

# MEMORANDUM

STATE OF ALASKA

*Department of Law*

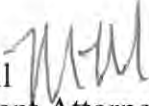
To: Monica Wellard  
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From: Mike Mitchell   
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Subject: **Comments on Proposals for  
2013 Board of Fisheries  
Meeting on Statewide Finfish  
and Supplemental Issues**

The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at its March 19-24, 2013 meeting on regulations for statewide fisheries and on supplemental issues.

**Proposal 215:** This would add new provisions in 5 AAC 39.205 (Criteria for the allocation of fishery resources among personal use, sport, and commercial fisheries), and presumably also in 5 AAC 75.017 (same) and 5 AAC 77.007 (same), to prohibit allocation of 100% of fish harvest opportunity to any one user group in a particular area and to prohibit allowing an aquaculture association to obtain its entire cost-recovery needs from one fishing area while disallowing a common property commercial fishery in that area. The proposer states that this would “clearly follow the state laws” and that the purpose is to address “[t]he unconstitutional allocation to a single user group of a natural resource. Specifically, the allocation to Cook Inlet Aquaculture [of] the entire catch of sockeye in Resurrection Bay for funding their entire operations.” We do not agree that allocation of 100% of fish harvest opportunity to any one user group in a particular area is per se unconstitutional or that the change is otherwise necessary to be consistent with state law. Since this proposal is intended to address a concern with a particular fishery, the Board should consider whether a statewide regulation is appropriate and possible ramifications for other fisheries if the proposal is adopted.

**Proposal 216:** This would add a new statewide regulation in 5 AAC 39 (general provisions) to provide that achieving escapement goals is the primary management objective in regulatory management plans and that nothing in the management plans limits the commissioner’s use of emergency order authority to achieve established

escapement goals. Such a provision is not required for current regulations to be consistent with constitutional sustained yield standards. The legal effect of the proposed regulation is uncertain if it were to conflict with the language of a particular management plan in effect now or adopted in the future. In general, courts will try to harmonize conflicting regulations to give effect to both, and it is possible a court could find that the provisions in a later and/or more specific management plan are controlling. To the extent this proposal is intended to address concerns with particular fisheries, the Board should consider whether a statewide regulation is appropriate and possible ramifications for other fisheries if the proposal is adopted.

**Proposal 217:** This proposes to mandate that meeting escapement goals for king salmon stocks be the top management priority and that the lower end of all king salmon goals statewide be raised two percent annually for the next 15 years. The Board's practice is to look at each stock's escapement goals on a case-by-case basis, and the Board should consider whether a statewide increase might be unwarranted in some cases. The legal effect of the proposed regulation is uncertain if it were to conflict with the language of a particular management plan in effect now or adopted in the future. In general, courts will try to harmonize conflicting regulations to give effect to both, and it is possible a court could find that the provisions in a later and/or more specific management plan are controlling. To the extent this proposal is intended to address concerns with particular fisheries, the Board should consider whether a statewide regulation is appropriate and possible ramifications for other fisheries if the proposal is adopted.

**Proposal 236:** This proposes to amend 5 AAC 39.205, 5 AAC 75.017, and 5 AAC 77.007 (Criteria for the allocation of fishery resources among personal use, sport, and commercial fisheries) to require that a point value be assigned to the regulatory allocation criteria set out in AS 16.05.251(e) (i.e. the history of use by each user group, participation by residents and nonresidents, importance of each fishery to provide residents with fish for family consumption, availability of alternative fisheries, economic importance to the state, region and local area, and importance to provide recreational opportunity) when considering allocations to user groups. The language of AS 16.05.251(e) does not require weight or point values be assigned to allocation criteria. Such a system was not contemplated in the legislative history of the statute. Rather, the legislature directed the Board to adopt and consider criteria, but left the evaluation of the criteria in a particular allocation decision to the Board's discretion. Assigning a point value to each allocation criteria would clarify relative priority of existing criteria, but the proposal lacks sufficient detail to describe how rankings would be used in Board decisions. In addition, a numerical system would not necessarily be binding on a future Board, since it could find that a different allocation would be appropriate in particular circumstances notwithstanding the results of the application of the numerical system or the requirements of the allocation regulations.