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Commercial Fisheries Entry Commission

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To: Märit Carlson-Van Dort, Chair
Alaska Board of Fisheries

Date: February 27, 2025

Thru: Glenn Haight, Chair
Rick Green, Commissioner
Commercial Fisheries Entry Commission

Subject: CFEC Comments on
Proposals 298, 313, and
316

From: Reid Johnson, Research Section Lead
Commercial Fisheries Entry Commission

The Commercial Fisheries Entry Commission (CFEC, Commission) has reviewed proposals 298, 313, and 316, and submits these comments to be a part of the public process for the Alaska Board of Fisheries (BOF, Board). As a reminder, the CFEC issues permits for fisheries that have been defined by the BOF. The Limited Entry Act defines a fishery as "...a specific fishery resource in a specific administrative area with a specific type of gear..."¹. On occasion, the Commission may attach restrictions to permits, such as vessel length or the amount of gear operated. Generally, the Board defines the specific fisheries and the CFEC reacts accordingly, however, when currently limited entry fisheries are involved, the CFEC reviews proposals to determine how that may interact with the Limited Entry Act.

The comments in this memo are intended to provide the Board with the Commission's thought on implementation of the changes that are proposed for BOF action, elaborate on any nexus that those proposals may have with provision in the Limited Entry Act, and apprise of the possible, subsequent actions that the CFEC may have to take if certain proposals are passed.

¹ Alaska Statute § 16.473.990(4)

Proposal 298

Proposal 298 seeks to implement a new gear type (pot gear) in the Kodiak scallop fishery. Under CFEC regulations, all commercial fisheries in the State of Alaska are defined by species, gear type, and administrative area, with CFEC issuing permits in accordance with the classifications. If Proposal 298 is adopted, CFEC will be required to establish a new permit type to accommodate the proposed gear type.

Proposal 313

Proposal 313 seeks to allow beach seine as an alternative gear type for the Cook Inlet set gillnet salmon fishery, specifically in the East Side Set Net area. Passage of this proposal will require subsequent action by the CFEC to append “Beach Seine” to S04H permits. Beach seines are not currently a gear type used in Cook Inlet; therefore, there are no other direct gear conflicts with other operators in this administrative area. Should the Board adopt beach seine as an allowable gear type for the S04H permits, the CFEC will review the subject and respond accordingly.

Proposal 316

Before further comments, it should be noted that none of the potential follow-up actions that the Commission may need to take should this proposal be adopted should, in any way, dissuade the Board from consideration of how to establish this fishery.

As discussed previously, and as it was the impetus to form the Herring Revitalization Committee, the economic values in herring fisheries across the state have changed dramatically and it is in the Board’s authority and role to address this change. The Limited Entry Act provides:

Section 16.43.950. Applications of regulation of Board of Fisheries.

Nothing in this chapter limits the power of the Board of Fisheries, including the power to determine legal types of gear and the power to establish size limitations or other uniform restrictions applying to a certain type of gear. Holders of interim-use permits or entry permits issued under this chapter are subject to all regulations adopted by the Board of Fisheries

Proposal 316 seeks to modify the Kodiak Sac Roe fishery by removing the term “Sac Roe” from the regulation and replace it with “Herring”. A similar proposal (Proposal 57) was discussed at the Kodiak BOF meeting in January 2024, however, the current version differs from that proposal in that it creates “A” and “B” seasons for the new fishery.

If the Board adopts Proposal 316, the Commission's necessary actions will depend on the final regulation language, subject to subsequent legal analysis. The following are possible outcomes and notations regarding potential modifications.

- As currently written, Proposal 316 appears to create a new “herring” fishery in the Kodiak administrative area. Upon initial review, this new fishery may be considered as a new, open access fishery, which would indicate that new entrants to herring fisheries in Kodiak may be able to participate.
- As currently written, the proposal removes the “sac roe” fishery or management plan. While there would no longer be a defined “sac roe” fishery, there would still be “sac roe” limited entry permit holders. Understanding how this new fishery functions with new entrants during a fishing season that was previously conducted by limited entry permit holders is an important question.
- Proposal 316 contains a potential conflict with the existing Kodiak herring food and bait limited entry fishery. The CFEC recognizes the original Board generated proposal was careful to set season dates around the existing herring “food and bait” fishery, but whether this is adequate to accommodate conflicts with existing permit holders, is an important legal question for discussion. For instance, season dates are not the criteria with which fisheries are limited, which may mean that participants in a new “herring” fishery may not be allowed to participate in the harvest of herring for food or bait, regardless of the dates in which they are legally able to take fish, as this could potentially conflict with provisions for the current Kodiak food and bait limited entry permits under 20 AAC 05.822.
- One potential modification to the proposal could be eliminating all references in regulation to “sac roe” and “food and bait”. Should the Board pursue this option, further legal analysis will help identify if the existing limited entry permit holders have standing. In Vanek v. Board of Fisheries (2008), the Court held that Board actions which proved deleterious to the interest of limited entry permit holder did not create a compensatory damage to the permit holders². This may well be the outcome if all references to product forms are removed from the regulations and existing limited entry permit holders no longer have a fishery management plan.
- Prior to the Board's acceptance of this proposal, the CFEC Was preparing to establish optimum numbers for the purse seine/gillnet and trawl permits in the Kodiak herring “food and bait” fishery. If

² *Vanek v. Board of Fisheries* 196 P.3d 283 (Alaska 2008)

the Boards does not remove “food and bait” from 5 AAC 27.535, and the aforementioned conflict between this new “herring” fishery and the existing “food and bait” fishery persists, the CFEC could revise its optimum number based on new guideline harvest levels (GHL) and issue additional purse seine/gillnet permits into the fishery. If the Board does not pass Proposal 316 in some form, the CFEC will reengage in its effort to add more permits to the existing limited entry Kodiak herring food and bait fishery.

- Should the Board create a new, open access herring fishery, and should the Alaska Department of Fish and Game (ADF&G) indicate management concerns, please be reminded that the Commission may establish a moratorium³ for the fishery if petitioned by ADF&G, following consultation and approval by the Board⁴.
- The question of gear type across the Kodiak herring fisheries is one that should also be discussed. The CFEC issues permits based on the combination of resource code, gear type code, and administrative area code, and would note that ADF&G has expressed concerns regarding trawl as a gear type in this fishery as it pertains to the overexploitation in areas with low GHL, if this gear type is unrestricted. It may be worth considering which gear types should remain allowable in this fishery as changes are being discussed.

Given the uncertain passage of any final language and additional legal analysis, the Commission’s comments on this proposal are less than definitive. The urgency to increase opportunity in the “food and bait” fishery is understandable. However, the nature of the fisheries involved and the current regulations regarding limitation mark for a very complex set of circumstances that may merit special attention and extra cooperation between the Board and the Commission in order to create a streamlined regulation project that will result in the most benefits for Alaska’s commercial fishermen. The Commission will act as quickly as possible if, and however, the board determines to advance this proposal

If you have any questions or need further information, please contact the CFEC research section at your convenience at reid.johnson@alaska.gov, (907) 717-6512.

³ Alaska Statute § 16.43.225

⁴ Alaska Statute § 16.05.251(g)