

## BEFORE THE ALASKA BOARD OF FISHERIES

## FOR THE 2022 BRISTOL BAY MEETING AT ANCHORAGE

**Opposition to Proposal 41 That Seeks An Additional 100 Feet Seaward For the Outside Markers In 5 AAC 06.331(n)(2, 3, and 4)****Current Regulation Provides For Flexibility To Move In Or Out Whenever The Mean High Tide Mark Moves In Or Out To Accommodate Shoreline Changes Including Erosion. Current Shore Lease Regulation also Provides A Good Time Table To Make Necessary Adjustments With Its Ten Year Extension Requirement For Shore Leases (11 AAC 64.391).**

Current regulation provides for flexibility to move in or out whenever the mean high tide mark moves in or out to accommodate shoreline changes including erosion. The flexibility in current regulation allows for irregular shorelines as well.

The proposal says, “Ekuk Beach is experiencing significant erosion. Portions of Ekuk Beach were surveyed in 1983 and then again in 2021 and there has been a loss of 146 feet or more in many places since 1983. The erosion is accruing from downstream from the Range Marker on Ekuk Beach.” Proposal, p. 35. However, current regulations provide flexibility to move in or out as necessary. For example, one 2008 shore lease diagram shows the mean high water line for 1983 and an approximate mean high water line for 2007. The majority of the site leases in the diagram use the 2007 mean high water line, and their net ends are within feet of the 2007 mean high water line. The two sites still on the 1983 line also could easily have been moved inward after 2008 to an updated mean high water line. See Attachment A.<sup>1</sup> This shows that the sites can be moved in to comply with the current regulation, and that there has been ample time to do it.

In addition, current regulation (11 AAC 64.391) provides a good time table to make adjustments with its 10 year extension requirement for shore site leases. At the time of the 10 year renewal, lease sites can adjust net ends including anchors and do so in an orderly, staggered manner to avoid everybody having to move at once.

**Contrary to the Proposal’s claim, subsections (n)(3 and 4) provide certainty.**

Contrary to the Proposal’s claim, subsections (n)(3 and 4) provide certainty. The proposal claims, “The current system of setting setnet boundaries, using the mean high tide line and minus 3-foot tide line as outer limits, introduces unnecessary uncertainty and variability. The mean high tide line can change significantly with every wind storm. ,,,” Proposal, p. 35.

First, the Alaska Supreme Court in Seater v. Estate of Seater, 461 P.3d 421, n. 18 (Alaska 2020) discussed the definition of “mean high tide line,”

11 Alaska Administrative Code (AAC) 53.900(14) (2020) defines mean high water as the “tidal datum plane of the average of all the high tides, as would be established by the National Geodetic Survey, at any place subject to tidal influence,” and 11 AAC 53.900(15) defines mean high water line as “the intersection of the datum plane of mean high water with shore.” Federal law defines mean high water line as the average point reached by high tides over 18.6 years “established by survey with reference to the available tidal datum.” 33 CFR Section 329.12(a)(2) (2019).

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<sup>1</sup> In Attachment A, I deleted the names of most site holders out of respect for their privacy. The information is public, however.

Under no circumstance, as I understand it, does the mean high water line change significantly with every wind storm under these definitions relied upon for the orderly use of land and water.

Second, subsections 3 and 4 use only a mean high tide mark from First Creek to Etolin Point. There is no minus 3 foot tide mark provision in these two subsections 3 and 4 from First Creek to Etolin Point.

Third, under the current regulation, set net sites related to this proposal have shore fishery diagrams that allow for the determination of the mean high water mark. A diagram starts from a monument with coordinates for latitude and longitude, then shoots a bearing to the set net site, and then determines the distance in feet on the bearing to the end of the net,<sup>2</sup> which is often times on the high water line or else within feet of the high water line, to come up with a mean high water mark. Then one only needs to measure the distance out, 700 or 1000 feet, respectively, from the mean high tide mark. Thus, current regulation provides certainty.

For example, co-sponsor Nicholas Dowie's set net shore fishery lease dated April 30, 2016 has a monument with a latitude of 58°46'55.332" N and longitude 158°28'34.711" W., the bearing is 110 38' 47" to the high water line on the site, and the distance from the monument on the bearing to the end of the net on the high water line for the mean high water mark is 1,180.05 feet. See Attachment B.

### **Contrary to the proposal's claim, subsection 2 also provides certainty.**

Contrary to the proposal's claim, subsection 2 also provides certainty. Subsection 2 provides that a net must be within 500 feet from the mean high tide mark, or the minus three foot low tide mark, whichever location is closer to the mean high tide mark. For those set netters who come within the 500 feet provision, please see my comments for the section immediately above. It is unknown how many set netters come under the 500 feet provision or the minus three foot tide provision (which is contained in only subsection 2).

For those who come within the minus three foot low tide mark, I assume that they get out the tide book and go to their sites when the tide is at or near a minus three foot tide to determine the outer marker for their net. This should provide reasonable certainty.

### **The Proposal for Subsections 3 and 4 Acknowledges That Those Current Subsections Work And Provide Certainty.**

The proposal necessarily acknowledges that the current subsections work and provide certainty by adopting virtually identical language as the current regulation. The proposal for subsections 3 and 4 is identical to the current regulation, except for the addition of 100 feet to the distance in each subsection.

### **The Proposal Necessarily Acknowledges That Using the "Mean High Tide Mark" Works and Provides Certainty.**

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<sup>2</sup> Regulation 11 AAC 64.260(c)(10) requires a shore fishery lease application to include in part ..... the site's distance and bearing from the shoreward end of the net or anchor point to a known fixed point, such as a ... monument ...)

The proposal necessarily acknowledges that the phrase “Mean High Tide Mark” works and provides certainty. Though the proposal says the “mean high tide line” causes uncertainty under current regulation (p. 35 ), the proposal continues to use the phrase “mean high tide mark” used in current regulation in subsections 2 through 4. It is noted that the current regulation and the proposal use the word “mark”, not line or boundary.

**The Proposal Wants To Take 100 Feet of Traditional Drift Net Fishing Grounds For Between 14-16 Miles From Clark’s Point Dock to Etolin Point.**

The proposal wants to take 100 feet of traditional drift fishing grounds for between 14-16 miles from Clark’s Point dock to Etolin Point. I traced the distance using the ruler function on Google map and came up with 16.47 miles (See Attachment C), but some distance should be subtracted for the area from 58\_ 50.10' N. lat., 158\_ 33.52' W. long. to 58\_ 49.29' N. lat., 158\_ 33.10' W. long. between Clark’s Point and Ekuk. I ask that the BOF find a more precise way to measure the distance from the Clark’s Point dock to Etolin Point.

**Contrary to the Proposal’s Claim, This Proposal Is Allocative.**

Contrary to the proposal’s claim (p. 36), this proposal is allocative. The ADF&G stated, regarding a proposal dealing with subsection 2 from 2015<sup>3</sup>, that “This proposal also reallocates drift gillnet area to set gillnets.”, and that “However this could allow for the interception of fish currently harvested in a different statistical area ....”<sup>4</sup>

Similarly, this proposal reallocates drift gillnet area to set gillnets. The fish run largely on shore in the Ekuk area. Drift boats fish legally off these set net sites over a thousand times a year, typically towing legally to the end of the outer buoys of the set nets to maximize their drift fish catches. I’ve fished hundreds of times in the Ekuk area in the past two decades. The proposal’s claim about erosion appears to encompass the set net area from the Range line down to the low end of the Ekuk bluff that the proposal wants to capture to enlarge its fishing grounds, instead of complying with current regulation. This proposal overall wants to exclude drift boats from fishing in another 100 feet of traditional drift waters for about 14-16 miles.

Additionally, allowing an extra 100 feet of set net fishing grounds from Clark’s Point dock to Etolin Point could allow for the interception of fish currently harvested in a different statistical area because of the set net and drift net fishing done upstream of the Clark’s Point dock.

**Contrary to the Proposal’s claim of imperilment (p. 36), Ekuk Beach Is Very Profitable.**

Contrary to the Proposal’s claim of imperilment (p. 36), Ekuk Beach is very profitable. It is not imperiled. This proposal is an effort to block drift fishing in another 100 feet of traditional drift fishing grounds for the purpose of increased profits on top of an already lucrative fishery. I’m sure

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<sup>3</sup> BOF 2015 Proposal 63 is clearly distinguishable from the present Proposal 41. Proposal 63 claimed the lack of sufficient water to fish and inadequate fishing water/time because the mud flats over the years filled in. There is also not a significant amount of drift fishing that occurs in the area adjacent to this mud flat. In contrast, Proposal 41 does not claim insufficient water/time to fish. Indeed, much of the Ekuk Beach from at least the Range line to the low end of the Ekuk bluff almost always has set nets in the water. In addition, Proposal 41 claims uncertainty with markers and erosion that in essence enlarge its area. There is also a huge amount of drift fishing that occurs in the area adjacent to the Ekuk/Flounder flats area.

<sup>4</sup> ADF&G Staff comments to Proposal 63 in 2015.

that every set netter will move their outside anchoring devices out to take advantage of the 100 additional feet under this proposal.

The proposal says “This proposal is not allocative, it addresses these two problems which imperil the current setnet fleet on Ekuk Beach.” Proposal, p. 36. Ekuk Beach, however, is not imperiled. The average pounds for the period from 2018-2022 for statistical area 325-34 Ekuk/Flounder Flats is 6,309,616 pounds.<sup>5</sup> The average pounds per set net tract over the same period is 77,896 pounds.<sup>6</sup> In Bristol Bay, individual permit holders can, and do, hold up to two tracts.<sup>7</sup> Spouses can, and do, hold one or more tracts as well.

### **The Proposal Will Do What It Says It Doesn’t Want To Do—Result in the Relocation of Anchoring Devices.**

The proposal will do what it says it doesn’t want to do—result in the relocation of anchoring devices. The proposal says, “Applying the tidal boundaries currently in regulation, and/or the effects of erosion, could require relocation of the outer anchorage devices of some setnet sites, which is a major endeavor, is not commonly attempted, and is often not possible during a season.” Proposal, p. 36. But common sense tells us that under the proposal, every set netter will relocate his/her anchoring device by moving out to take advantage of the 100 additional feet for the purpose of increasing profits. Any set netter currently outside even the 100 additional feet marker will be required move in to comply with the proposed regulation. The proposal will do what it says it doesn’t want to do.

### **The Board Should Not Reward Illegal Fishing and Penalize Legal Fishing.**

Under the current regulation, each set netter is either inside the outer marker, on the outer marker, or over the outer marker. If they are inside the marker, they are okay. If they are on the marker, they are okay. In other words, the current regulation is working, and there is no need to relocate any anchor.

If a setnetter is outside the outer marker, the person should comply with the regulation. Apparently, no set netter is past an outside marker. The proposal never says anybody “is” past an outside marker. The proposal never says any set netter has been cited for violating this regulation. The proposal, however, says, “Applying the tidal boundaries currently in regulation, and/or the effects of erosion, could require relocation of the outer anchoring devices of some setnet sites, ...”. Proposal, p. 36. In other words, possibly an undetermined number of set netters might relocate their anchors. One has to guess and speculate about the reality of how many set netters are past their outside markers. The proposal should be required to provide specifics without the need for speculation, conjecture, and surmise.

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<sup>5</sup> See Attachment D obtained from the Alaska Department of Fish and Game for set net total catch numbers and total pounds for the years from 2018 to 2022 for the statistical area 325-34 Ekuk/Flounder Flats area (not including the Clark’s Point statistical area). The figure was calculated by adding the pounds for the years 2018-2022 and dividing by 5 to equal 6,309,616 pounds.

<sup>6</sup> Attachment A. This figure was calculated as follows: 6,309, 616 pounds divided by 81 (approximate number of set net tracts) equals 77,896 pounds/tract. The number of set net tracts in statistical area 325-34 is approximately 81, based on count on page 2 of Attachment A. Please confirm whether this number is correct with the DNR Shore Fishery Lease Program.

<sup>7</sup> CFEC Bristol Bay Salmon Fisheries, 1975-2021, Reid Johnson and Brad Robbins, (November 2022), p. 30. (stating “In Bristol Bay, the DNR shore fishery program allows a permit holder to maintain up to two tracts per permit.”)

However, the proposal suggests that there is a possibility an undetermined number of setnetters might be past outside markers by application of the current regulation. The Board should not reward illegal fishing by giving 100 feet of additional fishing grounds to every set net site holder for roughly 14-16 miles from Clark's Point dock to Etolin Point. Drift fishermen should not be penalized by having traditional drift fishing grounds taken away from them because of illegal fishing either.

**Gravel Should Not Be Removed From The Ekuk Village Beach.**


Gravel should not be removed from the Ekuk Village beach. I saw a front end loader remove gravel from the Ekuk beach at the village while I was commercial fishing on August 2, 2016. The front end loader would get a bucket load of gravel from the beach, bring it back behind a big tan building apparently for a new construction project, and come back and do it again. It's a self-fulfilling prophecy: you build by the beach, gravel is removed from the beach for projects, and there is an erosion problem caused in part by removal of beach gravel. Attachment E is a picture taken by me.

**As a Surveyor Who Prepared Diagrams For At Least 14 Shore Fishery Leases At Ekuk Beach, Mr. John P. O'Connor's Multiple Financial Interests Raise Serious Questions About Any Survey Information He Gives The Board To Add 100 Feet To The Seaward Markers of 5 AAC 06.331 (n) (2-4).**

As a surveyor who prepared diagrams for at least 14 shore fishery leases for Ekuk beach, Co-Sponsor Mr. John P. O'Connor's multiple financial interests raise serious questions about any survey information he gives the Board to add 100 feet to the distance for the seaward markers of the current regulation. Mr. O'Connor is a professional surveyor and prepared diagrams for at least 14 shore fisheries leases for the Ekuk Beach. He set nets at Ekuk beach, and his wife and extended family set net there as well. His multiple financial interests raise serious question about survey information he gives the Board to add 100 feet to the distance for the seaward markers of 5 AAC 06.331 (n) (2-4).

In fair disclosure to the Board, I've lived at Dillingham since 1992. I've drift fished predominantly the Nushagak district for two decades. I'm also a lawyer, but I am submitting this comment in my capacity as an individual commercial fisherman only. I thank you for your time and consideration.

Dated: November 30, 2022

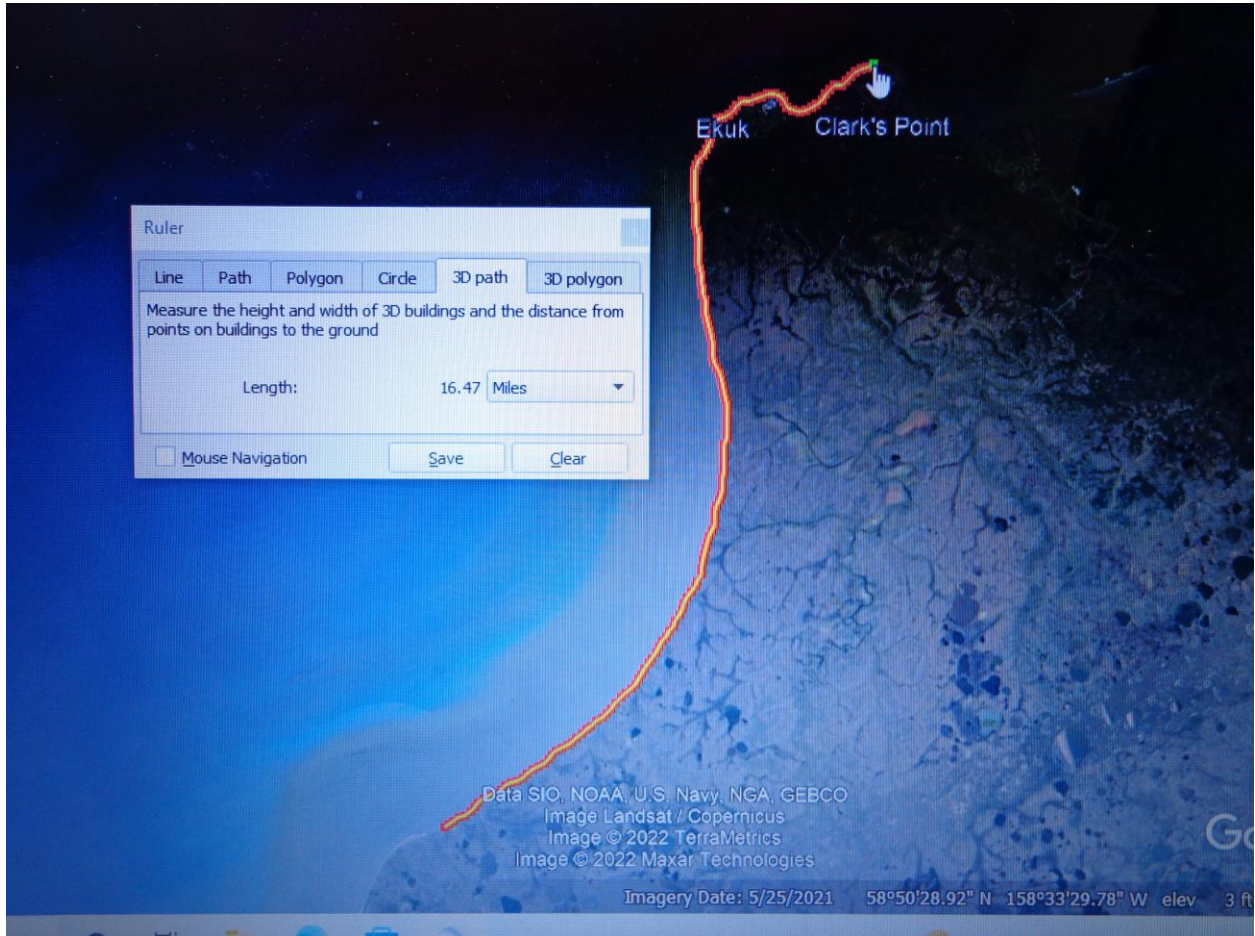
  
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Attachment C





## Attachment D

Date of Landing Year	Stat Area	Number Of Fish (estimated)	Landed Weight (lbs)	Confidentiality Processor Count (Informational)	Confidentiality Permit Count (Informational)	Confidentiality Vessel Count (Informational)
2018	32534	1,785,064	8,492,293	7	113	NA
2019	32534	1,587,337	8,170,485	6	122	NA
2020	32534	968,184	4,556,519	10	115	NA
2021	32534	872,224	3,861,756	6	115	NA
2022	32534	1,296,192	6,467,027	5	115	NA

Attachment E

