

The Hon. Carl Rosier, Commissioner
Department of Fish & Game

April 22, 1991

663-91-0352

465-3600

Prospective assistant
management biologist
whose spouse holds a CFEC
permit:
Executive Ethics Act
(AS 39.52)

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Warren Wiley, former designated ethics supervisor for the Department of Fish and Game, in a February 13, 1991, memorandum requested our evaluation under AS 39.52.240 of his preliminary conclusion that the following situation raises questions under the Executive Branch Ethics Act, AS 39.52. A current department employee has applied for an assistant management biologist position. The employee's spouse holds a commercial fisheries entry permit for the fishery over which the position would exercise some responsibility. An ethics problem is presented if the assistant biologist may influence either the current or future earning power of the relevant permits or their current or future market value. If an ethics problem is present, the position's duties should be reassigned; if that cannot be done, the position should not be offered to the applicant.

The attached August 30, 1989, memorandum from our office to Warren Wiley, 1989 Inf. Opin. Att'y Gen. (August 30; 663-90-0073), summarizes the relevant provisions of the Executive Branch Ethics Act in a situation very similar to the one presented here. In that situation, an individual holding a limited entry permit was seeking a position as a management biologist with jurisdiction over the fishery in which the permit authorized participation. The individual had suggested that he or she could refrain from fishing the permit during the period of employment in that position. However, we agreed with Warren Wiley's conclusion that more was required, since the actions of the individual occupying that position could ultimately influence the value of the permit on the open market or the value of fishing the permit in the future. 1/ One factor playing a significant part in our

1/ Your department had explained in its memorandum of inquiry that the position would be "very involved in all commercial fisheries management and research in the area and privy to information upon which management decisions are made for all of the area's fisheries," and that the individual filling the position would play "an important role in formulating the area's in-season management plans and play a major role in determining both long- and short-term management regimes." 1989 Inf. Opin.

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analysis was the small size of the fishery in question, with only 35 issued permits.

In contrast, the situation posed to us in Warren Wiley's February 13, 1991, memorandum involves (1) an assistant management biologist position, rather than a management biologist position, and (2) a fishery having more than 900 issued permits, rather than 35. 2/

In the situation in the attached opinion, the fact that the fishery involved was so small -- 35 permits -- combined with the duties of the management biologist in question with respect to the fishery led us to conclude that under AS 39.52.210(b)(1) the position's duties should be reassigned to cure the potential violation. If that were not feasible, and the individual were not willing to divest him or herself of the permit, the department would be correct in not hiring that individual for that position.

To provide guidance in the situation presented here, we can turn to the basic distinction made by the Executive Branch Ethics Act "between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interest that are substantial and material," AS 39.52.110(a)(3). With regard to the fishery itself, the more than 900 authorized participants may support viewing this potential conflict as one which is diffused under AS 39.52.110(b)(1); in other words, it may be a situation in which there is "no substantial impropriety" because the financial interest is possessed by a "large class of persons." However, the large number of permits in the fishery

Att'y Gen. at 2 (Aug. 30; 663-90-0073).

2/ The fact that in this case the spouse holds the permit, rather than the applicant, is not a relevant difference, since the Executive Branch Ethics Act defines a "financial interest" which can trigger an inquiry under the Act as "an interest held by a public officer or an immediate family member" in specified financial situations. AS 39.52.960(9). Thus, if a permit held by the applicant would pose a problem, the same permit held by the applicant's spouse would also pose a problem. Warren Wiley transmitted to us an inquiry about whether a divorce would solve any problem posed under the Executive Branch Ethics Act. A divorce for purposes of changing the legal status of the couple only, rather than really reflecting some change in their living situation, would not be useful, since a regular member of the public officer's household is included as an "immediate family member" under the statute. AS 39.52.960(11).

should be weighed against the influence the assistant management biologist position could exercise over the fishery. 3/

If the official actions (including recommendations 4/) of the assistant biologist could directly and materially affect the yearly success or market value of the relevant permits, either now or in the future, on balance we believe corrective action should be taken, despite the size of the fishery. Should you reach that conclusion, one option under AS 39.52.210(b)(1) is that duties be reassigned. 5/ On the other hand, if the assistant biologist exercises minimal discretion in carrying out responsibilities, and would have minor or speculative influence over permit values, then the large size of the fishery could mean that there would be "no substantial impropriety" in offering the applicant the position, should he or she be otherwise qualified.

If you would like our office to review the determination you make, based on the actions that someone in this position could take and the influence the position could thus have on the fishery,

3/ Please note that the question is not what influence the department believes that the particular applicant in question here would choose to exercise, but what influence could be exercised. As noted in the attached opinion, our office has previously determined that the Executive Branch Ethics Act prohibitions apply not only to actual conflicts, but to potential conflicts.

4/ The kinds of "official action" that must be examined to determine whether the position could affect permit market values or yearly success include "a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction." AS 39.52.960(14). We understand that the position in question exercises emergency order authority over the fishery. However, also to be considered is the discretion the position has in exercising that authority, and the ability of the individual filling this position to influence the formulation of in-season management plans, as well as long- or short-term management regimes.

5/ We understand that Warren Wiley concluded that reassignment was not feasible. If you concur with that assessment, then the position should not be offered to the applicant under the circumstances.

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combined with the fact that the fishery is relatively large,
please feel free to contact us.

LIS:nml

attachment

cc w/attch.: Bonnie Harris
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