613 (Alaska 2004).

<sup>3</sup> We believe this does not limit the definition of conservation to its purest sense, because Article VIII, Section 4 requires that fish and all other "replenishable" resources be managed "on the sustained yield principle." In other words, this is conservation for the sake of the consumer.

We can expect more court cases interpreting these principles and providing us with further direction. Absent a regulation, the Board of Fisheries will not have the burden of modifying a regulation to conform to future court cases.

## **2. A Generic Stacking Regulation May be Impracticable in View of Diverse Conditions From Fishery-to-Fishery.**

Permit stacking regulations are currently implemented in the Yakutat and Cook Inlet salmon set gillnet fisheries. The Kodiak and Bristol Bay salmon set gillnet fisheries were also managed under stacking regulations over separate 3-year periods, but the regulations in each of these fisheries were allowed to sunset.

Variations of permit stacking have been proposed for other fisheries as well. The Board has heard stacking proposals for the Bristol Bay and Southeast Alaska drift gillnet fisheries, the Southeast Alaska Dungeness crab fishery, and possibly other fisheries.<sup>4</sup> It is likely that similar permit stacking proposals will be suggested in the future.

A significant part of our caution with respect to Proposal 225 is our recognition of the diversity of Alaska's fisheries. The perceived benefits or problems related to permit stacking may be difficult to capture or to adequately address in a single policy statement.

As you well know, the characteristics of individual fisheries may vary widely with respect to gear type, species harvested, the number of permit holders, and the regulatory schemes. Even within a permitted fishery, the diversity of fishing can vary widely and permit stacking will carry with it differing goals and potential benefits. An example is in the Yakutat salmon set gillnet fishery, where the Board approved permit stacking, but decided to limit the option to only three locations in the management area, and further narrowed the regulations to apply only under certain circumstances at two of the locations.<sup>5</sup>

In summary, we feel that the broadest goals and considerations for fleet consolidation are already well defined in the state constitution, in state law, and through judicial decisions. We also urge caution with what may be the good intentions of trying to put permit stacking policy in a regulatory format. The consequences of doing so are undetermined. Attempting to define a single policy that encompasses many fisheries that operate under different sets of conditions could potentially hamper the development of creative programs tailored for specific fisheries.

---

<sup>4</sup> Proposals 36-37, 2012 (Bristol Bay salmon); 255-256, 2009 (SE salmon); and Proposal 229, 2000 (SE Dungeness).

<sup>5</sup> 5 AAC 30.345