



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**JOHN L. HILL
ATTORNEY GENERAL**

March 21, 1977

The Honorable Bill Sullivant
Chairman
Environmental Affairs Committee
House of Representatives
Austin, Texas 78701

Letter Advisory No. 122

Re: Constitutionality of
H.B. 294, which would
prohibit persons from
being licensed both as
commercial fishermen and
fish farmers.

Dear Chairman Sullivant:

You have requested our opinion regarding the constitutionality of House Bill 294, presently pending in the 65th Legislature, which would prohibit a person from being licensed both as a commercial fisherman and a fish farmer. House Bill 294 proposes to amend the Parks & Wildlife Code by adding section 48.0021, which would provide:

(a) A person holding a [fish farmer's] license under this chapter is prohibited from being a commercial fisherman or engaging in activity described in Subdivision (1), Section 47.001 of this code.

(b) A person holding a commercial fisherman's license issued under Chapter 47 of this code may not acquire and hold a [fish farmer's] license issued under this chapter.

(c) This section does not prohibit the taking of fish from a private pond.

You ask whether this prohibition against dual licensing would violate the Due Process and Equal Protection Clauses of the Texas and United States Constitutions by establishing a suspect classification.

House Bill 294 prohibits a particular, narrowly-defined set of persons from holding a commercial fisherman's license -- all persons who hold a fish farmer's license. It defines a

similarly specific set of persons who may not hold a fish farmer's license -- those who hold a commercial fisherman's license. In occupational licensing cases, the "rational basis" test, rather than the "strict scrutiny" test, is usually held to apply in determining whether a suspect classification exists. D'Amico v. Board of Medical Examiners, 112 Cal. Rptr. 786, 798 (Cal. 1974); Opinion of the Justices to the House of Representatives, 333 N.E.2d 414, 418 (Mass. 1975). In upholding the validity of a prosecution under the state antitrust laws, the Court of Criminal Appeals in 1939 articulated the standard required by the "rational basis" test:

The question is whether the legislature, in dealing with the economic policy with which the statute is concerned, has adopted a classification which can be said to have no reasonable relation to the promotion of the general welfare [T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Ex parte Tigner, 132 S.W.2d 885, 894 (Tex. Crim. App. 1939). See also San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

You state that the purpose of House Bill 294 is to curtail the practice by which

commercial fishermen using illegal traps are able to obtain licenses as fish farmers and "feed out" illegally-caught fingerlings. By prohibiting dual licensing, H.B. 294 proposes to destroy one ready means by which illegal fishermen are now profiting and thereby ensure that more fingerling fish will be left to grow to maturity in public waters.

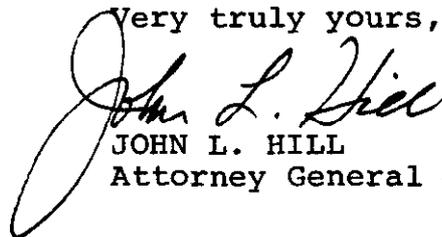
The state is possessed of inherent power to regulate the taking of fish from public waters. So long as such power is reasonably exercised by the Legislature, it is presumed to

be constitutional. Dodgen v. Depuglio, 209 S.W.2d 588, 592-93 (Tex. 1948); Tuttle v. Wood, 35 S.W.2d 1061, 1063 (Tex. Civ. App. -- San Antonio 1930, writ ref'd). We cannot say that the prohibition established by House Bill 294 bears "no reasonable relation to the promotion of the general welfare." Ex parte Tigner, supra at 894. Neither can we say that the classifications created thereby are unreasonable or arbitrary, or that they do not "rest upon some ground of difference having a fair and substantial relation to the object of the legislation." Id. at 894. All persons holding a fish farmer's license are treated alike, as are all persons holding a commercial fisherman's license.

In Thompson v. Calvert, 489 S.W.2d 95 (Tex. 1972), the Supreme Court upheld, over due process and equal protection objections, a statute which prohibited a person licensed as a coin-machine operator from having an interest in a business engaged in selling or serving alcoholic beverages for on-premises consumption. Recently, the Supreme Judicial Court of Massachusetts upheld a statute which prohibited a liquor wholesaler from holding a retailer's license. Declaring that "[t]he right to engage in a particular business is not a fundamental one," the court found a "rational basis for the classifications, one which furthers a legitimate State interest." Opinion of the Justices, supra at 420. A Michigan court upheld a similar statute in Borman's Inc. v. Michigan Liquor Control Commission, 195 N.W.2d 316 (Mich. App. 1972). See also City of New Orleans v. Dukes, 96 S.Ct. 2513 (1976); Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955).

In our opinion, the courts would hold that House Bill 294's prohibition against dual licensing furthers the legitimate state interest of conserving the supply of fish in public waters, that it establishes a reasonable classification of persons subject to the prohibition, and that, as a result, it does not contravene the Due Process and Equal Protection guarantees of the state and federal constitutions.

Very truly yours,



JOHN L. HILL
Attorney General of Texas



DAVID M. KENDALL, First Assistant



C. ROBERT HEATH, Chairman
Opinion Committee

lfd