

Submitted at the request of Board Chair Carlson Van-Dort by Alaska Department of Fish and Game

Date March 15, 2022

RC 086, submitted by Keenan Sanderson, Ketchikan Indian Community (KIC), requests replacing “shellfish and plants” with gumboots, Abalone, sea urchins, all bivalves excluding geoducks, limpets, lady slippers for Proposal 170.

The following is provided in response to regulatory clarification requested by Chair Van-Dort.

Background of customary and traditional use determinations (C&T)

Customary and traditional uses of fish and game populations are protected by state law, and the Board of Fisheries must provide for those uses before providing for other uses such as commercial or recreational uses. To decide if a fish stock or game population is associated with customary and traditional uses, the boards must consider eight criteria that describe customary and traditional uses (5 AAC 99.010) The boards rely on data about customary and traditional uses provided by the Division of Subsistence, as well as other data, to help guide them in making positive or negative customary and traditional use findings.

- Criterion 1: Length and consistency of use
- Criterion 2: Seasonality
- Criterion 3: Methods and means of harvest
- Criterion 4: Geographic areas
- Criterion 5: Means of handling, preparing, preserving, and storing
- Criterion 6: Intergenerational transmission of knowledge, skills, values, and lore
- Criterion 7: Distribution and exchange
- Criterion 8: Diversity of resources in an area; economic, cultural, social, and nutritional elements

Timeline: C&T for shellfish in Southeastern Alaska-Yakutat Area

The majority of findings were made in 1989 with follow up findings made in the 1990s and early 2000s. The following is a brief timeline:

1989: C&T determinations were made by community. These included Yakutat, Klukwan, Hoonah, Angoon, Kake, Saxman, Kasaan, Craig, Klawock, Hydaburg, Haines

1990: Supreme Court case *McDowell v. State of Alaska* which changed the legal framework for state subsistence law because board C&T findings based in part on rural residency was deemed unconstitutional.

1991: Division of Subsistence develops Worksheets for Findings of Customary and Traditional Uses of Fish and Shellfish in Southeast Alaska for use by the Alaska Board of Fisheries. January 1991 (Revised 1/11/91) to reflect findings by regulatory districts instead of by communities. C&T worksheets were for the following species:

- abalone

- crab
- scallops
- sea cucumber
- shrimp
- miscellaneous shellfish including:
 - clams
 - cockles
 - mussels
 - chitons (referred to in RC 086 as gumboots and lady slippers)
 - limpets
 - periwinkles
 - octopus
 - squid
 - sea urchin

1993: The BOF conducted a consistency review in response to the McDowell case and reauthorized subsistence regulations for the Yakutat and Southeast areas. The new regulations did not include reference to communities and did not permit subsistence fishing in non-subsistence areas.

1995 – Positive C&T for shellfish except shrimp, king, and tanner crab found for Sumner Strait (waters of District 5 north of a line from Point St. Albans to Cape Pole, in the waters of Section 6-A west of a line from Macnamara Point to Mitchell Point, and in waters of Section 6-B west of the longitude of Macnamara Point).

1997 or 1998 – Positive C&T finding for Dungeness, shrimp, abalone, sea cucumbers, chitons, cockles, clams excluding geoducks was made for District 13 (the year this occurred is currently under review to confirm)

2003 – Positive finding for shellfish except king and tanner in Districts 7 and 8.

Amount Necessary for Subsistence (ANS): There are currently no ANS findings for shellfish in Southeastern Alaska-Yakutat Area.

Current C&T findings for Subsistence use of Shellfish in Southeastern Alaska-Yakutat Area

There are five broad types of C&T findings. These vary by area. (See map on page 3)

These are:

1. No C&T finding
2. C&T finding for shellfish excluding shrimp, king crab, Tanner crab
3. C&T finding for shellfish except king crab, Tanner crab
4. C&T finding for Dungeness crab, shrimp, abalone, sea cucumbers, gumboots, cockles, and clams except geoducks in District 13
5. C&T finding for shellfish in Yakutat District

There is currently no statutory definition for shellfish.

Noncommercial Harvest of Aquatic Plants

AS 16.05.258 directs the board to identify fish stocks and game populations that are customarily and traditionally taken or used for subsistence. Aquatic plants are not within the definition of “fish”, defined in regulation as any species of aquatic finfish, invertebrate, or amphibian, in any stage of its life cycle, found in or introduced into the state, although aquatic plants do qualify as a “fishery resource”. Because aquatic plants are not included in AS 16.05.258(a), preferential subsistence findings and subsistence regulations cannot be made for aquatic plants. However, AS 16.05.251(a)(10) *Regulations of the Board of Fisheries* grants the board the authority to establish “seasons, areas, quotas, and methods of harvest for aquatic plants”. In 2007, a department-generated proposal regarding noncommercial harvest of aquatic plants outside of nonsubsistence areas came before the board. The Department of Law recommended the board repeal 5 AAC 01.713 *Subsistence use of aquatic plants in Southeastern Alaska Area* and amend Chapter 37 *Aquatic Plants* to allow year-round noncommercial harvest of aquatic plants and eliminate the permit requirement for noncommercial harvest of aquatic plants outside of the nonsubsistence areas. After those board actions, Chapter 37 provided for the noncommercial harvest of aquatic plants outside of the nonsubsistence areas, but there were no personal use regulations in Chapter 77 regarding the harvest of aquatic plants, except that they could only occur under regulations in the chapter. This made the noncommercial harvest of aquatic plants in the nonsubsistence areas unlawful. To address this oversight, in 2018 as the result of a department proposal, the board adopted the Southeast Alaska personal use regulation 5AAC 77.679 *Personal use aquatic plant fishery*, providing for the harvest of aquatic plants under personal use regulations, with no season and some possession limits in the Ketchikan and Juneau nonsubsistence areas.

Southeast Alaska Shellfish Customary and Traditional Use Areas

Please see 5 AAC 02.108 and 5 AAC 99.015 (1)(2) for detailed descriptions of legal boundaries

For general reference only

