

August 18, 2004

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Dear Paul,

Below is the summary of research of the Sea Grant Law Center regarding the question you posed to us about whether California Assembly Bill 1805 would survive a court challenge if passed. The following information is intended as advisory research only and does not constitute legal representation of California Sea Grant by the National Sea Grant Law Center. It represents our interpretation of the relevant laws and cases.

Assembly Bill (AB) 1805, introduced by Assembly Member Lloyd Levine, would ban the possession, purchase or sale of farm-raised salmon in California to protect the marine environment and the health of California consumers. A copy of AB 1805, as amended, is attached. Although the bill does not ban salmon farming, the ban on the sale and possession of the fish would effectively shut down the farms. Because of the enormous economic impact of such a ban on the economy of California and the Pacific Northwest, I suspect a court challenge would promptly follow the passage of AB 1805.

"Unless restricted by the federal or state Constitution, the Legislature has any power which it chooses to exercise." (7 Witkin Summary of California Law, Constitutional Law § 51). Furthermore, the State of California has the "right to protect its citizens and has wide discretion when it exercises its police power for this purpose." (*In re Quinn*, 35 Cal. App. 3d 473, 386 (Cal. Ct. App. 1973)). The term "police power" refers to a legislature's power to pass laws necessary to protect the health, safety and general welfare of its citizens. "When the state sees fit to regulate upon a matter which is within its police power, its authority over the subject is plenary and can be reviewed by the courts only to the extent of determining whether the regulation is reasonable." (*Sandstrom v. California Horse Racing Board*, 31 Cal. 2d 401, 407-8 (Cal. 1948)). In California, courts will only invalidate a legislative enactment based on the police power if it is "palpably unreasonable, arbitrary or capricious, having no tendency to promote the public welfare, safety, morals, or general welfare." (*Justesen's Food Stores, Inc. v. Tulare*, 43 Cal. App. 2d 616, 621 (Cal. Ct. App. 1941)).

A ban on farmed salmon is probably a valid exercise of the state's police power. First, the state would be acting to protect the public from PCBs, the marine environment from pollution, and native salmon from nonnative escapees and disease. The scope of the police power clearly embraces actions taken for public health, consumer protection, and environmental reasons. Because AB 1805 falls within the state's police power, challengers would bear the high burden of proving that the ban is

unreasonable.

While there is little scientific evidence that PCB levels in farmed salmon pose a threat to human health, salmon aquaculture can have serious impacts on the marine environment. Fish waste and excess feed sink and degrade bottom habitat; antifoulant paints contain copper and other chemicals that can leach into the water; antibiotics, used to treat diseases and parasites, drift outside the treatment area; and escapees threaten the genetic diversity of wild salmon populations. The actual and perceived environmental impacts of salmon farming have caused major problems for the industry. In 2003, for example, a U.S. District Judge in Maine ordered Atlantic Salmon of Maine and Stolt Sea Farm to cease operations of their salmon aquaculture pens due to concerns about the environmental impacts of their operations. (*U.S. Public Interest Research Group v. Atlantic Salmon of Maine*, 257 F. Supp. 2d 407 (ME 2003)). Proper permitting and best management practices can lessen many of these impacts, but the state is free to take additional steps to protect the marine environment.

When the police power is used to protect the natural environment, "the test of legislation enacted thereunder is whether there *is any reasonable basis* from which the Legislature could determine that the regulations it enacts are 'necessary or desirable for its intended purpose.'" (*The People v. K. Sakai Co.*, 128 Cal. Rptr. 536, 540 (Cal. Ct. App. 1976) (emphasis added)). The legislature does not need to choose the best course - only a reasonable course. Because the full environmental impacts of aquaculture operations are as yet unknown, the California legislature could reasonably choose to take action to protect human health and the marine environment. A ban might not make the most sense from an economic standpoint, but from an environmental perspective it would solve many problems.

The legislative power of the state of California is extremely broad, bounded only by the federal and state constitutions. One of the main constitutional limitations is the due process clause contained in both the U.S. and the California Constitutions. Article 1, Section 7 of the California Constitution states that "a person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

"In the exercise of its police power a Legislature does not violate due process so long as an enactment is procedurally fair and reasonably related to a proper legislative goal." (*Hale v. Morgan*, 22 Cal. 3d 388, 398 (Cal. 1978)). If the California legislature follows the proper procedures in enacting the ban on farmed salmon, challengers must prove that the ban is in no way reasonably related to the protection of human health and the marine environment. "No valid objection to the constitutionality of a statute under the due process clause properly arises if it is reasonably related to promoting the public health, safety, comfort, and welfare, and if the means adopted to accomplish that promotion are reasonably appropriate to the purpose." (*Higgins v. Santa Monica*, 62 Cal. 2d 24, 31 (Cal. 1964)).

The supporters of AB 1805 would argue that a ban on farmed salmon is reasonably related to the protection of public health and the marine environment because a total ban is the only means currently available to prevent escapees and degradation of

the benthic environment. Furthermore, farmed salmon may, according to some researchers, have higher levels of PCBs. A ban would prevent California citizens from consuming contaminated fish. Challengers would probably argue that the ban is unreasonable because not all farmed salmon pose a threat to wild populations and the scientific evidence relating to increased levels of PCBs in farmed salmon is dubious.

Because of the broad power of the California Legislature to enact laws to protect the general welfare, AB 1805 would be upheld unless a court determines that the ban is an *unreasonable* means to accomplish the Legislature's stated purposes of environmental and consumer protection. If the Legislature's main goal is to protect the environment from the impacts of salmon farming, it would seem more reasonable to ban salmon farming. However, a ban on the sale and possession of farmed salmon is probably reasonable enough, as it effectively prohibits salmon farming. Additionally, a complete ban might be considered unreasonable because existing environmental laws could be strengthened to reduce water pollution and eliminate the farming of non-native salmon species. State agencies could also lower the tolerance levels for PCBs in fish to prevent contaminated fish from reaching the market. However, a state is free to implement a new regulatory regime if the current regime is inadequate to achieve its goals.

In California, there is an interesting line of cases that indicate judicial disfavor of complete bans. "However laudable its purpose, the exercise of police power may not extend to total prohibition of activity not otherwise unlawful." (*People ex rel. Younger v. County of El Dorado*, 96 Cal. App. 3d 403, 406 (Cal. Ct. App. 1979)). In *Frost v. City of Los Angeles* (Cal. 1919), the California Supreme Court overturned a local ordinance that banned the sale of water that was less pure than the purest available. The court held that the ordinance was an unreasonable restriction on a lawful occupation because it required suppliers of safe water to cease supplying water until they obtained the best quality water available. In *San Diego Tuberculosis Association v. East San Diego* (Cal. 1921), the California Supreme Court again overturned a complete ban, this time on the operation of hospitals treating infectious diseases within city limits. The Supreme Court stated that such a prohibition could only be justified "on the ground that such a hospital, no matter how well conducted, is a menace to the public peace, morals, health, or comfort." The court found that the hospitals did not pose a threat to the public and the ban was unreasonable. A challenger relying on this line of cases might succeed in overturning the ban, because it would be difficult to prove that a salmon farm, no matter how well conducted, is a menace to public health or the environment.

While it is highly unlikely that AB 1805 will pass, salmon farmers and other opponents of the ban will face an uphill battle to overturn the ban if it does. Courts are reluctant to interfere with the legislative branch unless legislative enactments are clearly unreasonable or violate constitutional provisions. Whether or not a ban on the possession and sale of farmed salmon is clearly unreasonable would, in reality, depend on which court hears the matter and which sides' evidence and arguments are more persuasive.

Thanks for approaching us with your question. Please contact us if you have additional questions regarding the above

information.

Sincerely,

Stephanie Showalter
Director, Sea Grant Law Center