

MEMORANDUM

State of Alaska Department of Law

TO: Kristy Tibbles
Executive Director
Alaska Board of Game

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SUBJECT: February 2018
Central/Southwest Region
Board of Game meeting

GENERAL COMMENTS

In general, ethics disclosures: Before staff reports begin on any new agenda item, or, if preferred, at the very beginning of the meeting, Ethics Act disclosures and determinations must be made under AS 39.52.

In general, record-making: It is very important that Board members carefully explain and clearly summarize on the record the reasons for their actions and the grounds upon which the actions are based. The Alaska Supreme Court has stressed the importance of a clear record to facilitate the courts in determining that the Board's actions are within its authority and are reasonable. A clear record also assists the public in understanding the Board's rationale. If Board members summarize the reasons for their actions before they vote, it will help establish the necessary record.

In considering each proposal, and the specific requirements that apply in some cases, such as with the subsistence law, it is important that the Board thoroughly discuss and summarize on the record the basis and reasons for its actions. Consistency with past approaches is another important point for discussion. If a particular action does not appear to be consistent, Board members should discuss their reasons for a different approach.

The Alaska Administrative Procedure Act requires that State agencies, including the Board of Game, "[w]hen considering the factual, substantive, and other relevant matter, ... pay special attention to the cost to private persons of the proposed regulatory action." AS 44.62.210(a). This requirement to pay special attention to costs means, at a minimum, that the Board should address any information presented about costs, or explicitly state that no such information was presented, during deliberation of any proposal likely to be adopted. In our view, this requirement does not go so far as to mandate that the Board conduct an independent investigation of potential costs, nor does it require that cost factor into the Board's decision more than, for example, conservation

concerns might. However, it does require the Board to address and “pay special attention to” costs relevant to each regulation adopted.

In general, written findings: If any issue is already in court, or is controversial enough that you believe it might result in litigation, or if it is complex enough that findings may be useful to the public, the Department, or the Board in the future, it is important that the Board draft and adopt written findings explaining its decisions. From time to time, the Department of Law will recommend that written findings be adopted, in order to better defend the Board’s action. Such recommendations should be carefully considered, as a refusal to adopt findings, in these circumstances, could mean that the Board gets subjected to judicial oversight and second-guessing which might have been avoided. The Alaska Supreme Court has stressed the importance of an adequate decisional document, or written finding, to a determination that the Board has acted within its authority and rationally in adopting regulations, and has deferred to such findings in the past.

In general, subsistence: For each proposal the Board should consider whether it involves or affects identified subsistence uses of the game population or sub-population in question. If action on a proposal would affect a subsistence use, the Board must be sure that the regulations provide a reasonable opportunity for the subsistence uses, unless sustained yield would be jeopardized. If the Board has not previously done so, it should first determine whether the game population is subject to customary and traditional uses for subsistence and what amount of the harvestable portion, if any, is reasonably necessary for those uses. *See* 5 AAC 99.025 for current findings on customary and traditional uses and amounts reasonably necessary for subsistence uses. The current law requires that the Board have considered at least four issues in implementing the preference:

- (1) Identify game populations or portions of populations customarily and traditionally taken or used for subsistence; *see* 8 criteria at 5 AAC 99.010(b);
- (2) determine whether a portion of the game population may be harvested consistent with sustained yield;
- (3) determine the amount of the harvestable portion reasonably necessary for subsistence uses; and
- (4) adopt regulations to provide a reasonable opportunity for subsistence uses.

Reasonable opportunity is defined to mean “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.” AS 16.05.258(f). It is not to be construed as a guarantee of success.

The amount of the harvestable portion of the game population that is reasonably necessary for subsistence uses will depend largely on the amount of the game population used for subsistence historically and the number of subsistence users expected to participate. This may require the Board to determine which users have been taking game for subsistence purposes, and which ones have not. Once the Board has determined the amount reasonably necessary for subsistence uses, the Board should by regulation provide an opportunity that allows the predicted number of normally diligent participants a reasonable expectation of success in taking the subject game. The Board may base its determination of reasonable opportunity on all relevant information including past subsistence harvest levels of the game population in the specific area and the bag limits, seasons, access provisions, and means and methods necessary to achieve those harvests, or on comparable information from similar areas.

If the harvestable portion of the game population is not sufficient to provide for subsistence uses and any other consumptive uses, the Board is required to eliminate non-subsistence uses in order to provide a reasonable opportunity for subsistence uses. If the harvestable portion of the game population is still not sufficient to provide a reasonable opportunity for all subsistence uses, the Board is required to eliminate non-subsistence consumptive uses and distinguish among the subsistence users based on the following Tier II criteria:

- (1) The customary and direct dependence on the game population by the subsistence user for human consumption as a mainstay of livelihood; and
- (2) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated. AS 16.05.258.

In general, intensive management: Under AS 16.05.255 (e), (f) and (g), the Board should assure itself that the steps outlined below have been followed when acting on proposals dealing with ungulate populations.

First - Determine whether the **ungulate** population is **important for high levels of human consumptive use**. The Board has already made many of these determinations. *See* 5 AAC 92.108. However, these past findings do not preclude new findings, especially if based on new information.

- If so, then subsequent intensive management analysis may be required.
- If not, then no further intensive management analysis is required.

Second - Is the ungulate population **depleted** or will the Board be **significantly reducing the taking** of the population? See 5AAC 92.106(5) for the Board's current definition of "significant" as it relates to intensive management.

The Board must determine whether depletion or reduction of productivity, or Board action, is likely to cause a significant reduction in harvest.

- If either is true, then subsequent intensive management analysis is required.
- If not, then further intensive management analysis is not required.

Third - Is intensive management appropriate?

(a) If the population is depleted, has the Board found that consumptive use of the population is a preferred use? Note that the Legislature has already found that "providing for high levels of harvest for human consumption in accordance with the sustained yield principle is the highest and best use of identified big game prey populations in most areas of the State ..." In the rare cases where consumptive use is not a preferred use, then the Board need not adopt intensive management regulations.

(b) If consumptive uses are preferred, and the population is depleted or reduced in productivity so that the result may be a significant reduction in harvest, the Board must consider whether enhancement of abundance or productivity is feasibly achievable using recognized and prudent active management techniques. At this point, the Board will need information from the Department about available recognized management techniques, including feasibility. If enhancement is feasibly achievable, then the Board must adopt intensive management regulations.

(c) If the Board will be significantly reducing the taking of the population, then it must adopt, or schedule for adoption at its next meeting, regulations that provide for intensive management *unless*:

1. Intensive management would be:
 - A. Ineffective based on scientific information;
 - B. Inappropriate due to land ownership patterns; or
 - C. Against the best interests of subsistence users;

Or

2. The Board declares that a biological emergency exists and takes immediate action to protect and maintain the population and also schedules for adoption those regulations necessary to restore the population.

Comments on Individual Proposals

Proposals 56 through 59 and 67B were deferred from the November 2017 Statewide meeting:

Proposal 56: See Proposal 98.

Proposal 59: This proposal would amend 5 AAC 92.072 and 92.070 to require all customary and traditional uses as eligibility criteria for all Tier II and community subsistence harvest permit applications.

It is unclear what constitutes “all customary and traditional uses.” “Customary and traditional” is defined in statute to mean

the non-commercial, long-term, and consistent taking of, use of, and reliance upon fish or game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time taking into consideration the availability of the fish or game.¹

To the extent this proposal includes nonconsumptive uses, the Board does not have the authority to use nonconsumptive factors in adopting a regulation for discriminating between users when a game population is at a Tier II level.

For any game population that is not at a Tier II level, including a community subsistence hunt, the Board cannot adopt regulations that discriminate between users; all Alaskans are eligible to participate.

Palmer area:

Proposal 85: This proposal would amend 5 AAC 85.045 to lengthen the resident season for moose in 16B Remainder and replace certain hunts (DM540, YM541, and RM574) with an August 20 to September 30 season for “any bulls” for residents. The Board has established a positive customary and traditional finding for moose in portions of Unit 16B, and has established amounts reasonably necessary for subsistence. The Board should consider sustained yield of the moose population and potential impacts on subsistence uses.

¹ AS 16.05.940(a)(7).

Glennallen area:

Proposal 91: This proposal would amend 5 AAC 99.025, to modify ANS for caribou and moose in Unit 13.

The Board may, in its discretion, revisit and amend the regulation to adjust the ANS. However, the language in the proposal [from Ken Manning] suggests that the ANS for caribou in Unit 13 is invalid and must be changed, but that is not correct. The Alaska Supreme Court upheld the current ANS, ruling against Mr. Manning, in *Manning v. State*, 315 P.3d 530 (Alaska 2015), *cert denied*. The Court held that the ANS established by the Board of Game did not violate the Alaska Constitution and was reasonable. It was not manipulated to achieve a predetermined outcome, but was supported by considerable evidence in the record. The Board took “a hard look at the salient problems and . . . genuinely engaged in reasoned decision making.”

In that case Mr. Manning also alleged the Board’s regulations improperly granted a racial preference, but the Court found this claim had no merit. Although his proposal suggests that the current regulations grant a racial preference, it should be noted that the Alaska Supreme Court did not agree.

Proposal 98: (Also Proposal 56 deferred from the Statewide meeting held in November 2017) This proposal would amend 5 AAC 92.072 for all community subsistence hunts statewide.

Currently any community or group of at least 25 people may submit an application to participate. AS 16.05.330 authorizes the Board of Game to adopt regulations “for issuance and expiration of subsistence permits for areas, villages, communities, groups, or individuals as needed for authorizing, regulating, and monitoring the subsistence harvest of” game. The proposal would eliminate the word “group” and define “community” as

“a group **of 25 or more individuals** [OF PEOPLE] linked by a common interest in, and participation in **a consistent pattern of noncommercial taking, use, and reliance on a wide diversity of subsistence resources in** [,] an **identified** area [AND THE WILDLIFE POPULATIONS IN THAT AREA,] that **provides substantial economic, cultural or social, and nutritional elements of the subsistence way of life of the community and its members.**”

The proposal would delete the word “resident” so that a member of a community need not reside near another member of the “community” as defined. It should be noted, however, that only an Alaska resident is eligible to participate in a community subsistence hunt. Although not all Alaskans participate in a subsistence lifestyle, all

Alaskans, urban or rural, are eligible to participate in subsistence hunts, including community subsistence hunts.²

The Department of Law has consistently advised that using scoring criteria to discriminate between, and eliminate, applicants for a Tier I hunt is impermissible.³ In addition, subsistence uses cannot be constitutionally limited to members of communities that historically practiced subsistence hunting and fishing.⁴ Any group of 25 or more persons who commit to follow the identified pattern of use is eligible to participate. Information from the required administrator reports and voluntary household reports may be useful for management purposes, but cannot be used to score or eliminate users.

In addition, delegating authority to the department to establish enforceable permit conditions may violate the requirement that the Administrative Procedure Act “does not allow agencies to circumvent its requirement for promulgating regulations by imposing ‘requirements of substance’ through a permitting process.”⁵

The failure-to-report penalty in subsection (f), for rejecting an application from a community for two years, would be based on the proposed mandatory requirement for a representative of the community to report annually under subsection (c)(3). All members of the community would be subject to the penalty and could not participate in a CSH for two regulatory years.

The Board should consider (1) whether a failure to report penalty should be retained if reporting is not required for all communities, because this would create two

² *Alaska Fish & Wildlife Conservation Fund v. State & Ahtna Tene Nene*, 347 P.3d 97 (Alaska 2015).

³ *Alaska Fish & Wildlife Conservation Fund v. State & Ahtna Tene Nene*, 347 P.3d 97 (Alaska 2015); *State v. Morry*, 836 P.2d 358 (Alaska 1992). Distinctions between users are only authorized at the Tier II level, AS 16.05.258(b)(4)(B).

⁴ *Madison v. Alaska*, 696 P.2d 168 (Alaska 1985); *Alaska Fish & Wildlife Conservation Fund v. State & Ahtna Tene Nene*, 347 P.3d 97 (Alaska 2015).

⁵ *Estrada v. State*, 362 P.3d 1021 (Alaska 2015). The Board of Fisheries adopted a statewide regulation that authorized the department to issue subsistence fishing permits, and provided that the number of fish may not exceed the limits set out in the permit. The Board of Fisheries also adopted a regulation authorizing the department to set possession limits “if resources are limited relative to anticipated harvest levels,” and the department “may not set any possession limit which jeopardizes the sustained yield of a stock.” The Court ruled that the harvest limits in the permits have the “core characteristics of a regulation,” namely, the harvest limits “made specific a statutory requirement, and the limit was used as a tool in dealing with, and indeed criminally prosecuting, the public.” The permit limits could not be enforced because the limits had not been established by regulation under the APA procedures.

classifications of users and only one class would be subject to a potential loss of hunting opportunity, (2) the effect of the penalty in light of the two-year commitment to participate in the CSH and the prohibition on hunting moose and caribou elsewhere, and (3) whether a community's failure to report should result in a penalty preventing any member from participating in a CSH for a period of two years.

The proposal would amend subsection (h) to direct a community representative to require members to observe customary and traditional patterns of use "as that pattern is practiced by the community." The Board should consider whether this provides sufficient clarity, whether a community representative has authority over others within the group or community, and whether this is too subjective to be enforced.

Dillingham area:

Proposal 146: This proposal would amend 5 AAC 85.025 to open a guide-required nonresident drawing hunt for caribou in Unit 17B with a cost of \$1,000 per tag. The tag fee for a nonresident to take a caribou is set by the legislature in AS 16.05.340(a)(15) at \$650, and the Board is not authorized to change this fee.

Misc:

Proposal 165: This proposal would open a moose hunt in Unit 19. The Board has made a positive customary and traditional use finding for moose in portions of Unit 19, and has established an amount reasonably necessary for subsistence. The Board should consider potential effects on subsistence under the statutory guidance found in AS 16.05.258.