

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STEPHEN VANEK, ERIK HUEBSCH, )  
IAN PITZMAN, and UNITED COOK )  
INLET DRIFT ASSOCIATION, INC., )  
and COPPER RIVER SEAFOODS, INC.)  
an Alaska corporation, )

Plaintiffs, )

v. )

STATE OF ALASKA, DEPARTMENT )  
OF FISH AND GAME and ALASKA )  
BOARD OF FISHERIES, )

Defendants. )

Case No. 3AN-11-9043 CI

**ORDER ON PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING  
ORDER**

This case is before the Court on expedited consideration of plaintiffs' request for a temporary restraining order to halt the effect of emergency regulations promulgated by the Alaska Board of Fisheries and the Alaska Department of Fish and Game on June 30, 2011. The Court granted expedited consideration of plaintiffs' motion on July 8, and State Defendants filed their opposition to the motion on July 11. The parties, including intervenor Kenai River Sportfishing Association,<sup>1</sup> appeared before the Court on July 12, 2011, for oral argument on plaintiffs' motion. The Court considers the motion and the parties' arguments here.

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<sup>1</sup> The Court granted Kenai River Sportfishing Association's Motion to Intervene prior to oral argument on July 12.

## I. Factual Background

### A. The Regulations

The regulations at issue affect commercial driftnet salmon fishing in the Upper Cook Inlet during the July 9- 31 time period. As set out in the Central District Drift Gillnet Fishery Management Plan<sup>2</sup>, there are six scheduled 12-hour fishing days (Monday and Thursday each week<sup>3</sup>) during this period. Before the Board took emergency action on June 30, 2011, the regulations enacted after the Board's March 2011 meetings<sup>4</sup> limited the fishing period as follows:

(A) from July 9 through July 15,

(i) fishing during the first regular fishing period [July 11] is restricted to the Expanded Kenai and Expanded Kasilof Sections; additional fishing time is allowed only in the Expanded Kenai and Expanded Kasilof Sections of the Upper Subdistrict;

(ii) fishing during the second regular fishing period [July 14] is restricted to the Expanded Kenai and Expanded Kasilof Sections of the Upper Subdistrict and Drift Gillnet Area 1;

(iii) at run strengths greater than 2,300,000 sockeye salmon to the Kenai River, the commissioner may, by emergency order, open one additional 12-hour fishing period in the Expanded Kenai and Expanded Kasilof Sections of the Upper Subdistrict and Drift Gillnet Area 1;

(B) from July 16 through July 31,

(i) at run strengths of less than 2,300,000 sockeye salmon to the Kenai River, fishing during one regular 12-hour fishing period will be restricted to the Expanded Kenai and Expanded Kasilof Sections of the Upper Subdistrict;

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<sup>2</sup> 5 AAC 21.353.

<sup>3</sup> 5 AAC 21.320(b).

<sup>4</sup> The Department had the challenging task of reducing the Board's decision and directives from the February-March meetings to a set of regulations.



(ii) at run strengths of 2,300,000 to 4,600,000 sockeye salmon to the Kenai River, fishing during one regular 12-hour fishing period per week will be restricted to either the Expanded Kenai and Expanded Kasilof Sections of the Upper Subdistrict or Drift Gillnet Area 1, or both;<sup>5</sup>

At the March 2011 meetings, the Board also amended the regulations to include a stated purpose:

(a) The purpose of this management plan is to ensure adequate escapement of salmon into the Northern District drainages and to provide management guidelines to the department. The department shall manage the commercial drift gillnet fishery to minimize the harvest of Northern District and Kenai River coho salmon in order to provide sport and guided sport fishermen a reasonable opportunity to harvest these salmon stocks over the entire run, as measured by the frequency of inriver restrictions.<sup>6</sup>

B. The Board's Emergency Regulations

The Board met again on June 30, 2011 in response to an emergency petition from groups of sport fishermen. The sport fishermen asked the Board to correct codification "errors" and issue emergency regulations, which the Board did. The Board's June 30, 2011 emergency regulatory changes impact three days—one fishing day on July 14 and two fishing days between July 16 and July 31. In addition, the emergency regulations limit the discretion of the Department of Fish and Game ("Department") to open any additional days of commercial fishing. The amended "emergency" regulations provide as follows:

(A) from July 9 through July 15,

(i) fishing during the first regular fishing period [July 11] is restricted to the Expanded Kenai and Expanded Kasilof Sections; additional fishing time is allowed only in the Expanded Kenai and Expanded Kasilof Sections of the Upper Subdistrict;

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<sup>5</sup> 5 AAC 21.353(a)(2).

<sup>6</sup> 5 AAC 21.353(a).

(ii) fishing during the second regular fishing period [July 14] is restricted to the Kenai and Kasilof Sections of the Upper Subdistrict and Drift Gillnet Area 1;

(iii) at run strengths greater than 2,300,000 sockeye salmon to the Kenai River, the commissioner may, by emergency order, open one additional 12-hour fishing period in the Kenai and Kasilof Sections of the Upper Subdistrict and Drift Gillnet Area 1;

(B) from July 16 through July 31,

(i) at run strengths of less than 2,300,000 sockeye salmon to the Kenai River, fishing during one regular 12-hour fishing period will be restricted to the Expanded Kenai and Expanded Kasilof Sections of the Upper Subdistrict;

(ii) at run strengths of 2,300,000 to 4,600,000 sockeye salmon to the Kenai River, fishing during one regular 12-hour fishing period per week will be restricted to either *or both* the Expanded Kenai and Expanded Kasilof Sections of the Upper Subdistrict or Drift Gillnet Area 1;<sup>7</sup>

After the issuance of the emergency regulations on June 30, plaintiff United Cook Inlet Drift Association (“UCIDA”) filed a letter of protest with the Lieutenant Governor. The letter disputed the Board’s declaration of an emergency. UCIDA also contacted the Board’s attorneys regarding a resolution. In the absence of a response from the Lieutenant Governor or of assurances from the Board, UCIDA filed this action. Plaintiffs consist of UCIDA and commercial driftnet fishermen—Stephen Vanek, Erik Huebsch, and Ian Pitzman—as well as Copper River Seafoods, a fish processor.

## II. Legal Analysis

### A. Standard of Review

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<sup>7</sup> 5 AAC 21.353(a)(2) (emphasis added).



Emergency regulations are reviewed in the same way other agency regulations are reviewed; courts presume that a regulation promulgated under the Administrative Procedure Act (“APA”) is both *procedurally* and substantively valid and place the burden of proving otherwise on the challenging party.<sup>8</sup> Emergency regulations promulgated in accordance with the APA enjoy the same presumptions of validity as regulations promulgated after a notice and comment process.<sup>9</sup> Plaintiffs must “show a substantial failure to comply with the APA in order to rebut the presumption of procedural validity.”<sup>10</sup>

The issuance of a temporary restraining order (“TRO”) is within the discretion of the Court.<sup>11</sup> Generally, the Court will apply a “balance of hardships” approach which entails a three part test: “1) the plaintiff must be faced with irreparable harm; 2) the opposing party must be adequately protected; and 3) the plaintiff must raise serious and substantial questions going to the merits of the case.”<sup>12</sup> Where the injury which will result from the TRO is “not inconsiderable and may not be adequately indemnified by a bond, a showing of probable success on the merits is required before a temporary restraining order or a preliminary injunction can be issued.”<sup>13</sup>

#### B. Whether there is Irreparable Harm

Plaintiffs argue that a TRO is necessary because they will suffer irreparable harm from lost fishing opportunities this summer as a result the three changes the Board made on June 30, 2011 to the Central District Drift Gillnet Fishery Management Plan. First, the emergency regulations decrease the drift fleet’s available fishing area on July 14th from the Expanded Kenai and Kasilof Sections

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<sup>8</sup> *State of Alaska, Alaska Bd. of Fisheries v. Grunert*, 139 P.3d 1226, 1232 (2006).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1232 n.23 (citing *Gilbert v. State, Dep’t of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 394 (Alaska 1990)).

<sup>11</sup> *Miller v. Atkinson*, 365 P.2d 550, 552 (Alaska 1961); *Sprucewood Inv. Corp. v. Alaska Housing Finance Corp.*, 33 P.3d 1156, 1160-1161 (Alaska 2001).

<sup>12</sup> *North Kenai Peninsula Road Maintenance Service Area v. Kenai Peninsula Borough*, 850 P.2d 636, 639 (Alaska 1993).

<sup>13</sup> *State v. United Cook Inlet Drift Ass’n*, 815 P.2d 378, 379 (Alaska 1991).

to the smaller regular Kenai and Kasilof Sections.<sup>14</sup> Second, the emergency regulations limit the commissioner's discretion to open additional fishing days in the July 9-15th period to only the Kenai and Kasilof Sections, as opposed to the Expanded Sections.<sup>15</sup> Plaintiffs estimate the difference between the Expanded Kenai and Kasilof corridors and the regular corridors is 160 square miles. Finally, for two days during the July 16-31 period, the Board's emergency action withdrew the option for the drift fleet to fish in both Area 1 corridor and the Expanded Kenai and Kasilof Sections and instead restrict the fleet to only one of those areas.<sup>16</sup> If required to fish in only the Expanded Sections, the drift fleet estimates it will lose approximately 1,300 square miles of fishing area.

Plaintiffs assert that because "the Board's emergency regulations restrict commercial fishermen to smaller areas on 50% of the peak fishing days authorized during the most important three weeks of the season, UCIDA's members' chances of yielding a productive harvest are greatly diminished."<sup>17</sup> While the drift fleet members recognize that fishing is not an "exact science," they estimate the regulations will cause a 30-50% smaller harvest. The State urges the Court to find that plaintiffs' projections of lost harvest are purely "speculative." The Ninth Circuit has held that speculative injury cannot constitute irreparable harm.<sup>18</sup> Plaintiffs' diminished opportunity to fish as a result of the Board's emergency regulations is not speculative, however, it is certain. While no one can know exactly where the Kenai and Kasilof bound sockeye will run in the next few weeks, the evidence establishes a direct connection between the geographic range allowed the drift net fishermen and the amount of their catch. The Court concludes plaintiffs are irreparably harmed by the additional restrictions enacted June 30, 2011.

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<sup>14</sup> 5 AAC 21.353(a)(2)(A)(ii).

<sup>15</sup> 5 AAC 21.353(a)(2)(A)(iii).

<sup>16</sup> 5 AAC 21.353(a)(2)(B)(ii).

<sup>17</sup> Memorandum in Support of Motion for Temporary Restraining Order at 15.

<sup>18</sup> *Goldie's Bookstore v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984).



C. Whether Opposing Parties and Other User Groups are Adequately Protected

In considering a request for a temporary restraining order, the Court must consider the injury, if any, a restraining order will cause the State and other resource users, whether sport fishermen, northern district set-netters, or subsistence users. The parties in this case do not dispute that the Upper Cook Inlet finfish fisheries are a “fully allocated” resource; an increase of use for one user group necessarily diminishes use for another group. The Alaska Supreme Court has found that the injury other user groups will suffer as a result of injunctive relief “is as irreparable as the injury which commercial fishermen might suffer if injunctive relief were not granted.”<sup>19</sup> The Court agrees that, in essence, the allocation of the resource in question is a “zero sum” game. If a temporary restraining order is granted, there will be injury in diminished returns of salmon for sport fishermen and other users. Because of the likelihood of injury to other users, plaintiffs must establish probable success on the merits of their case.<sup>20</sup>

D. Whether Plaintiffs have Demonstrated Probable Success on the Merits of the Case

Plaintiffs bring this action under the Administrative Procedure Act (“APA”). Part of the APA expressly authorizes the Court to invalidate a regulation upon the ground that the facts do not constitute an emergency. *See* AS 44.62.300. Plaintiffs argue that the Board did not have a valid basis for finding an emergency.

Where regulations are adopted in accordance with the APA, judicial review is limited to determining whether the regulation is reasonable and not arbitrary; the Court cannot substitute its judgment for, or second-guess, the Board’s actions.<sup>21</sup> This case, however, does not address whether the Board could legitimately restrict

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<sup>19</sup> *United Cook Inlet Drift Ass’n*, 815 P.2d at 379.

<sup>20</sup> *Id.* Plaintiffs have not offered to bond or indemnify other users.

<sup>21</sup> *State v. Kenaitze Indian Tribe*, 83 P.3d 1060, 1064 (Alaska 2004); *Interior Alaska Airboat Ass’n, Inc. v. State, Board of Game*, 18 P.2d 686, 690 (Alaska 2001).

the geographic fishing areas of the plaintiffs. Ultimately, that issue clearly falls within the Board's area of expertise and demands judicial deference.<sup>22</sup> The question presented here is much narrower: Could the Board rely on its emergency regulatory power, with at best a circumscribed or abbreviated process for public input, comment, and participation, in promulgating the challenged regulations?

1. Characteristics of an Emergency

AS 44.62.250 provides that the Board may adopt regulations on an emergency basis if the Board “makes a written finding, including a statement of the facts that constitute the emergency, that the adoption of the regulation or order of repeal is necessary for the immediate preservation of public peace, health, safety, or general welfare.” In addition, the Board may only accept review of an emergency petition and promulgate subsequent emergency regulations when “the problem outlined in the petition justifies a finding of emergency.”<sup>23</sup> Pre-adoption notice and public comment procedures do not apply when the Board promulgates an emergency regulation.<sup>24</sup> Largely because of this, it is “state policy” that “emergencies are held to a minimum and are rarely found to exist.”<sup>25</sup>

Neither party has cited any case defining “emergency.” The Oxford English Online Dictionary defines “emergency” as “[t]he arising, sudden or unexpected occurrence (of a state of things, an event, etc.).”<sup>26</sup> Black’s Law Dictionary defines “emergency circumstances” as a “situation that demands unusual or immediate action and that may allow people to circumvent usual procedures, as when a neighbor breaks through a window of a burning house to save someone inside.”<sup>27</sup>

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<sup>22</sup> *Native Village of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999) (“Courts are singularly ill-equipped to make natural resource management decisions. Consequently, we do not substitute our judgment for that of the Board.”).

<sup>23</sup> 5 AAC 96.625(f).

<sup>24</sup> AS 44.62.250.

<sup>25</sup> AS 44.62.270.

<sup>26</sup> Oxford English Online Dictionary, available at <http://dictionary.oed.com>; See *Watson v. United States*, 552 U.S. 74, 79 (2007) (noting that terms are construed consistently with their everyday meaning, including by reference to the dictionary).

<sup>27</sup> Black’s Law Dictionary 260, 562 (8<sup>th</sup> ed. 2004) (cross-referencing “exigent circumstances”).



The Department's own regulations define an emergency as:

an unforeseen, unexpected event that either threatens a fish or game resource, or an unforeseen, unexpected resource situation where a biologically allowable resource harvest would be precluded by delayed regulatory action and such delay would be significantly burdensome to the petitioners because the resource would be unavailable in the future.<sup>28</sup>

Plaintiffs rely upon the first portion of the Department's definition. In their emergency petition and the Board's "Finding of Emergency," the Board and intervenor KRSA state that the codification errors constitute an "unforeseen, unexpected event that threatens a fish resource." Plaintiffs challenge the sufficiency of the Board's finding and argue the Board "identifies no plausible basis for an emergency."<sup>29</sup>

## 2. Whether there is an Emergency

When an agency of the state adopts emergency regulations, Alaska law expressly authorizes the Court to determine whether an "emergency" exists.<sup>30</sup> In the promulgation of its emergency regulations, the Board identifies the emergency as follows:

The Board of Fisheries accepts and incorporates by reference the petitioner's assessment of the facts and conclusions supporting a finding of emergency... Errors in the language of the codified regulatory changes to 5 AAC 21.353(a)(2), rendering the regulations inconsistent with the intent of the Board when it adopted the changes during its Upper Cook Inlet February 22-March 5, 2011 meeting, constitute an unforeseen, unexpected event that threatens a fish resource because measures intended to protect salmon stocks returning to the Northern District of the Upper Cook Inlet Area were not included in the codified language. *See* 5 AAC 96.625(f). Emergency regulations to correct these errors are necessary

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<sup>28</sup> 5 AAC 96.625(f).

<sup>29</sup> Memorandum in Support of Motion for Temporary Restraining Order, 20.

<sup>30</sup> AS 44.62.300.

for the immediate preservation of the public general welfare under AS 44.62.250.<sup>31</sup>

Two independent events formed the basis for the Board's emergency finding: (1) the failure on the part of the Department to accurately translate the Board's intent into regulations and (2) the condition of the Northern District fish stock as a "stock of concern."

The uncontradicted facts establish that the Northern District fish stocks have been a concern for years. The State's brief acknowledges the Board's historical concern with Northern District stocks:

[T]he Board had and continues to have concerns about the Susitna River sockeye stock, which caused it to designate this a regulatory "stock of yield concern" in 2008. In addition, Board members have been concerned about dramatically declining coho returns in recent years, although the Board has not formally designated northern coho stocks to be regulatory "stocks of concern." These concerns motivated the Board to make numerous changes to the Central District plan . . . including the changes at issue here, to protect northern district stocks.<sup>32</sup>

The Department's alleged failure to draft regulations that accurately track the Board's intent is also not unforeseen or unexpected, but an occurrence that the Board regularly anticipates. In 2006, the Board delegated its rulemaking authority to the Department to adopt regulations "designated to eliminate inconsistencies, ambiguities, errors or omissions, or other technical deficiencies in existing regulations."<sup>33</sup> The Board recognized that:

As a result of the volume of regulations considered by the Board and the compressed timeline for getting regulations into place, errors or omissions, such as incorrect phrasing of Board conceptual regulatory language, do happen in the course of regulatory writing during a board cycle, and the

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<sup>31</sup> Finding of Emergency, Exhibit A-1 to Memorandum in Support of Motion for Temporary Restraining Order.

<sup>32</sup> State's Opposition to Motion for TRO, 5-6.

<sup>33</sup> Delegation of Authority, Board Finding 2006-250-FB.



board recognizes the need to correct such problems to make the regulations consistent with board's original intent.<sup>34</sup>

Regardless of whether the Board's original intent at the February-March 2011 meetings is easily ascertainable or ambiguous, it is obvious that errors in the Department's codification are to be expected, and possibly even commonplace.

Viewed in isolation, neither the regulatory errors nor the concern for the Northern District stocks is either unforeseen or unexpected. The crux of the emergency finding in this action is that the two events have occurred in tandem—i.e., a drafting or "codification" error has coincided with the regulation of stocks of concern.

The Board commonly deals with threatened fish stocks. There is no indication or evidence presented suggesting that the Northern District stocks have changed since the Board deliberated in March. A conclusion that any drafting error in a regulation involving a threatened stock may justify amendment by emergency regulation would be inconsistent with the definition of emergency and the statutory characterization that they be "rare." To allow the Board to proceed by way of its authority to enact emergency regulations merely because a draft regulation does not comport with Board intent would invite repeated use of a procedure intended to be rarely invoked. While there is no claim that either the Board or the Department acted in bad faith in this case, the Court must be concerned that diluting the definition of "emergency" would invite future abuse.

A helpful test of whether a situation constitutes an emergency within the meaning of AS 44.62.270 asks whether the "set of events is unlikely to be repeated."<sup>35</sup> By that measure, the situation at bar does not present an emergency. Both of the independent causes—the drafting errors and the condition of the Northern District fish stocks—are persistent occurrences. The likelihood of their

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<sup>34</sup> *Id.*

<sup>35</sup> *Grunert*, 139 P.3d at 1233 (A "finding of emergency follows a fact intensive inquiry into a set of events unlikely to be repeated").

simultaneous recurrence is significant. Thus, the drafting or "regulatory" error in this case did not constitute an "emergency" within the meaning of AS 44.62.250.

### III. Conclusion

While the plaintiffs do not contest that the Board in good faith perceived an emergency existed, a decision permitting the enactment of the regulations in this case would expand emergency rulemaking beyond the Board's authority as granted by the Legislature. The Court, having determined that the facts recited in the Board's "Finding of Emergency" do not constitute an emergency as a matter of law, the emergency regulations promulgated by the Board on June 30, 2011 and set to expire on October 27, 2011 are hereby declared invalid. Accordingly, plaintiffs' Motion for Temporary Restraining Order is GRANTED.

Plaintiffs have also filed a motion for preliminary injunction. Given the Court's finding that there was no emergency justifying the Board's emergency regulations, plaintiffs have succeeded on the merits of their case. Because the requirements for a temporary restraining order and preliminary injunction are identical,<sup>36</sup> plaintiffs' Motion for Preliminary Injunction is GRANTED.

**ORDERED** this 13<sup>th</sup> day of July, 2011, at Anchorage, Alaska.

I certify that on  
a copy of the above was mailed to  
each of the following at their  
addresses of record:

*Osborne ACO*  
*Coffey*

*McMartin*

Jackie Kapper, Judicial Assistant

*Nikki Martin, Law Clerk*

*Andrew Guidi*  
ANDREW GUIDI  
Superior Court Judge

<sup>36</sup> *United Cook Inlet Drift Ass'n*, 815 P.2d at 379. At oral argument the parties agreed that the issuance of a TRO, if granted, would likewise support a preliminary injunction.