

Agenda Item: "B-4"



**ALASKA DEPARTMENT OF FISH AND GAME  
REPORT TO THE NORTH PACIFIC FISHERY MANAGEMENT  
COUNCIL  
APRIL 2005**

Fisheries managed under delegated authority to the State of Alaska since the last council report includes salmon, scallops and groundfish.

**Salmon Troll Fishery (FIGURE 1)**

The Winter Troll fishery for chinook salmon in Southeast Alaska opened by regulation on October 11, 2004. The fishery closes when the cap of 45,000 treaty fish is reached, or on April 30, 2005, whichever occurs first. Prices remain very high, averaging \$5.60 per pound. Effort is more than double the recent five year average, with recent weekly catches more than three times that average. Catch to date is greater than last season, and the five year average. Average weights continue to be below the five-year average. The Alaskan hatchery component remains high.

### **Statewide Scallops (FIGURE 2)**

The Alaska scallop season closed by regulation on February 15, 2005. The various fisheries closed due to reaching harvest specifications, bycatch limits for crab, or season dates. Following are preliminary harvests, in pounds of shucked meats:

Yakutat, Area D	85,750
Yakutat, Area D16	24,430
PWS	49,320
Kodiak, NE District	80,105
Kodiak, Shelikof District	174,622
Bering Sea	10,050
Cook Inlet	6,117

### **Central Region Pacific Cod (FIGURE 3)**

#### **Prince William Sound**

The 2005 Prince William Sound state managed Pacific cod season opened on February 2, 200~~4~~<sup>5</sup>, which was seven days after the close of the federal fishery. The GHL has been set at 896,620 pounds, which is calculated as 10percent of the federal Eastern Gulf ABC. To date there has been no effort in this fishery.

#### **Cook Inlet**

In Cook Inlet, the state waters fishery opened January 27, 200~~4~~<sup>5</sup>, which was twenty-four hours after the close of the federal fishery. The GHL for the 2005 state waters season had been set at 2.19 million pounds. That GHL was calculated as 3.0 percent of the Acceptable Biological Catch (ABC) for the federal Central Gulf of Alaska area. Catch was split to 75 percent to pot gear, and 25 percent to jig gear. The Alaska Board of Fisheries passed new regulations in January 2005 raising the Cook Inlet Pacific cod GHL to 3.75 percent of the ABC for federal Central Gulf of Alaska. Pot gear allocation has been met four of the past seven years, as pot gear has generally been more effective in harvesting cod than jig gear. This will put into regulation what is already in place in the step up plan, and allow the highest GHL to be reached sooner. Because of that increase, the GHL

became 2.74 million pounds. To date, 15 vessels have made approximately 179 landings totaling approximately 2.13 million pounds. The season closed to pot gear on March 3, 2005. Jig gear opportunities continue.

**Westward Region Pacific Cod (FIGURE 4)**

**Kodiak Pacific Cod (FIGURE 5)**

The Kodiak fishery opened on February 2, 2005, which was seven days after the closure of the federal Central Gulf of Alaska Pacific cod season. The GHL is 9.13 million pounds, which is 12.5 percent of the Central Gulf of Alaska ABC. The GHL is allocated 50 percent to mechanical jig and hand troll gears and 50 percent to pot gear, or 4.56 million pounds each. Vessel operators fishing with pot gear on vessels that are longer than 58 feet overall length are restricted to 25 percent of the GHL (2.28 million pounds) before September 1, 2005. In anticipation of reaching their quota, the fishery closed to the use of pot gear at 2 pm on Sunday, February 13, 2005. Fifty-three pot fishermen made 120 landings in twelve days, totaling approximately 4 million pounds of Pacific cod. One hundred nineteen jig fishermen have made 417 landings to date, totaling approximately 620,000 pounds. That fishery continues at this time.

**Chignik Pacific Cod (FIGURE 6)**

The Chignik area Pacific cod season opened by regulation on March 1, 2005. The GHL is 6.39 million pounds, which is calculated as 8.75 percent of the Central Gulf of Alaska ABC. The GHL is now split to allow pot fishermen 90 percent of the quota. Fourteen pot fishermen have made 63 landings to date, catching approximately 1.8 million pounds of cod to date. Only one jig fisherman has registered to date, and there are no landings.

**South Alaska Peninsula Pacific Cod (FIGURE 7)**

The Pacific cod fishery in the South Alaska Peninsula opens seven days after the closure of the federal fishery in the Western Gulf of Alaska. The GHL is 11.53 million pounds, which is 25 percent of the Western Gulf of Alaska ABC. The harvest is allocated 85 percent to pot gear and 15 percent to jig gear. There were 42 pot fishermen registered for the fishery and they made 287 landings totaling approximately 10.2 million pounds. As that exceeded their allocation, the fishery closed to the use of pot gear on March 24, 2005. The jig sector, with 32



fishermen registered to date, has harvested approximately 550,000 pounds through 91 landings. That fishery continues.

**Southeast Groundfish (FIGURE 8)**

This is the first year that the directed fishery for demersal shelf rockfish (DSR) did not open in Central Southeast Outside (CSEO) and Southern Southeast Outside (SSEO). The directed fishery closure in these areas is due to mortality of DSR in other fisheries. The directed fishery quota for the Southeast Outside District (CSEO, East Yakutat (EYKT), Northern Southeast Outside (NSEO), and SSEO) is set after the Total Allowable Catch (TAC) for all fisheries is calculated and bycatch mortality in other fisheries is deducted from the TAC (5 AAC 28.160 (c)). The TAC is set based on harvest rate of 2 percent of adult biomass. Adult biomass is estimated as the area-specific product of density, average weight, and area of habitat. Staff included sport harvest and subsistence harvest in the formula for the first time this year. Sport harvests of rockfish have been significant and have increased in recent years. Additionally, harvest estimates include only fish that are kept. They do not account for incidental mortality of fish caught and released, and are considered minimum estimates of total mortality for that reason.

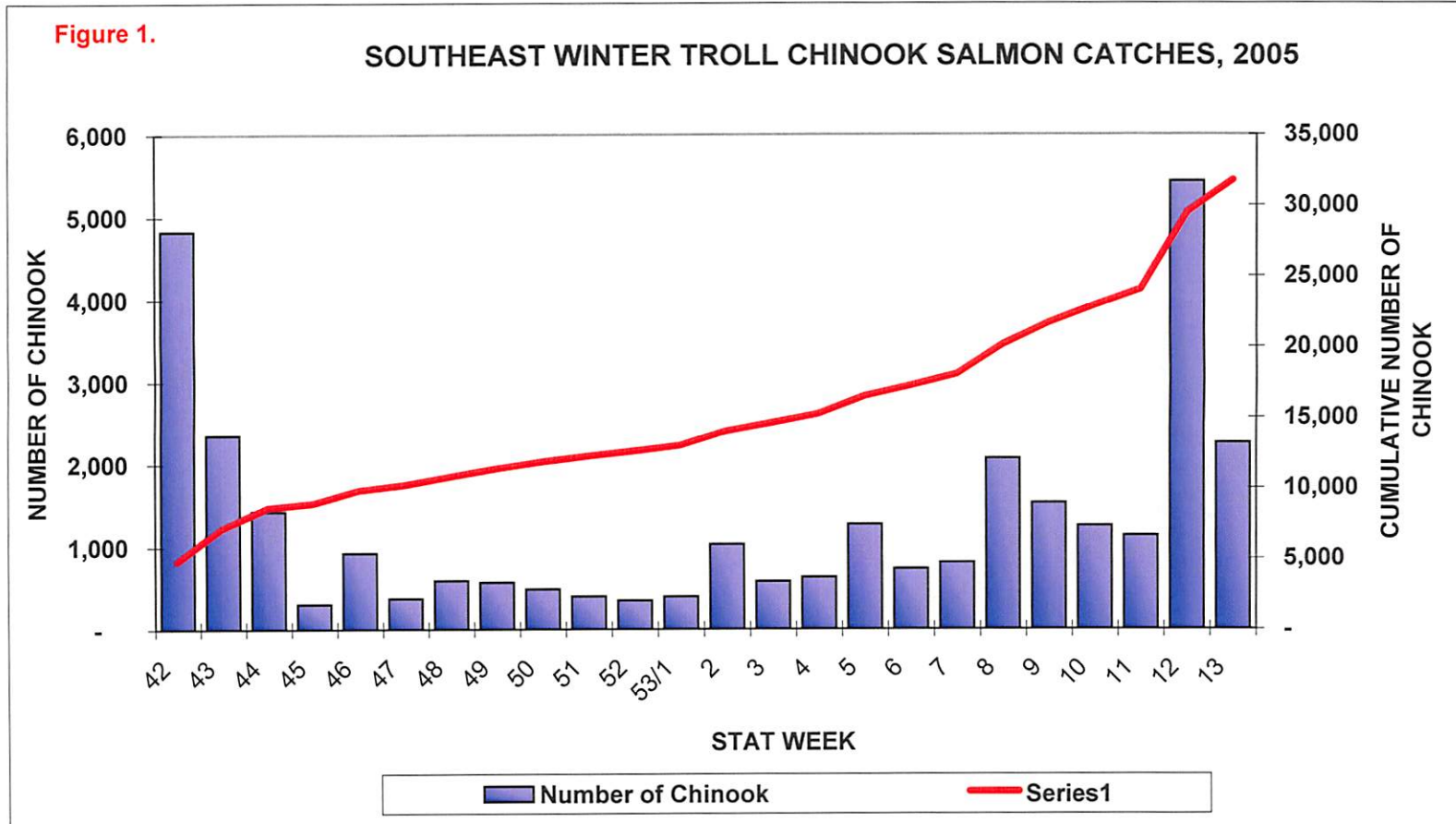
This is the second year we have allowed Northern Southeast Inside (NSEI) Sablefish permit holders to fish outside of the regular season. There will be one more open period (April 14-18, 2005) before the regular season (August 15 – November 15, 2005).

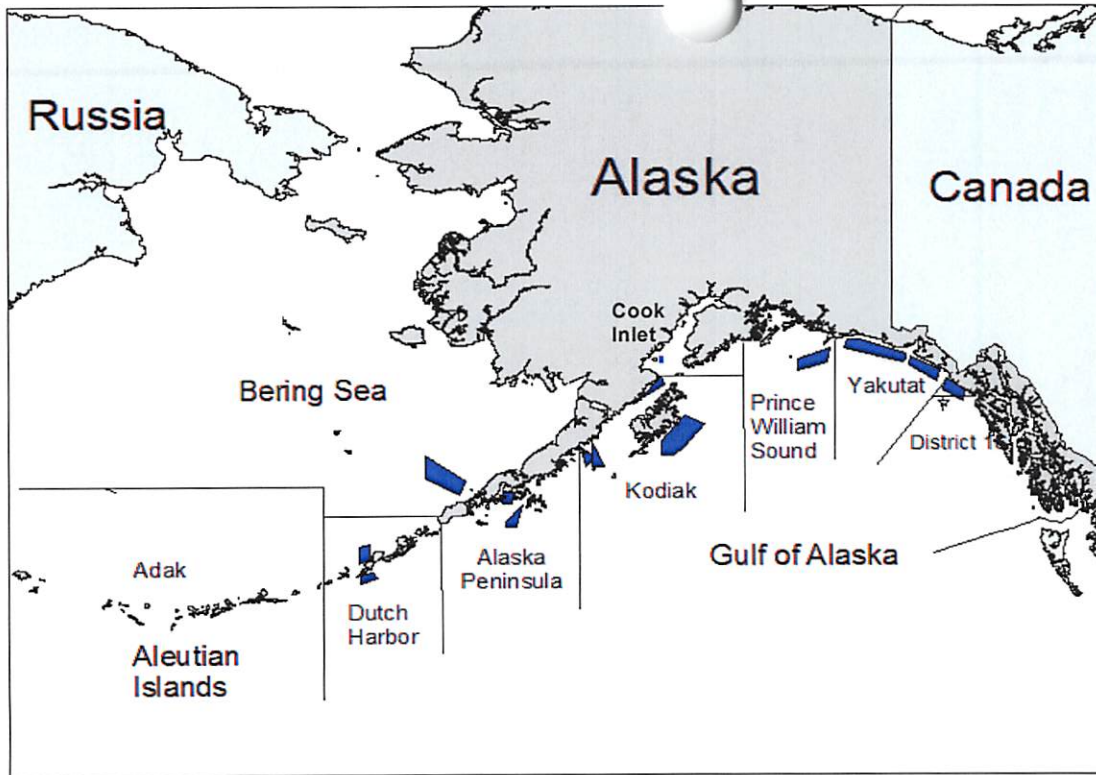
This is only the second time since a guideline harvest range was implemented that we have closed an inside waters area to directed Pacific cod harvest. Approximately 125,000 round pounds of Pacific cod were harvested in Statistical Area 335701 alone; the other areas were closed for enforcement purposes. Increased catch is due to a row and milt market out of Wrangell.

**Figure 1. Southeast Alaska Chinook Salmon Troll Winter Fishery, 2005**

Troll Year	MARCH 13 to MARCH 19				Week 12		
	Permits Fished	Landings	Number of Chinook	Catch per Landing	Average Weight (lbs)	Average Price/lb	Total Catch through Wk 45
2005	205	357	5,428	15.2	11	\$ 5.60	29,465
2004	163	259	3,048	11.8	14	\$ 4.91	25,556
5-yr Avg.	83	153	1,595	9.5	15.3	\$ 4.48	24,067

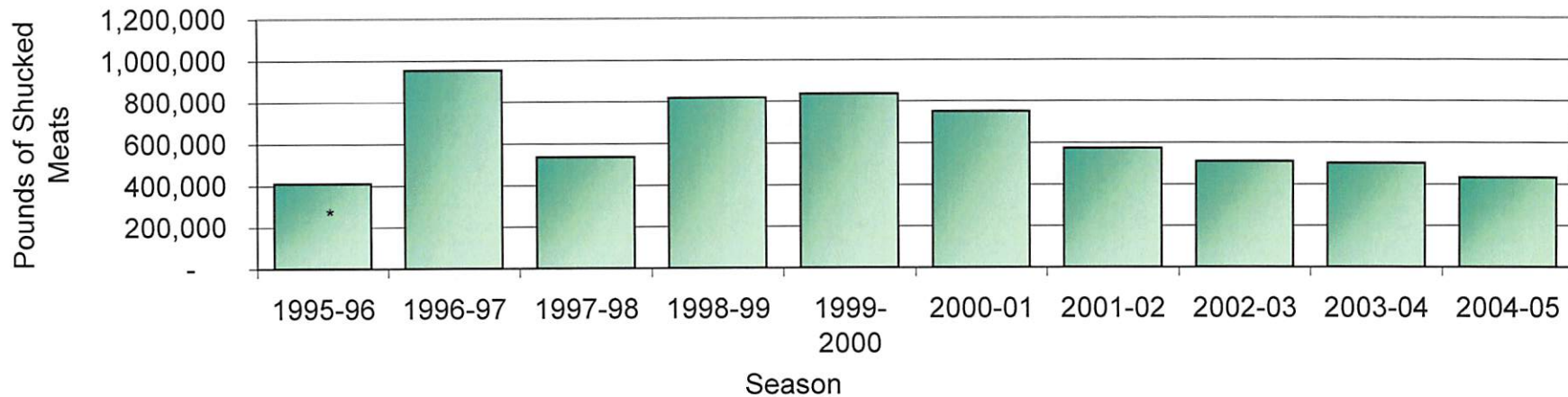
Through March 29, 2005





Major weathervane scallop fishing locations in coastal waters of Alaska.

### Scallop Harvest by Season



\*Harvest includes those taken by a single vessel outside the jurisdiction of the State in excess of the allowable limit



3. Harvest guideline, effort, and catch reported for state waters Pacific cod fisheries through March 31, 2005

This summary censured for CONFIDENTIAL reports or records.

Pacific Cod				PARALLEL SEASON - STATE WATERS		
Cook Inlet Management Area				Prince William Sound		
Gear	Vessels	Landings	Pounds	Vessels	Landings	Pounds
Hand troll	0	0	-	0	0	0
Jigs	0	0	-	0	0	0
Trawl	0	0	-	3	confidential	confidential
Longline	6	9	7,434	2	confidential	confidential
Pots	7	38	167,320	0	0	0
<b>Totals</b>	<b>13</b>	<b>47</b>	<b>174,754</b>	<b>5</b>	<b>5</b>	<b>269</b>
Status		<b>Closed</b>			<b>Closed</b>	
Federal seasons:		Directed	Opened - Closed		Directed	Opened - Closed
Central Gulf		Jan 1 - noon	Jan 26		Jan 1 - noon	Jan 26

Parallel season concurrent with federal waters of the Central Gulf of Alaska (CGOA).  
Totals include Pacific Cod bycatch to other directed fisheries e.g. halibut & sablefish.

Pacific Cod				STATE MANAGED - STATE WATERS*		
Cook Inlet Management Area				Prince William Sound		
GHL (lb) *2.74 million @ 3.75%				896,620		
Gear	Vessels	Landings	Pounds	Vessels	Landings	Pounds
Hand troll	0	0	-	0	0	0
Jigs	4	5	16,247	0	0	0
Pots	11	174	2,108,928	0	0	0
<b>Totals</b>	<b>15</b>	<b>179</b>	<b>2,125,175</b>	<b>0</b>	<b>0</b>	<b>0</b>
State seasons:		Opened - Closed			Opened - Closed	
Jigs		noon Jan 27 -			noon Feb 2 -	
Status		<b>Open</b>			<b>Open</b>	
State seasons:		Opened - Closed			Opened - Closed	
Pots		noon Jan 27 - noon March 16			noon Feb 2 -	
		noon March 16 - 3 PM March 26				0
						0
Status		<b>Closed</b>			<b>Open</b>	

\*The state managed fishery for Pacific cod opens by emergency order to pot and jig gear under exclusive area registration 24 hours after the Federal closure in Cook Inlet and 7 days in PWS. Includes only directed fishery harvest.

Figure 4.

## 2005 State Managed Groundfish Preliminary Pacific Cod Harvest by Fishery Week

		Kodiak			Chignik			South Alaska Peninsula				
Vessel Registration		TOTAL	POT	JIG	TOTAL	POT	JIG	TOTAL	POT	JIG		
Current		119	0	119	15	14	1	74	42	32		
Overall		172	53	119	15	14	1	74	42	32		
<b>2005 GHK</b>		<b>9.13 Million Pounds</b>			<b>6.39 Million Pounds</b>			<b>11.53 Million Pounds</b>				
ALLOCATIONS:		50% Jigs, 50% Pots Pots > 58' restricted to 25% of total GHK before Sept 1 <sup>st</sup> Jigs = 4.56, Pots = 4.56, > 58' pots 2.28 before Sept 1 <sup>st</sup>			90% Pots, 10% Jigs Pots = 5.75 Million Jigs = 0.63 Million			85% Pots, 15% Jigs Pots = 9.8 Million Jigs = 1.73 Million				
Fishery opened 2/2/05	POTS		JIGS		POTS		JIGS		POTS		JIGS	
	Dates	Landings	Catch	Landings	Catch	Landings	Catch	Landings	Catch	Landings	Catch	
2/2/05 to 2/5/05	42	998,831	26	105,197	Fishery opens 3/1/05 at 12:01 am				Fishery opens 7 days after Federal WGOA closes			
2/6/05 to 2/12/05	78	1,966,597	25	62,537	Fishery opens 3/1/05 at 12:01 am				Fishery opens 7 days after Federal WGOA closes			
2/13/05 to 2/19/05	42	1,012,408	44	203,824	Fishery opens 3/1/05 at 12:01 am				Fishery opens 7 days after Federal WGOA closes			
2/20/05 to 2/26/05	Closed 2/13	Closed 2/13	51	212,386	Fishery opened 3/1/05 at 12:01 am				Fishery opened 3/3/05 at Noon			
2/27/05 to 3/5/05	Closed 2/13	Closed 2/13	66	283,483	7	223,205	0	0	19	378,654	confidential	confidential
3/6/05 to 3/12/05	Closed 2/13	Closed 2/13	8	41,792	14	383,642	0	0	64	1,603,059	4	20,215
3/13/05 to 3/19/05	Closed 2/13	Closed 2/13	91	545,035	19	500,316	0	0	96	3,361,165	29	174,491
3/20/05 to 3/26/05	Closed 2/13	Closed 2/13	106	620,248	23	679,551	0	0	108	4,867,139	58	353,309
<b>ACCUMULATIVE CATCH</b>	<b>120</b>	<b>3,977,836</b>	<b>417</b>	<b>2,074,502</b>	<b>63</b>	<b>1,786,714</b>	<b>0</b>	<b>0</b>	<b>287</b>	<b>10,210,017</b>	<b>91</b>	<b>548,015</b>
	(Total Combined)		<b>6,052,338</b>		(Total Combined)		<b>1,786,714</b>		(Total Combined)		<b>10,758,032</b>	
ACCUMULATIVE CATCH		Harvest by pot vessels less than or equal to 58'		2,149,888		Harvest by pot vessels greater than 58'		1,827,947		SAP Pot cod closed 3/24/05		
		Harvest by pot vessels greater than 58'		1,827,947						Pot pounds not final		
												updated 3/29/05

Vessels greater than 58' restricted to 2.28 million pounds before September 1<sup>st</sup>

Confidential data combined with the following week



Figure 5.

### Kodiak State Managed Pcod Harvests

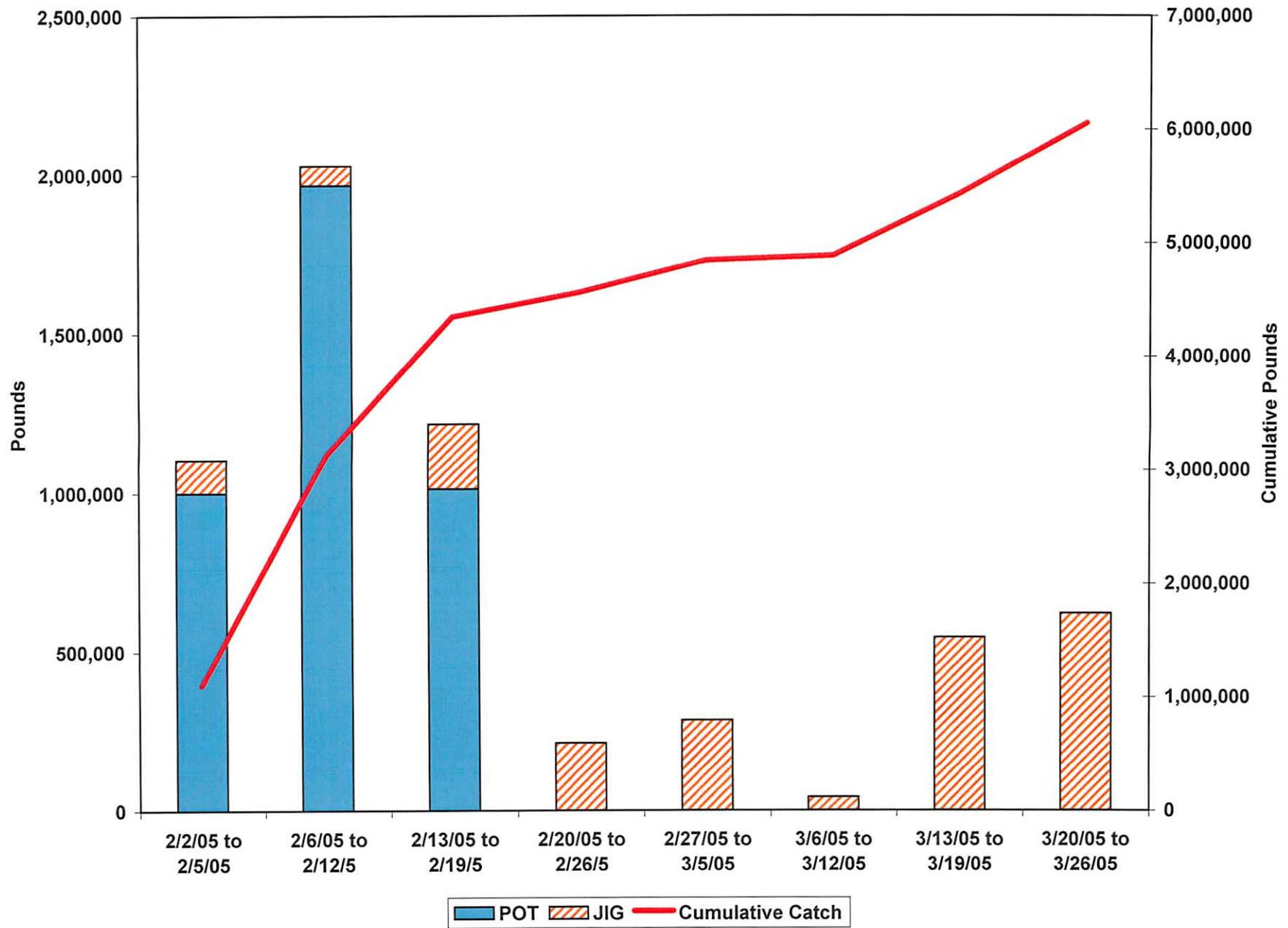


Figure 6.

### Chignik State Managed Pcod Harvests

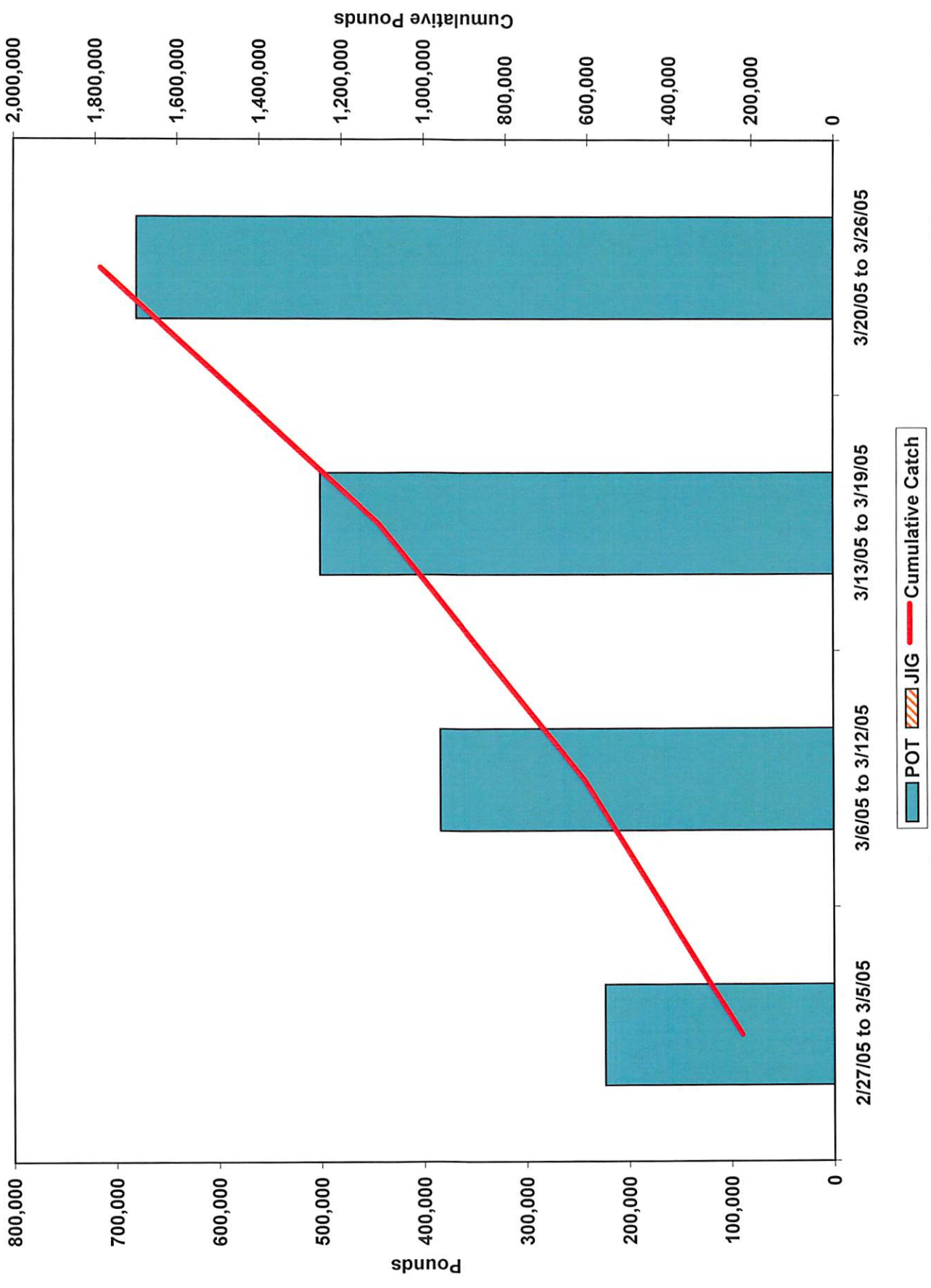
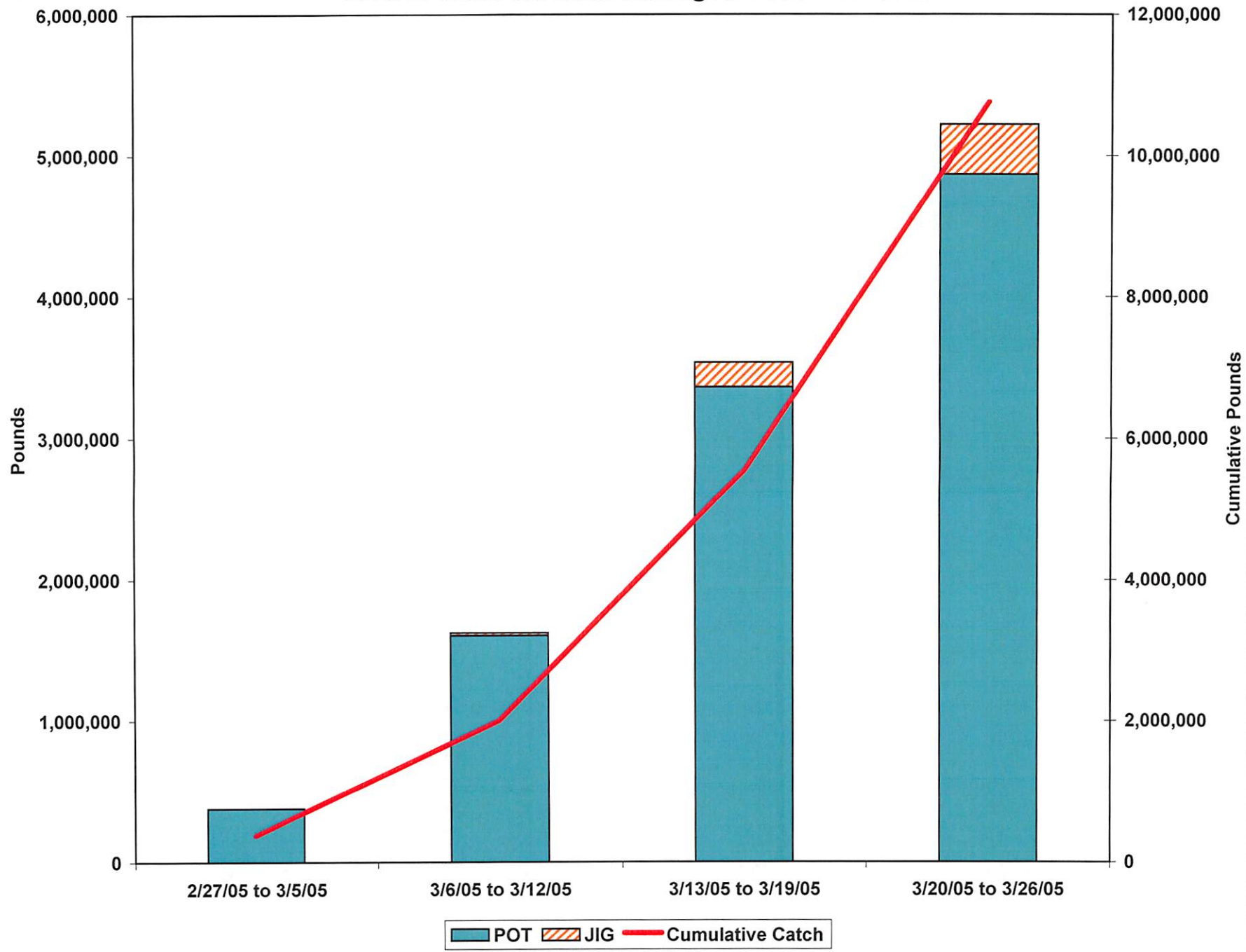


Figure 7.

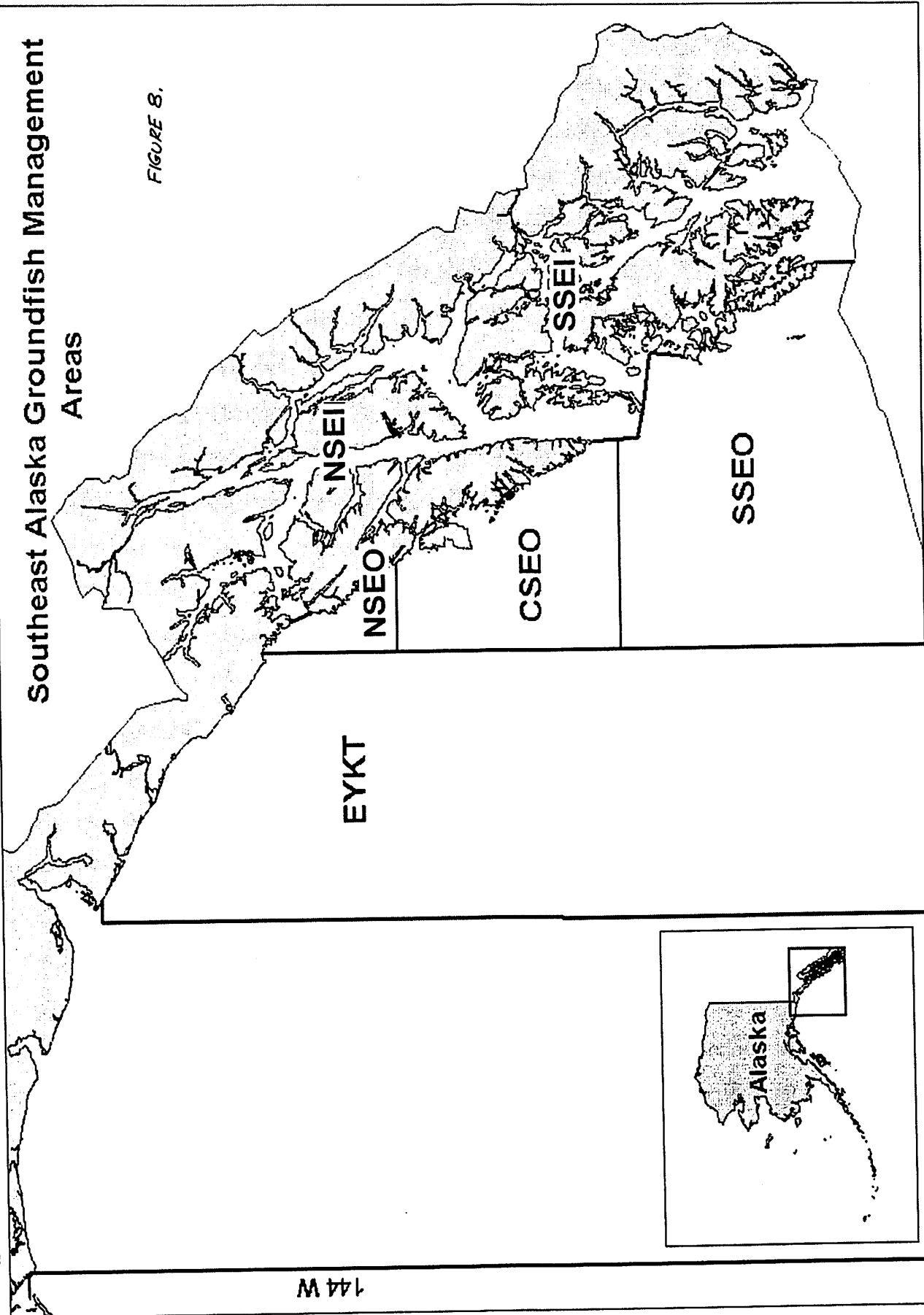
### S. AK Peninsula State Managed Pcod Harvests





Southeast Alaska Groundfish Management Areas

FIGURE 8.



144 W

RC 98

March, 2005

**Proposal 455 - Substitute Language**

Amend 5 AAC 28.087 (Management plan for parallel groundfish fisheries) and other applicable regulations to the effect that the Commissioner's existing emergency order closing state waters to fishing for pollock, cod, and Atka mackerel surrounding various Steller sea lion (SSL) rookeries and haulouts does not have to exactly "match federal fishery management measures for protecting Steller sea lions."

More specifically, closures in state waters surrounding sea lion rookeries and haulouts in the following areas may be altered, and other regulations amended, as follows:

**In the Aleutian Islands:** from 174 to 178 degrees W longitude, state waters surrounding SSL haulouts would be opened to fishing for walleye pollock, however state waters within ten miles of SSL rookeries would be closed to pollock fishing. Also, fishing for pollock within state waters of the Aleutian Islands from 174 to 178 degrees W longitude would be opened only to vessels equal to or less than 58 feet in length.

**In the western Gulf of Alaska (South Alaska Peninsula):** state waters within 20 miles, but outside a 10-mile radius, of Jude Island would be opened to pollock fishing. Also, fishing for pollock within state waters of the western GOA would be limited to only vessels equal to or less than 58 feet in length. Also, catcher vessels in the western GOA would be limited to daily deliveries of pollock of no more than 300,000 pounds (136 mt) and tender vessels would be limited to receiving or retaining onboard no more than 600,000 pounds (272 mt) of unprocessed pollock harvested in the western GOA per day.

**In the central Gulf of Alaska (North Gulf District of the Cook Inlet area):** from 149 and 150 degrees W longitude, state waters beyond a three-mile radius of SSL haulouts would be opened to pollock fishing under provisions of a Commissioner's permit.

The scenarios outlined above pertain to parallel fisheries for pollock in the Aleutian Islands, the western GOA, and the central GOA. Seasons, TACs, allocations, and other management actions, other than those specified above, would continue to parallel those imposed by the federal government. The federal government would actively manage harvests against federally-established TACs and allocations, would open and close seasons, would establish gear restrictions, etc. The state would not actively manage the harvests; rather, ADF&G would treat this fishery similar to other parallel fisheries through the global E.O.

These, or modified, amendments could be:

- (1) enacted immediately,
- (2) some portion enacted immediately (e.g., western GOA and central GOA), with other portions (e.g., Aleutian Islands) deferred to the agenda of a subsequent meeting of the Board of Fisheries, perhaps with further consideration by a task force in the interim,
- (3) enacted immediately with a delayed implementation date (e.g., effective in January 2006, or other specified time), perhaps with further consideration by a task force in the interim, or
- (4) all portions deferred to the agenda of a subsequent meeting of the Board of Fisheries (e.g., considered in October 2005 or other meeting date), and possibly referred to a task force in the interim.



**SENATE BILL NO. 113**

IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY SENATOR BEN STEVENS BY REQUEST

Introduced: 2/23/05

Referred: Resources, Finance

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to entry into and management of Gulf of Alaska groundfish fisheries."**

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

3 \* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section  
4 to read:

5 **FINDINGS AND PURPOSE.** (a) The Alaska State Legislature finds that

6 (1) groundfish fisheries in the Gulf of Alaska are facing significant challenges  
7 from changing economic conditions and fishery management practices in the federal  
8 exclusive economic zone that affect fisheries and fishery resources in a manner that is likely  
9 to increase pressures on groundfish stocks;

10 (2) some form of limitation on access into the fisheries may be necessary to  
11 provide for the economic health of fishermen in the Gulf of Alaska groundfish fisheries and  
12 those dependent upon them for a livelihood and to ensure conservation of the biological and  
13 capital resources of the fishery;

14 (3) groundfish fisheries in the Gulf of Alaska are prosecuted by a diverse  
15 fishing fleet using many different types of gear and sizes of vessels to harvest multiple species

1 of groundfish;

2 (4) the current forms of limited entry authorized under AS 16.43 may not be  
3 well-suited to promote the best interests of the State of Alaska in the Gulf of Alaska  
4 groundfish fisheries;

5 (5) the Alaska Board of Fisheries has led an effort to explore how best to  
6 respond to the changes facing the Gulf of Alaska groundfish fisheries;

7 (6) the Alaska Board of Fisheries has concluded that either the board or the  
8 Alaska Commercial Fisheries Entry Commission or both the board and the commission  
9 should have statutory authority, applicable only to the Gulf of Alaska groundfish fisheries, to  
10 limit participation in the fisheries to persons or vessel owners, or both, with a history of  
11 participation in the fisheries;

12 (7) the Alaska Board of Fisheries has concluded that, for the Gulf of Alaska  
13 groundfish fisheries, the board or commission, or both, should have authority to allocate  
14 differential, exclusive harvest shares to persons or vessel owners, or both, either individually  
15 or as members of a harvesting association, based on the history of harvests in the fishery;

16 (8) because the Gulf of Alaska groundfish fisheries are managed by harvest  
17 limits, dedicated access privileges may be feasible and appropriate and may better serve the  
18 goals of resource conservation, prevention of economic distress among fishermen and those  
19 dependent upon fishermen for a livelihood, and promoting the safety of fishermen involved in  
20 the fisheries.

21 (b) It is the purpose of this Act to authorize a new type of access limitation program,  
22 called a dedicated access privilege program, as best serves the interests of the State of Alaska.  
23 The dedicated access privilege program, if adopted and implemented, should result in the  
24 allocation of harvest share privileges, in the Gulf of Alaska groundfish fisheries, in a manner  
25 that serves the purposes of limited entry under art. VIII, sec. 15, Constitution of the State of  
26 Alaska, with the least impingement on the open access principles embodied in art. VIII,  
27 Constitution of the State of Alaska.

28 \* **Sec. 2.** AS 16.05 is amended by adding a new section to article 5 to read:

29 **Sec. 16.05.740. Allocation of Gulf of Alaska groundfish fishery resources.**

30 (a) If the Alaska Commercial Fisheries Entry Commission has adopted a dedicated  
31 access privilege program under AS 16.43.530, the holder of a dedicated access

1 privilege is entitled to share in the overall harvest authorized by the Board of Fisheries  
2 to the extent provided by the dedicated access privilege.

3 (b) The Board of Fisheries may adopt regulations to allocate portions of the  
4 harvestable surplus of Gulf of Alaska groundfish species to associations of dedicated  
5 access privilege holders authorized by the board based on the combined dedicated  
6 access privileges held by the members of each association.

7 (c) In considering whether to approve allocation of Gulf of Alaska groundfish  
8 species, to the extent practicable, the board shall seek to promote

9 (1) sound fishery management;

10 (2) resource conservation;

11 (3) the economic health of the commercial Gulf of Alaska groundfish  
12 fisheries;

13 (4) the economy of the state and of regions of the state dependent on  
14 the Gulf of Alaska groundfish fisheries;

15 (5) the enforcement and enforceability of the allocations;

16 (6) coordination with the fishery management system for Gulf of  
17 Alaska groundfish fisheries in the adjacent federal exclusive economic zone;

18 (7) the safety of participants in the commercial Gulf of Alaska  
19 groundfish fisheries;

20 (8) other important goals as identified by the board.

21 \* **Sec. 3.** AS 16.43.210(a) is amended to read:

22 (a) For each fishery that is not subject to a maximum number of entry permits  
23 under AS 16.43.240 and not subject to a moratorium under AS 16.43.225 or a  
24 dedicated access privilege program under AS 16.43.530, the commission shall issue  
25 interim-use permits under regulations adopted by the commission to all applicants who  
26 can establish their present ability to participate actively in the fishery for which they  
27 are making application.

28 \* **Sec. 4.** AS 16.43.210 is amended by adding a new subsection to read:

29 (f) An interim-use permit for a fishery subject to a dedicated access privilege  
30 program established under AS 16.43.530 may be issued only to a person who qualifies  
31 under regulations adopted by the commission under AS 16.43.530.



1 \* Sec. 5. AS 16.43 is amended by adding new sections to read:

2 **Article 7A. Gulf of Alaska Groundfish Fisheries.**

3 **Sec. 16.43.530. Dedicated access privileges for Gulf of Alaska groundfish**  
 4 **fisheries.** (a) If the commission finds that entry into a Gulf of Alaska groundfish  
 5 fishery should be limited on the basis of dedicated access privileges to serve the  
 6 purposes of this chapter, the commission may adopt regulations, developed in  
 7 conjunction with the Board of Fisheries, that are necessary to establish and implement  
 8 a dedicated access privilege program for that fishery. The amount of dedicated access  
 9 privileges initially issued to qualified applicants under a dedicated access privilege  
 10 program may be based on the quantity of qualified past landings credited to the  
 11 applicant.

12 (b) In adopting a dedicated access privilege program for a Gulf of Alaska  
 13 groundfish fishery, to the extent practicable, the commission shall seek to promote

14 (1) sound fishery management;

15 (2) resource conservation;

16 (3) the economic health of the commercial Gulf of Alaska groundfish  
 17 fisheries;

18 (4) the economy of the state and of regions of the state dependent on  
 19 the Gulf of Alaska groundfish fisheries;

20 (5) the enforcement and enforceability of the allocations;

21 (6) coordination with the fishery management system for Gulf of  
 22 Alaska groundfish fisheries in the adjacent federal exclusive economic zone;

23 (7) the safety of participants in the commercial Gulf of Alaska  
 24 groundfish fisheries;

25 (8) other important goals as identified by the commission.

26 (c) If the commission adopts regulations under (a) of this section to establish a  
 27 dedicated access privilege program, the commission shall in writing

28 (1) identify how a limitation on access into the fishery on the basis of  
 29 dedicated access privileges serves the purposes of this chapter;

30 (2) describe why other access limitation programs authorized under  
 31 this chapter would not best serve the purposes of the chapter, would not be feasible, or

1 would not serve the best interests of the State of Alaska and its citizens;

2 (3) describe why other feasible access limitation programs authorized  
3 under this chapter would be expected to be more exclusive than the dedicated access  
4 privilege program adopted by the commission.

5 (d) Regulations adopted by the commission to establish a dedicated access  
6 privilege program under this section must address

7 (1) the qualification date, eligibility period, landings threshold, and  
8 years of participation in the fishery to be used to determine qualified landings in the  
9 fishery, qualified applicants, and initial access to implement the dedicated access  
10 privilege program;

11 (2) the permits that must be held by qualified interim-use permit  
12 holders, entry permit holders, vessel owners, dedicated access privilege holders, and  
13 commercial fishing license holders before and after dedicated access privileges are  
14 issued;

15 (3) qualifications for receiving and holding an interim-use permit for a  
16 fishery subject to a dedicated access privilege program and requisite restrictions on the  
17 holder of an interim-use permit under a dedicated access privilege program;

18 (4) whether the qualified past landings are to be credited, solely or  
19 partially, to interim-use permit holders, entry permit holders, vessel owners, or  
20 commercial fishing license holders;

21 (5) whether qualified past landings or the dedicated access privileges  
22 based on those qualified landings are transferable and the terms and conditions under  
23 which the landings or privileges may be transferred;

24 (6) whether dedicated access privileges expire or attenuate over time  
25 and the terms and conditions under which the privileges expire or attenuate;

26 (7) the procedures by which persons or vessels without qualified past  
27 landings may gain entry into the fishery;

28 (8) the process by which the commission will prevent the fishery from  
29 becoming too exclusive;

30 (9) other issues the commission determines appropriate.

31 (e) In this section, "groundfish" means a species of marine finfish other than

1 halibut, osmerids, herring, or salmonids.

2 **Sec. 16.43.535. Dedicated access privileges; general provisions.** (a) A  
3 dedicated access privilege issued under AS 16.43.530 constitutes a use privilege that  
4 may be modified or revoked by order of the commission or by law without  
5 compensation.

6 (b) A dedicated access privilege issued under AS 16.43.530 may not be  
7 pledged, mortgaged, encumbered, attached, distrained, or sold on execution of  
8 judgment or under any other process or order of any court.

9 (c) Nothing in AS 16.43.530 - 16.43.540 limits the powers of the Board of  
10 Fisheries or the Department of Fish and Game.

11 **Sec. 16.43.540. Dedicated access privileges; fees.** (a) The commission shall  
12 establish fees for the issuance and renewal of dedicated access privileges. Fees  
13 established under this subsection must reasonably reflect the rate of economic return  
14 of the dedicated access privileges.

15 (b) Subject to AS 37.10.050(a), the commission may establish fees for  
16 processing applications for dedicated access privileges and, if authorized by the  
17 commission, transfer of dedicated access privileges.

18 (c) The commission may charge interest at a rate not to exceed the legal rate  
19 of interest established in AS 45.45.010(a) on fees established under this section that  
20 are more than 60 days overdue.

21 \* **Sec. 6.** AS 16.43.945 is amended to read:

22 **Sec. 16.43.945. Commercial fishing privileges exempt from claims of**  
23 **creditors.** Except as provided in AS 16.10.333 - 16.10.338, AS 16.43.170(g),  
24 AS 44.81.215, and 44.81.231 - 44.81.250, commercial fishing privileges granted under  
25 this chapter, including entry permits and dedicated access privileges, are exempt  
26 from claims of creditors, including claims under AS 09.38.065 and AS 45.29.408.

27 \* **Sec. 7.** AS 16.43.960(a) is amended to read:

28 (a) The commission may revoke, suspend, or transfer all entry or interim-use  
29 permits, vessel entry permits, [OR] vessel interim-use permits, or dedicated access  
30 privileges held by a person or entity who knowingly provides or assists in providing  
31 false information, or fails to correct false information provided to the commission for

1 the purpose of obtaining a benefit for self or another, including the issuance, renewal,  
 2 duplication, or transfer of an entry or interim-use permit, vessel license, vessel entry  
 3 permit, [OR] vessel interim-use permit, or dedicated access privilege. The  
 4 commission may suspend, as appropriate, that person's or entity's eligibility to hold an  
 5 entry or interim-use permit, vessel entry permit, [OR] vessel interim-use permit, or  
 6 dedicated access privilege for a period not to exceed three years, and may impose an  
 7 administrative fine of not more than \$5,000 on the person or entity whose officers,  
 8 employees, representatives, or agents knowingly provide or assist in providing false  
 9 information, or fail to correct false information provided, to the commission for the  
 10 purpose of obtaining a benefit.

11 \* Sec. 8. AS 16.43.960(b) is amended to read:

12 (b) The commission shall serve the respondent personally or by certified or  
 13 registered mail with a notice to show cause why the proposed action should not take  
 14 place. The notice to show cause must

15 (1) be supported by an affidavit, which may be made on information or  
 16 belief, setting out the facts that are the basis of the proposed actions;

17 (2) provide for a least 30 days' notice of the place, date, and time of the  
 18 hearing where the respondent may present evidence in opposition to the proposed  
 19 action; unless waived in writing by the respondent, the hearing shall be held within the  
 20 judicial district in which the respondent resides if the respondent resides in the state;  
 21 the hearing place shall be at the discretion of the commission for those respondents  
 22 residing outside the state;

23 (3) specify the statutes or regulations violated;

24 (4) state with particularity the action proposed to be taken;

25 (5) indicate to the respondent that the respondent's ability to  
 26 permanently transfer the permits or dedicated access privileges that [WHICH] are  
 27 the subject of the show cause proceedings has been suspended as of the date of the  
 28 notice and will continue to be suspended until the exhaustion of all administrative and  
 29 judicial remedies; and

30 (6) provide other information the commission considers proper.

31 \* Sec. 9. AS 16.43.960(c) is amended to read:

1 (c) A permit or dedicated access privilege subject to show cause proceedings  
 2 under this section may not be transferred after the date of the notice in (b) of this  
 3 section pending exhaustion of all administrative and judicial remedies arising from  
 4 action taken under this section.

5 \* Sec. 10. AS 16.43.960(g) is amended to read:

6 (g) The provisions of this section apply to conduct occurring after January 1,  
 7 1973, but do not affect a permit or dedicated access privilege held by a person who is  
 8 a bona fide purchaser. Failure to correct false information is a continuing offense.

9 \* Sec. 11. AS 16.43.970(b) is amended to read:

10 (b) A person or entity who knowingly makes a false statement to the  
 11 commission for the purpose of obtaining a benefit, including the issuance, renewal,  
 12 duplication, or transfer of an entry or interim-use permit, vessel license, vessel  
 13 interim-use permit, [OR] vessel entry permit, or dedicated access privilege, or a  
 14 person who assists another by knowingly making a false statement to the commission  
 15 for the purpose of obtaining a benefit for another, is guilty of the crime of unsworn  
 16 falsification as set out in AS 11.56.210. Upon conviction, the person or entity is also  
 17 subject to suspension of commercial fishing privileges and revocation of commercial  
 18 fishing permits under (i) of this section.

19 \* Sec. 12. AS 16.43.970(d) is amended to read:

20 (d) If a permit holder or a dedicated access privilege holder is charged by  
 21 the state with violating a provision of this chapter or a regulation adopted under this  
 22 chapter, the holder may not transfer any interim-use or entry permit under  
 23 AS 16.43.170, [OR] any transferable vessel entry permit under AS 16.43.450 -  
 24 16.43.520, or any dedicated access privilege until after the final adjudication or  
 25 dismissal of the charges.

26 \* Sec. 13. AS 16.43.970(e) is amended to read:

27 (e) Notwithstanding any other provision of this section, an interim-use or entry  
 28 permit, [OR] transferable vessel entry permit, or dedicated access privilege may not  
 29 be transferred while under suspension, without the consent of the commission.

30 \* Sec. 14. AS 16.43.970(j)(2) is amended to read:

31 (2) "commercial fishing privileges" means the privilege of



1 participating in an activity for which a commercial fishing permit **or dedicated access**  
2 **privilege** is required and the privilege of obtaining a commercial fishing permit **or**  
3 **dedicated access privilege**.

4 \* **Sec. 15.** AS 16.43.990 is amended by adding a new paragraph to read:

5 (12) "dedicated access privilege" means a harvest-use privilege issued  
6 by the commission under AS 16.43.530 that authorizes the holder of the privilege to  
7 harvest a specified portion of the overall harvest of a specified fishery resource  
8 allowed by the Board of Fisheries in a specified fishery.

# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: S.B. 113  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Fish and Game  
 Title An Act Relating to Entry into and RDU Administration and Support  
Management of Gulf of Alaska Groundfish Component Boards of Fisheries and Game  
 Sponsor Senator Ben Stevens by Request  
 Requester Senate Resources Committee Component No. 2048

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	0.0	*	*	*	*	*
Travel	28.8	*	*	*	*	*
Contractual	16.8	*	*	*	*	*
Supplies	0.0	*	*	*	*	*
Equipment	0.0	*	*	*	*	*
Land & Structures	0.0	*	*	*	*	*
Grants & Claims	0.0	*	*	*	*	*
Miscellaneous	0.0	*	*	*	*	*
<b>TOTAL OPERATING</b>	<b>45.6</b>	<b>*</b>	<b>*</b>	<b>*</b>	<b>*</b>	<b>*</b>
<b>CAPITAL EXPENDITURES</b>	<b>0.0</b>	<b>*</b>	<b>*</b>	<b>*</b>	<b>*</b>	<b>*</b>
<b>CHANGE IN REVENUES ( )</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts	0.0	*	*	*	*	*
1003 GF Match	0.0	*	*	*	*	*
1004 GF	45.6	*	*	*	*	*
1005 GF/Program Receipts	0.0	*	*	*	*	*
1037 GF/Mental Health	0.0	*	*	*	*	*
Other (Specify Type--Do not abbreviate)	0.0	*	*	*	*	*
<b>TOTAL</b>	<b>45.6</b>	<b>*</b>	<b>*</b>	<b>*</b>	<b>*</b>	<b>*</b>

Estimate of any current year (FY2005) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

The authorities provided in S.B. 113 allow the Alaska Board of Fisheries (board) to explore innovative Gulf of Alaska (GOA) groundfish fisheries allocation and management strategies in ways that benefit the resource, the resource users, and the communities dependent upon them.

The GOA groundfish fisheries are comprised of a diverse group of users, vessels, gears, areas, and species. In order to implement this legislation, the board will do the following:

(continued on page 2)

Prepared by: Sarah Gilbertson, Legislative Liaison Phone (907) 465-6137  
 Division ADF&G Commissioner's Office Date/Time 3/8/05 11:37 AM  
 Approved by: Wayne Regelin, Acting Commissioner Date 3/8/2005  
 Agency Alaska Department of Fish and Game

FISCAL NOTE

STATE OF ALASKA  
2005 LEGISLATIVE SESSION

BILL NO. S.B. 113

**ANALYSIS CONTINUATION**

(continued from page 1)

(1) Continue the board's GOA Groundfish Rationalization Task Force; hold 3 to 4 additional meetings prior to community hearings. Costs for these task force meetings include 3 board members travel, 2 to 3 ADF&G staff travel, and meeting room costs.

(2) Hold hearings in affected communities around the Gulf of Alaska (e.g., Kodiak, Homer, Sand Point and others) in order to receive public and community input on options for structuring the groundfish fisheries to maximize fishery benefits. It is intended that program development for each GOA groundfish fishery will be developed in the transparent board public process, and not within this legislation.

(3) Add 2 to 3 meeting days to its schedule during FY 06 to specifically report to the full board on input from the community hearings, to receive further public input, and to work further on program development.

Passage of this legislation gives the board and the Commercial Fisheries Entry Commission (CFEC) a new tool in their toolbox, and in and of itself has no immediate fiscal impact. However, as the board and CFEC consider the development of a new program, the Alaska Department of Fish and Game anticipates some modest costs for travel and extended meetings as noted above.

At this point, it is unknown how program development might effect future data technology and personnel needs. Therefore, subsequent costs are indeterminate pending the shape and extent of any "designated access privilege" program established by the board and CFEC.

# Alaska State Legislature

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## Senate President

### SPONSOR STATEMENT

#### Senate Bill 113

#### **“An Act relating to entry into and management of Gulf of Alaska groundfish fisheries.”**

Senate Bill 113 provides statutory authority for the Board of Fisheries (BOF) and the Commercial Fisheries Entry Commission (CFEC) to jointly develop a Dedicated Access Privilege (DAP) program for Gulf of Alaska (GOA) groundfish as species, areas, and gear types warrant. The legislation provides for a full public process and grants appropriate authorities to the Commission and Board for development and implementation of a form of fisheries limitation for state water Gulf groundfish fisheries reflective of historic involvement in these fisheries. It does not predetermine whether a fishery will become a DAP fishery or how it will be managed.

The Alaska Board of Fisheries has led a joint effort to explore how best to respond to the changes facing Gulf of Alaska groundfish fisheries. A diverse fishing fleet utilizing different gear types and vessel sizes harvest multiple species of migratory groundfish from 0-3 miles off the Alaska Gulf coast. The GOA groundfish fisheries in state waters from 0-3 miles are comprised of two distinct components: a state waters fishery managed under an established Guideline Harvest Level (GHL), and a parallel fishery managed under a federal Total Allowable Catch (TAC). Efficiency has increased in many of these fisheries resulting in shortened seasons, an increased race for fish, decreased quality, and lost opportunities for value added products. The consequences are lower ex-vessel values. In addition, the federal government, through the North Pacific Fishery Management Council (NPFMC) is “rationalizing” the groundfish stocks and fisheries under its jurisdiction from 3-200 miles. This is likely to result in additional fishing effort and exacerbation of existing problems in the 0-3 mile state waters.

Because the Gulf of Alaska groundfish fisheries in state waters are managed by harvest limits, a dedicated access privilege program (DAP) may be feasible and

appropriate for managers to meet harvest objectives. It may better serve the goals of resource conservation and prevention of economic distress among fishermen and those dependent upon fishermen for a livelihood. It will also promote the safety of those involved in prosecuting these fisheries.

With the passage of Senate Bill 113, a lengthy, public process will ensue. ADF&G collects and CFEC holds all the fisheries harvest and vessel participation information. This information will have to be compiled and analyzed for a fishery being considered as a potential DAP fishery. Both the CFEC and the BOF have extensive public hearing processes and the public will have ample opportunity to participate in the development of any potential DAP program for GOA groundfish fisheries.

Senate Bill 113 protects the state's interests. It provides an important new tool for ensuring our state water groundfish fisheries can be developed to maximize the state's interests and protect the resource and those who depend upon it.



# Alaska State Legislature

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## Senate President

### SENATE BILL 113

**"An Act relating to entry into and management of Gulf of Alaska groundfish fisheries."**

#### FACT SHEET

##### Senate Bill 113 *Does Not*

- Does *not* provide processor Designated Access Privileges (DAPs) or "processor quota shares" for Gulf of Alaska groundfish in state waters
- Does *not* set a precedent for "processor quota shares" in GOA groundfish, salmon, or any other state fisheries
- Does *not* predetermine which, if any, species, areas, or gear types may have a DAP program developed
- Does *not* predetermine DAP recipients

##### Senate Bill 113 *Does*

- Does grant sufficient statutory authority to the Alaska Board of Fisheries and the Commercial Fisheries Entry Commission to adequately address fisheries development plans for Gulf of Alaska groundfish species
- Does clearly define the respective roles of the Alaska Board of Fisheries and the Commercial Fisheries Entry Commission in developing dedicated access privilege programs
- Does provide ample opportunities for the public to participate in the development of any DAP programs through the Board of Fisheries and Commercial Fisheries Entry Commission public hearing process
- Does offer the opportunity to be a more inclusive limited entry program than the existing statutes allow through the license limitation model

## **SB 113**

### **“An Act relating to entry into and management of Gulf of Alaska groundfish fisheries.”**

#### **ADF&G Discussion Points March 2005**

- The Gulf of Alaska (GOA) groundfish fisheries are comprised of a diverse group of users, vessels, gears, areas, and species. The fisheries are currently managed under open access, “race for fish” conditions that do not provide for maximization of the economic value of the fisheries to fishermen, processors, coastal communities, or the state, nor for addressing fisheries management issues such as bycatch reduction, habitat protection, and localized depletion, or for the safety of fisheries participants.
- Over time, because of the “race for fish,” fishermen have become more efficient at harvesting, and therefore, seasons are compressed in time (and sometimes in area), exacerbating the concerns previously described. Additionally, planned rationalization of the federal GOA groundfish fisheries has the potential to further aggravate the problems inherent in the “race for fish.”
- While Alaska's current Limited Entry program satisfactorily addresses fisheries and social issues in many fisheries, it may not best serve all of Alaska's diverse groundfish fisheries given the demands of today's global marketplace for consistent supply, quality, and market and product diversity.
- SB 113 provides authorities to the Board of Fisheries (BOF) and the Commercial Fisheries Entry Commission (CFEC) that allow them to explore innovative GOA groundfish fisheries allocation and management strategies that can provide solutions to the changing global marketplace and that will benefit the resource, the resource users, and the communities dependent upon them.
- One size will not fit all in addressing the needs of these diverse fisheries. Therefore, SB 113 has been purposefully written to provide for maximum flexibility without predetermining any programmatic outcome. It is intended that program development for each GOA groundfish fishery will be developed in the transparent BOF and CFEC public processes, and not within this legislation.
- This is “process” legislation, not “programmatic.”

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STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU  
February 28, 2005

The Honorable Ben Stevens  
President of the Senate  
Alaska State Legislature  
State Capitol, Room 111  
Juneau, AK 99801-1182

Dear President Stevens:

As you know, the groundfish fisheries in the Gulf of Alaska (GOA) are facing significant challenges from changing economic conditions and management practices in the Exclusive Economic Zone (EEZ) that affect fisheries and fishery resources in state waters. These economic and fishery management changes are likely to result in increased biological pressures. To fulfill its mandate of conserving, developing, and utilizing fishery resources, the State of Alaska is carefully considering the nature of those changes and evaluating the ways in which state management should respond in order to best serve the interests of Alaskans.

This evaluation has been underway for over six years by Alaska's representatives to the North Pacific Fishery Management Council (NPFMC). In addition, the Alaska Board of Fisheries (BOF) has been addressing these issues for almost two years. Both of these public processes have resulted in broad agreement that an integrated and coordinated state/federal management system for the GOA groundfish stocks migrating across jurisdictional lines best meets the public interest and assures that critical issues of mutual concern are responsibly addressed.

I support the Alaska Board of Fisheries' findings on this issue and appreciate your support in drafting legislation that seeks to confer authority to the Commercial Fisheries Entry Commission to authorize access to GOA groundfish fisheries based upon historical harvests.

At its December 2004 meeting, the NPFMC unanimously endorsed the approach sought by the BOF.

As always, thank you for your efforts in support of Alaska's fisheries.

Sincerely yours,

Handwritten signature of Frank H. Murkowski in black ink.  
Frank H. Murkowski  
Governor

SB 113 Materials

- Legal Opinion #1 (4 pages)
- Emailed information to define legal question (3 pages)
- Legal Opinion #2 (2 pages)

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

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Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

# 1 rec'd  
3-14-05  
JAM

## MEMORANDUM

March 14, 2005

**SUBJECT:** Constitutionality of SB 113, an Act relating to entry into and management of Gulf of Alaska groundfish fisheries (Work Order No. 23-LS0306\L)

**TO:** Senator Tom Wagoner  
Attn: Mary Jackson

**FROM:** George Utermohl *GU*  
Legislative Counsel

You have asked whether SB 113, relating to entry into and management of Gulf of Alaska groundfish fisheries, is constitutional. This memorandum is in response to your question.

SB 113 would authorize the Alaska Commercial Fisheries Entry Commission to establish a dedicated access privilege system for the Gulf of Alaska groundfish fisheries. A dedicated access privilege system is a form of commercial fisheries limited entry. The precise nature of the dedicated access privilege system will be determined by the commission at a later time. The key element of a dedicated access privilege system is the allocation of a privilege to harvest a specified portion of the allowable harvest of a groundfish species. It is the allocation of a privilege to an individual to harvest a specified portion of the allowable harvest that may raise significant issues under provisions of the Alaska Constitution.

An entry permit issued under AS 16.43 is a grant of an exclusive right of fishery that was specifically authorized when the "no exclusive right of fishery" section of the Alaska Constitution was amended in 1971 to allow a limited entry system to control entry into the state's commercial fisheries.

**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.

Article VIII, sec. 15, Constitution of the State of Alaska (emphasis added).

The second sentence of the no exclusive right of fishery section would seem to permit any form of limited entry, including a dedicated access privilege system, that would promote resource conservation or prevent economic distress among fishermen and those who depend on fishermen for their livelihood. However, the 1971 amendment must be construed in light of the specific language of the amendment and within the context of the common use section (art. VIII, sec. 3)<sup>1</sup>, uniform application section (art. VIII, sec. 17),<sup>2</sup> and the equal protection clause (art. I, sec. 1)<sup>3</sup> of the Alaska Constitution, and the first sentence of the no exclusive right of fishery section.

The Alaska Supreme Court recognizes that limited entry into commercial fisheries is inconsistent with the common use section of the Alaska Constitution. State v. Ostrosky, 667 P.2d 1184, 1189 (Alaska 1983). The court also recognizes that the inconsistency between limited entry and the common use section, equal protection clause, or other provisions of the Alaska Constitution was largely cured by the 1971 limited entry amendment. Id. at 1189 - 90. However, the court also found that the 1971 limited entry amendment did not justify every possible limited entry scheme that fostered resource conservation and promoted economic security for fishermen: "whatever system of limited entry is imposed must be one which, consistent with a feasible limited entry system, entails the least possible impingement on the common use reservation and on the no exclusive right of fishery clause." Id. at 1191 (emphasis added); see also, Johns v. Commercial Fisheries Entry Commission, 758 P.2d 1256, 1266 (Alaska 1988). Thus, the 1971 limited entry amendment must be construed narrowly so as to not unreasonably

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<sup>1</sup> Article VIII, sec. 3, Constitution of the State of Alaska states:

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

<sup>2</sup> Article VIII, sec. 17, Constitution of the State of Alaska states:

**Uniform Application.** Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

<sup>3</sup> Article I, sec. 1, Constitution of the State of Alaska states:

**Inherent Rights.** This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.



impinge on common use any more than is necessary to regulate entry into fisheries. Johns, 758 P.2d at 1266. For that reason, the state's current limited entry system only limits the right to participate in a commercial fishing user group. Those persons who obtain an entry permit have the right to participate in commercial fishing in common with all other permit holders. Each permit holder is free to catch as much of the available resource as possible given the permit holder's expertise, equipment, and dedication to fishing. No permit holder has a private right, interest, or expectancy to any portion of a fishery resource.

The direct allocation of fishery resources to individual fishermen, based on the fishermen's catch history in the fishery, impinges on the common use section and "no exclusive right of fishery" section. Under the common use doctrine, fishery resources are "owned" or held by the state in trust for all citizens of the state until the resource is lawfully reduced to physical possession of the fisherman. Isakson v. Rickey, 550 P.2d 359, 367 (Alaska 1976). Until the fish is in the physical possession of the fisherman, the fisherman has no claim to the fish. The creation of private interests in a fishery resource before the resource is caught by a fisherman seems to be the kind of special privilege that the common use and "no exclusive right of fishery" sections were intended to prohibit.<sup>4</sup> The 1971 limited entry amendment of the "no exclusive right of fishery" section did not make special privileges, such as the proposed dedicated access privileges, constitutional.<sup>5</sup> The 1971 limited entry amendment only allows the state to limit entry into the commercial fishing user groups only as necessary to achieve certain conservation and socio-economic goals. The amendment did not authorize the state to grant other kinds of exclusive rights or special privileges of fishery that were not directly related to limiting access to a commercial fishing user group. Because a dedicated access privilege system

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

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

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

<sup>5</sup> The common use section "mandates that limited entry be achieved through the least possible 'privatization' of the common resource." Ostrosky, dissent, 667 P.2d at 1196 (emphasis added).

Senator Tom Wagoner  
March 11, 2005  
Page 4

also allocates rights to a specific portion of the harvest of a fishery resource to individuals, it goes beyond limiting access to the right to fish.

The Alaska Supreme Court has not established precise criteria for determining whether a limited entry system impinges too much on the open access, equal rights, and no exclusive rights of fishery provisions of the Alaska Constitution though the Ostrosky and Johns cases provide some guidance.<sup>6</sup> The court may find that a dedicated access privilege system is consistent with the limited entry amendment to the constitution, though there is a significant possibility that the court may find that a dedicated access privilege system impinges too much on the other "equal access" provisions of the Alaska Constitution and thus, is not permissible under the Alaska Constitution.

If the Alaska Supreme Court finds that the Alaska Constitution does not allow a state dedicated access privilege system then the Alaska constitution must be further amended to specifically authorize a dedicated access privilege system.

If I may be of further assistance, please advise.

GU:jad  
05-154.jad

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<sup>6</sup> The Grunert case, which currently is awaiting a written decision by the Alaska Supreme Court, may also provide additional guidance. Grunert v. State of Alaska, Alaska Supreme Court case no. S-10841.

"emailed to define" 3/14/05  
9 AM

Request for legislative legal opinion Re: SB 113  
3/11/2005

### Question

In light of the issues addressed in the Background section below, would a dedicated access privilege program under SB 113, that is well constructed to meet the requirements of Article VIII, Section 15, of the Alaska Constitution and Johns v. CFEC, 758 P.2d 1256 (Alaska 1988), be likely to withstand a legal challenge under Article VIII of the Alaska Constitution?

### Background

#### (1) Alaska's Existing License Limitation System

Although relatively severe in its operation, Alaska's existing License limitation program has been upheld in the face of serious challenges under the State Constitution. *See, for example, State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983).

A primary goal of Alaska's existing license limitation program is to issue no more than the maximum number of permits in a limited fishery. AS 16.43.270. To avoid issuing more than the maximum number of permits, all eligible applicants are ranked against one and other based on their dependence on the fishery. At the end of the process, permanent entry permits are issued to applicants only at or above a particular point level. Conversely, all other applicants one (1) or more points below the issuance level are denied. AS 16.43.260 and AS 16.43.270. Thus, under the existing license limitation system, issuing and denying permits is a severe all or nothing determination: an applicant is either finally in or out of the fishery.

In order to meet the requirements of Alaska's constitution, and, in particular, Article VIII, Section 15:

a limited entry system should impinge as little as possible on the open fishery clauses consistent with the constitutional purposes of limited entry, namely prevention of economic distress to fishermen and resource conservation.

Johns v. CFEC, 758 P.2d 1256, 1266 (Alaska 1988) [citation omitted].

Additionally, Article VIII of Alaska's Constitution is better served when more participants can be included in a fishery rather than fewer. As the Alaska Supreme Court observed in State v. Hebert, 803 P.2d 863, 867 (Alaska 1990):

Further, we note that the regulation, if anything, furthers the interest underlying [Article VIII,] section 3's common use mandate. The board found that the number of fishermen probably would increase under the super exclusive use regulation, thus making it possible for more rather than fewer people to participate in commercial herring fishing.

Despite these operational and constitutional constraints, the state has successfully defended its existing license limitation program when it adopted the lowest possible maximum number for a limited fishery to serve conservation needs. Johns v. CFEC, 758 P.2d 1256 (Alaska 1988); Simpson v. State, CFEC, 101 P.3d 605 (Alaska 2004).

(2) A Well-Constructed Dedicated Access Privilege Program under SB 113

In contrast, a dedicated access privilege program under SB 113 would not be tied to a particular maximum number and many applicants could be included based upon their levels of past participation, without jeopardizing conservation of the fishery. Qualified participants under a dedicated access privilege program who receive a dedicated access privilege may continue to participate in the fishery, but their individual share of the fishery would be limited to the level authorized by their dedicated access privilege.

In a fishery managed by a quota (in contrast to a salmon fishery managed by escapement), such dedicated access privileges would likely serve conservation better than a license limitation program. For example, the state's license limitation program failed to meet the conservation needs of the Northern Southeast inside sablefish fishery. Simpson v. State, CFEC, 101 P.3d 605 (Alaska 2004).

In contrast, under a dedicated access privilege program, management could better ensure guideline harvest levels for the fishery were not exceeded. There would no longer be an incentive to race for fish nor the need to maintain a short season to contain the fishing effort. Therefore, the risk of exceeding the fishery's overall quota would be substantially reduced (as compared to a license limitation fishery).

In the absence of an incentive to race competing fishermen for the fish, the season in a dedicated access privilege fishery could likely be extended. An extended, more orderly season would create an opportunity for fishermen to improve the quality of their catch and allow for more flexibility in determining when to fish in consideration of available prices and markets. In short, a dedicated access privilege would likely improve the economic value of the fishery for participants. Additionally, a more orderly and less frantic season would likely contribute to safety by creating the flexibility for participants to wait for good weather and take more time for safety precautions.

Not being tied to a maximum number of units of gear, a dedicated access privilege program would likely allow more individual participants to participate in a fishery than a license limitation program in the same fishery. SB 113 requires the state to establish measures in a dedicated access privilege program to ensure such a fishery does not become too exclusive by allowing too much consolidation of shares. In addition to placing limits on consolidation of shares, the state could--if necessary to assure constitutionality--issue additional shares for a fishery. Similarly, if transferability were chosen as the means to ensure new entrants have access to a dedicated access privilege fishery, a portion of the shares could be restricted to individual smaller blocks of shares that could only be sold as individual blocks designed to ensure entry level opportunities in the fishery. Finally, a share system allows for the incremental purchase of small quantities or shares (in contrast to the all or nothing purchase of a license in a license limitation system.)

### Summary

In short, as applied to a fishery managed by quota, SB 113 would likely authorize the establishment of a limited access program that would be more inclusive of fishermen, better insure reasonable rates of economic return, and better serve conservation than the state's existing license limitation program.

# LEGAL SERVICES

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#2 read  
3-14-05 3 pm

## MEMORANDUM

March 14, 2005

**SUBJECT:** SB 113; Constitutionality of dedicated access privileges system for the Gulf of Alaska groundfish fishery (Work Order No. 24-LS0306L)

**TO:** Senator Tom Wagoner  
Attn: Mary Jackson

**FROM:** George Utermohle  
Legislative Counsel

You have asked whether "a dedicated access privilege program under SB 113, that is well constructed to meet the requirements of Article VIII, Section 15, of the Alaska Constitution . . . , be likely to with stand a legal challenge under Article VIII of the Alaska Constitution?" This memorandum is supplemental to my memorandum to you regarding the constitutionality of SB 113, dated March 14, 2005.

As background to your question, you have stated that: A dedicated access privilege program would not be tied to a maximum number of participants in a fishery. Qualified applicants for a dedicated access privilege would continue to participate in a fishery to the extent their dedicated access privilege. A dedicated access privilege would more likely serve conservation than would a license limitation program. A dedicated access privilege system would serve to prevent a race for fish and the need to maintain a short season to contain fishing effort and would likely improve the economic value of the fishery for participants. A dedicated access privilege program would likely allow more individuals to participate in a fishery. And, under a dedicated access privilege program consolidation of fishing privileges can be regulated and entry level opportunities in the fishery can be ensured.

Each of the points that you mention are consistent with statements the Alaska Supreme Court has made in regard to what are essential elements of a constitutional limited entry system for commercial fisheries. Each of those points would probably be viewed by the courts as supporting a entry limitation system authorized under art. VIII, sec. 15, of the Alaska Constitution and thus, would strengthen the argument that a dedicated access privilege program would be a constitutional means of regulating entry in Alaska commercial fisheries.

However, as I stated in my previous memorandum, the Alaska Supreme Court may not reach the issue of whether a dedicated access privilege program is a constitutional means



Senator Tom Wagoner  
March 14, 2005  
Page 2

of limiting entry into a fishery until the court has first resolved whether dedicated access privileges create an exclusive right or special privilege of fishery that is prohibited by the first sentence of art. VIII, sec. 15, of the Alaska Constitution.<sup>1</sup> If the Alaska Supreme Court finds that a dedicated access privilege is not a prohibited exclusive right or special privilege of fishery, then each of the points that you set out would provide support for the constitutionality of a dedicated access privilege program.

Because the precise nature of the dedicated access privilege program actually adopted by the Alaska Commercial Fisheries Entry Commission, in consultation with the Board of Fisheries, is unknown and unknowable, a more specific discussion of the constitutionality of such a system is not possible.

If I may be of further assistance, please advise.

GU:jad  
05-156.jad

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<sup>1</sup> Article VIII, Sec. 15, Constitution of the State of Alaska states (emphasis added):

**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.

Revised Legal Memorandum #1  
(revised March 17, 2005)

There are 2 technical revisions in this memorandum.

One is at the top of the page three – the revision says “1972 limited entry amendment” and the previous said “1971 limited entry amendment”.

The second is deletion of footnote #6 – referencing the Grunert case. That case was just resolved and the decision has no application to this bill.

Mary Jackson,  
3-18-05

# LEGAL SERVICES

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## MEMORANDUM

March 14, 2005  
(Revised March 17, 2005)

**SUBJECT:** Constitutionality of SB 113, an Act relating to entry into and management of Gulf of Alaska groundfish fisheries (Work Order No. 23-LS0306L)

**TO:** Senator Tom Wagoner  
Attn: Mary Jackson

**FROM:** George Utermohle   
Legislative Counsel

You have asked whether SB 113, relating to entry into and management of Gulf of Alaska groundfish fisheries, is constitutional. This memorandum is in response to your question.

SB 113 would authorize the Alaska Commercial Fisheries Entry Commission to establish a dedicated access privilege system for the Gulf of Alaska groundfish fisheries. A dedicated access privilege system is a form of commercial fisheries limited entry. The precise nature of the dedicated access privilege system will be determined by the commission at a later time. The key element of a dedicated access privilege system is the allocation of a privilege to harvest a specified portion of the allowable harvest of a groundfish species. It is the allocation of a privilege to an individual to harvest a specified portion of the allowable harvest that may raise significant issues under provisions of the Alaska Constitution.

An entry permit issued under AS 16.43 is a grant of an exclusive right of fishery that was specifically authorized when the "no exclusive right of fishery" section of the Alaska Constitution was amended in 1972 to allow a limited entry system to control entry into the state's commercial fisheries.

**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.

Article VIII, sec. 15, Constitution of the State of Alaska (emphasis added).

The second sentence of the no exclusive right of fishery section would seem to permit any form of limited entry, including a dedicated access privilege system, that would promote resource conservation or prevent economic distress among fishermen and those who depend on fishermen for their livelihood. However, the 1972 amendment must be construed in light of the specific language of the amendment and within the context of the common use section (art. VIII, sec. 3)<sup>1</sup>, uniform application section (art. VIII, sec. 17),<sup>2</sup> and the equal protection clause (art. I, sec. 1)<sup>3</sup> of the Alaska Constitution, and the first sentence of the no exclusive right of fishery section.

The Alaska Supreme Court recognizes that limited entry into commercial fisheries is inconsistent with the common use section of the Alaska Constitution. State v. Ostrosky, 667 P.2d 1184, 1189 (Alaska 1983). The court also recognizes that the inconsistency between limited entry and the common use section, equal protection clause, or other provisions of the Alaska Constitution was largely cured by the 1972 limited entry amendment. Id. at 1189 - 90. However, the court also found that the 1972 limited entry amendment did not justify every possible limited entry scheme that fostered resource conservation and promoted economic security for fishermen: "whatever system of limited entry is imposed must be one which, consistent with a feasible limited entry system, entails the least possible impingement on the common use reservation and on the no exclusive right of fishery clause." Id. at 1191 (emphasis added); see also, Johns v. Commercial Fisheries Entry Commission, 758 P.2d 1256, 1266 (Alaska 1988). Thus, the

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<sup>1</sup> Article VIII, sec. 3, Constitution of the State of Alaska states:

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

<sup>2</sup> Article VIII, sec. 17, Constitution of the State of Alaska states:

**Uniform Application.** Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

<sup>3</sup> Article I, sec. 1, Constitution of the State of Alaska states:

**Inherent Rights.** This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

1972 limited entry amendment must be construed narrowly so as to not unreasonably impinge on common use any more than is necessary to regulate entry into fisheries. Johns, 758 P.2d at 1266. For that reason, the state's current limited entry system only limits the right to participate in a commercial fishing user group. Those persons who obtain an entry permit have the right to participate in commercial fishing in common with all other permit holders. Each permit holder is free to catch as much of the available resource as possible given the permit holder's expertise, equipment, and dedication to fishing. No permit holder has a private right, interest, or expectancy to any portion of a fishery resource.

The direct allocation of fishery resources to individual fishermen, based on the fishermen's catch history in the fishery, impinges on the common use section and "no exclusive right of fishery" section. Under the common use doctrine, fishery resources are "owned" or held by the state in trust for all citizens of the state until the resource is lawfully reduced to physical possession of the fisherman. Isakson v. Rickey, 550 P.2d 359, 367 (Alaska 1976). Until the fish is in the physical possession of the fisherman, the fisherman has no claim to the fish. The creation of private interests in a fishery resource before the resource is caught by a fisherman seems to be the kind of special privilege that the common use and "no exclusive right of fishery" sections were intended to prohibit.<sup>4</sup> The 1972 limited entry amendment of the "no exclusive right of fishery" section did not make special privileges, such as the proposed dedicated access privileges, constitutional.<sup>5</sup> The 1972 limited entry amendment only allows the state to limit entry into the commercial fishing user groups only as necessary to achieve certain conservation and socio-economic goals. The amendment did not authorize the state to grant other kinds of exclusive rights or special privileges of fishery that were not directly related to limiting access to a commercial fishing user group. Because a dedicated access privilege system

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

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

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

<sup>5</sup> The common use section "mandates that limited entry be achieved through the least possible 'privatization' of the common resource." Ostrosky, dissent, 667 P.2d at 1196 (emphasis added).

Senator Tom Wagoner  
March 14, 2005 (Revised 3/17/05)  
Page 4

also allocates rights to a specific portion of the harvest of a fishery resource to individuals, it goes beyond limiting access to the right to fish.

The Alaska Supreme Court has not established precise criteria for determining whether a limited entry system impinges too much on the open access, equal rights, and no exclusive rights of fishery provisions of the Alaska Constitution though the Ostrosky and Johns cases provide some guidance. The court may find that a dedicated access privilege system is consistent with the limited entry amendment to the constitution, though there is a significant possibility that the court may find that a dedicated access privilege system impinges too much on the other "equal access" provisions of the Alaska Constitution and thus, is not permissible under the Alaska Constitution.

If the Alaska Supreme Court finds that the Alaska Constitution does not allow a state dedicated access privilege system then the Alaska constitution must be further amended to specifically authorize a dedicated access privilege system.

If I may be of further assistance, please advise.

GU:jad  
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