

MEMORANDUM

State of Alaska

Department of Law

TO: Glenn Haight
Executive Director
Alaska Board of Fisheries

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FILE NO.: 2021200476

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SUBJECT: Department of Law comments
on proposals for the November
30 - December 6 Board of
Fisheries meeting for Prince
William Sound finfish

The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at its November 30 - December 6 Board of Fisheries meeting for Prince William Sound finfish:

Subsistence. For proposals affecting subsistence fisheries the Board should consider whether adoption of the proposed regulation is needed to provide a reasonable opportunity for subsistence uses of the amount of fish reasonably necessary for those uses. “Reasonable opportunity” means an “opportunity as determined by the appropriate board, that allows a subsistence user to participate in a subsistence hunt or fishery that provides a normally diligent participant with a reasonable expectation of success of taking of fish or game.” The Board can base its determination of whether the regulations provide a reasonable opportunity for subsistence uses on amounts of a fish stock that have been established as reasonably necessary for subsistence uses, information pertaining to subsistence harvest data, bag limits, seasons, access, gear necessary to achieve the harvest, and other factors.

Unless it has done so previously, the Board, when considering a proposal that would affect subsistence, should: (1) determine whether the fish stock is in a nonsubsistence area; (2) determine whether the fish stock or portion of the fish stock is customarily and traditionally taken or used for subsistence; (3) determine whether a portion of the fish stock may be harvested consistent with sustained yield; (4) determine the amount reasonably necessary for subsistence uses; (5) adopt regulations to provide a

reasonable opportunity for subsistence uses; and (6) if the harvestable amount is not sufficient to allow for subsistence uses and other consumptive uses, adopt regulations to reduce or eliminate other uses in order to provide a preference and reasonable opportunity for subsistence uses.

If the harvestable amount is insufficient to allow subsistence uses and other consumptive uses, the Board must adopt regulations to reduce or eliminate other uses in order to provide a reasonable opportunity for subsistence uses. If the harvestable portion of the fish stock is not sufficient to provide a reasonable opportunity for all subsistence uses, the Board must eliminate nonsubsistence consumptive uses and distinguish among the subsistence users based on the Tier II criteria. AS 16.05.258(b)(4)(B)(i), (iii). However, the Board may not consider the criteria in clause (ii), proximity of domicile to the fish stock, because it was ruled unconstitutional in *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995) (“The Tier II proximity of the domicile factor violates sections 3, 15, and 17 of article VIII of the Alaska Constitution, because it bars Alaska residents from participating in certain subsistence activities based on where they live.”)

Policy for the management of sustainable salmon fisheries: The Board has adopted a “Policy for the management of sustainable salmon fisheries” at 5 AAC 39.222. Board members should review the policy thoroughly and ensure that the standards outlined in the policy have been considered on the record in any proposal dealing with salmon management. For purposes of the sustainable salmon fisheries policy, the Board has defined sustained yield as: “an average annual yield that results from a level of salmon escapement that can be maintained on a continuing basis; a wide range of average annual yield levels is sustainable; a wide range of annual escapement levels can produce sustained yields.” 5 AAC 39.222(f).

Proposal 5: This proposal seeks to implement an optimal escapement goal. There are three types of escapement goals: sustainable escapement goal (SEG), biological escapement goal (BEG), and optimal escapement goal (OEG). The policy for the management of sustainable salmon fisheries and the policy for statewide salmon escapement goals (5 AAC 39.223) state that BEGs and SEGs, along with sustainable escapement thresholds (SETs), will be determined by the department.

The escapement goal policy and the sustainable salmon fisheries policy give the Board authority to establish OEGs. "Optimal escapement goal" is defined in the sustainable salmon fisheries policy as a specific management objective for salmon escapement that (a) considers biological and allocative factors and may differ from the SEG or BEG, (b) may be expressed as a range with the lower bound above the level of

sustainable escapement threshold, (c) will be sustainable, and (d) will be adopted as a regulation by the board. 5 AAC 39.222(f)(25).

In 5 AAC 39.223(c) the escapement goal policy states that in recognition of its joint responsibilities, and in consultation with the department, the board will:

- (1) take regulatory actions as may be necessary to address allocation issues arising from implementation of a new or modified BEG, SEG, and SET;
- (2) during its regulatory process, review a BEG, SEG, or SET determined by the department and, with the assistance of the department, determine the appropriateness of establishing an optimal escapement goal (OEG); the board will provide an explanation of the reasons for establishing an OEG and provide, to the extent practicable, and with the assistance of the department, an estimate of expected differences in yield of any salmon stock, relative to maximum sustained yield, resulting from implementation of an OEG.

Law has regularly recommended that the Board act consistently with its policy regulations when it considers escapement goal proposals. If the Board chooses to specify a BEG or SEG in regulation, it should explain its reasoning for doing so. Also, while the Board and Department are not confined to using the types of escapement goals defined in the policies, it is best to use defined goals to avoid confusion unless the new goal and the reasons for using it are explained.

Proposal 6: This proposal would require sport and personal use fishermen to report salmon harvest information daily “using an online app.” The department indicates that it would be required to develop a reporting system and increase staffing to compile effort and harvest data that would be collected daily. Because the Board has no administrative, budgeting, or fiscal powers over the Department, any Department concerns about funding for a particular reporting system should be considered before adopting this kind of proposal.

Proposal 7: This proposal would prohibit the charging or paying for guide or transport services in subsistence fisheries. The board may regulate guided fishing and the methods and means utilized by fishing guides while engaged in fishing, but regulating the fees related to lawful guiding or transporting is probably not within the authority of the Board.

Proposals 9, 10, 11, 12, and 13: These proposals would prohibit dipnetting from a boat under various circumstances. Law has consistently advised that the Board has the authority to limit fishing methods and means, including regulations pertaining to the use

of boats and motors while fishing. Regulations that require boats to stay certain distances away from other fishing groups present challenges and must be carefully tailored to ensure uniform enforceability.

Proposal 16: This proposal would prohibit the use of depth or fish finders on boats participating in a fishery. The Board has the authority to limit fishing methods and means, including regulations pertaining to the use of boats and equipment. However, the Board should articulate how such restrictions are reasonably necessary to achieve an allocation or conservation purpose.

Proposals 22 and 23: These proposals would reverse the positive customary and traditional subsistence use determinations for freshwater finfish within the Chitina Subdistrict. The Board made positive C&T findings in 2008. Law has consistently advised that when addressing proposals to revisit previous C&T determinations the Board should first determine whether there was an error in its previous finding, or whether significant new information is now available to support reconsideration of its earlier finding. While in most situations the Board has extremely broad discretion to change fishing regulations, its discretion to change C&T findings is more limited because of its affirmative statutory duty to identify C&T uses of fish and game through factual findings. The Board's previous decision is presumed to be valid and supported by a record that provided a reasonable basis for the factual finding. The adoption process included a certification by the Department of Law that the Board committed no legal errors in its process. Thus, Law recommends that the Board identify an error in the previous C&T determination or significant new information previously unavailable before it reconsiders and reverses the earlier finding.

Proposal 26: This proposal would create a subsistence salmon permit exclusively for tribal members to harvest salmon for subsistence. This proposal would raise significant constitutional concerns if adopted in its current form, as it likely violates the equal protection clause of article I, section 1, the common use clause of article VIII, section 3, and the uniform application clause of article VIII, section 17 of the Alaska Constitution. As explained above, if the harvestable portion of the fish stock is not sufficient to provide a reasonable opportunity for all subsistence uses, the Board must eliminate nonsubsistence consumptive uses and distinguish among the subsistence users based on the Tier II criteria found in AS 16.05.258(b)(4)(B)(i) and (iii).

Proposal 32, 33, 34, 35, 36, and 37: These proposals would change regulations related to retention of rainbow/steelhead trout, Arctic grayling, and lake trout. The Board has adopted a “Policy for the management of sustainable wild trout fisheries” at 5 AAC

75.222, the “Wild Arctic Grayling Management Plan” for the Upper Copper River and Upper Susitna River Area at 5 AAC 52.055, and the “Wild Lake Trout Management Plan” for the Upper Copper River and Upper Susitna River Area at 5 AAC 52.060. Board members should review these policies thoroughly and ensure that the standards outlined in the policies have been considered on the record in any proposal dealing with the identified species. The Board may adopt regulations inconsistent with the policy, but should expressly note when it is doing so and explain its rationale for doing so.

Proposals 54 and 55: Generally, the Department has primary authority over hatchery permitting and associated issues relating to salmon production and cost recovery. *See* AS 16.10.400 - 16.10.430. The legislature has specified that “[e]xcept as expressly provided in AS 16.40.120(e) [authorizing board regulations for the conservation, maintenance and management of species for which an acquisition permit is needed] and 16.40.130 [authorizing regulations for the importation of aquatic plants or shellfish for stock], the Board of Fisheries may not adopt regulations or take action regarding the issuance, denial, or conditioning of a permit under AS 16.40.100 or AS 16.40.120, the construction or operation of a farm or hatchery required to have a permit under AS 16.40.100, or a harvest with a permit issued under AS 16.40.120.” AS 16.05.251(f). Law has advised that the Board is not authorized to take action that effectively revokes or prevents issuance of a permit. *See* 1997 Inf. Op. Att’y Gen. (Nov. 6; 661-98-0127). However, the legislature specified in AS 16.10.440(b) that the Board may, after the commissioner issues a permit for a hatchery, “amend by regulation ... the terms of the permit relating to the source and number of salmon eggs, the harvest of fish by hatchery operators, and the specific locations designated by the department for harvest.”

Proposal 61 and 62: These proposals request the Board authorize the commissioner to issue a commissioner’s permit to sea cucumbers in Registration Area E, subject to conditions to be place in the permit. The commissioner already has this authority under 5 AAC 38.062(a) which states that “Unless otherwise specified in 5 AAC 03 - 5 AAC 39, marine invertebrates ... may be taken only under the authority of a permit issued by the commissioner or the commissioner's authorized designee.” Moreover, the commissioner has statutory authority “to authorize the holder of an interim-use permit under AS 16.43 to engage on an experimental basis in commercial taking of a fishery resource with vessel, gear, and techniques not presently qualifying for licensing under this chapter in conformity with standards established by the Alaska Commercial Fisheries Entry Commission.” AS 16.05.050(a)(9).