

MEMORANDUM

State of Alaska Department of Law

TO:	Kristy Tibbles Executive Director Alaska Board of Game	DATE:	March 7, 2019
		FILE NO.:	2018200698
		TEL. NO.:	269-5232
FROM:	Cheryl Rawls Brooking Assistant Attorney General Natural Resources Section Department of Law	SUBJECT:	March 2019 Southcentral 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

Proposal 88: This proposal would change the boundary of the Skilak Loop Wildlife Management Area, 5 AAC 92.530(6), to the northern shoreline of the Kenai River. The area is jointly managed with the federal government land management agencies. The Board may wish to keep in mind that, if the proposal passes, discharge of weapons would still be prohibited in this area under 11 AAC 20.850.¹

Proposal 90: This proposal would amend 5 AAC 92.530(6) to eliminate season dates and expand the hunt area for the small game youth hunt in the Skilak Loop Wildlife Management Area. The Board may wish to consider possible conflicting federal and state regulations. In July 2017, the Kenai National Wildlife Refuge was directed to review its regulations and a proposed regulation change is expected to be published in the Federal Register, which may or may not affect the youth hunt area. The current U.S. Fish and Wildlife hunting and trapping regulations for the refuge in 50 CFR 36.39(i) provide:

(6) *Hunting and trapping within the Skilak Wildlife Recreation Area.* (i) The Skilak Wildlife Recreation Area is bound by a line beginning at the easternmost junction of the Sterling Highway and the Skilak Loop Road (Mile 58), then due south to the south bank of the Kenai River, then southerly along the south bank of the Kenai River to its confluence with Skilak Lake, then westerly along the north shore of Skilak Lake to Lower Skilak Campground, then northerly along the Lower Skilak campground road and the Skilak Loop Road to its westernmost junction with the Sterling Highway (Mile 75.1), then easterly along the Sterling Highway to the point of origin.

(ii) The Skilak Wildlife Recreation Area (Skilak Loop Management Area) is closed to hunting and trapping, except as provided in paragraphs (i)(6)(iii) and (iv) of this section.

(iii) You may hunt moose only with a permit issued by the Alaska Department of Fish and Game and in accordance with the provisions set forth in paragraph (i)(5) of this section.

¹ **11 AAC 20.850. Use of weapons**

(a) The use and discharge of a weapon for the purpose of lawful hunting or trapping is allowed in the Kenai River Special Management Area only on Skilak Lake and Kenai Lake, except as provided in (b) of this section.

(b) A person may use and discharge a shotgun below Skilak Lake, for the purpose of lawful hunting or trapping, from September 1 to April 30 annually.

(c) Except as provided in (d) of this section, the discharge of any firearm is prohibited within one-half mile of a developed facility or dwelling.

(d) A person may discharge a shotgun using steel shot no larger than size T, 0.2 inches in diameter, at a distance of no less than one-quarter mile from a developed facility or dwelling.

(iv) You may hunt small game in accordance with the provisions set forth in paragraph (i)(5) of this section and:

(A) Using falconry and bow and arrow only from October 1 through March 1; or

(B) If you are a youth hunter 16 years old or younger, who is accompanied by a licensed hunter 18 years old or older who has successfully completed a certified hunter education course (if the youth hunter has not), or by someone born on or before January 1, 1986. Youth hunters must use standard .22 rimfire or shotgun, and may hunt only in that portion of the area west of a line from the access road from the Sterling Highway to Kelly Lake, the Seven Lakes Trail, and the access road from Engineer Lake to Skilak Lake Road, and north of the Skilak Lake Road. The youth hunt occurs during each weekend from November 1 to December 31, including the Friday following Thanksgiving. State of Alaska bag limit regulations apply.

Proposal 93: This proposal would amend 5 AAC 85.030 to increase the bag limit for deer in Unit 8 to five, and the bag limit would be subject to change by emergency order. The Commissioner may issue emergency orders to open or close seasons when circumstances require, but the EO authority in AS 16.05.060 does not extend to changing bag limits. If the board decides to increase the bag limit, the board could authorize a bag limit of “up to” five deer and provide guidance to the department in how to set the bag limit within that range.

Proposal 99: This proposal would amend 5 AAC 92.061 to allocate 90% of Kodiak brown bear drawing permits in Unit 8 to residents. To the extent the proposal suggests it is unconstitutional to allocate 40% to nonresidents, the Department of Law disagrees. The Board has the authority to make allocation decisions.

Proposal 101: This proposal would amend 5 AAC 92.061 to allocate Kodiak brown bear drawing permits to residents who would be required to pay the nonresident brown bear locking tag fee. The Board is authorized to make allocation decisions, but the legislature determines resident and nonresident tag fees, AS 16.05.340.

Proposal 114: This proposal would amend 5 AAC 85.055 to establish a youth drawing hunt for Dall sheep in Unit 14C Aug 1-Aug 5. It would also provide that there would be no shared bag limit for youth sheep hunts, but the Board and department are required by statute to require a sheep to be counted against the bag limits of both the adult and the youth hunter. AS 16.05.255(i).