

# MEMORANDUM

STATE OF ALASKA

*Department of Law*

To: Glenn Haight  
Executive Director  
Alaska Board of Fisheries

Date: January 21, 2014

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Subject: **Comments on Proposals for  
2014 Board of Fisheries  
Meeting on Upper Cook Inlet  
Finfish**

The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at its January 31 – February 13, 2014 meeting on regulations for Upper Cook Inlet finfish fisheries.

**Proposals to Establish Escapement Goals (including proposals 148, 149, 152, 157, 159, 160, 162, 163, 186, 188, 189, 300, 301, 309, 313, 315, 321):** A number of proposals deal with escapement goals, including escapement goals for Kasilof River sockeye (148, 149, 152), Kenai River late-run sockeye (157, 159, 160, 162, 163), Kenai River early-run king (186, 188, 189), Deshka River coho (300), Kashwitna River king (301), Big River and Kustatan River cohos (309), Little Susitna River sockeye (313), Little Susitna chum (315), and Moose Creek king salmon 9321). The Board's policies for sustainable management of salmon fisheries and for statewide salmon escapement goals, 5 AAC 39.222 and 39.223, define several types of escapement goals and explain how those goals are established. These include "biological escapement goal (BEG)," "inriver run goal," "optimal escapement goal (OEG)," "sustainable escapement goal (SEG)," and "sustained escapement threshold (SET)." The policy regulations state that all these goals and measurements, with the exception of OEGs and inriver run goals, are established or determined by the Department. The policy regulations state that the Board will only adopt OEGs and inriver run goals. We recommend that the Board act consistently with its policy regulations when it considers escapement goal proposals. If the Board adopts an OEG, it should, to the extent practicable, indicate the expected differences in yield of any salmon stock relative to maximum sustained yield from



implementation of an OEG, consistent with 5 AAC 39.223(c)(2).<sup>1</sup> If it chooses to specify a BEG or SEG in regulation, it should explain its reasoning for doing so. Also, while the Board and Department are not confined to using the types of escapement goals defined in the policies, it is best to use defined goals to avoid confusion unless the new goal and the reasons for using it are explained. Some of the proposals ask the Board to adopt undefined types of escapement goals.

**Proposals to Regulate Boat and Motor Use on Rivers (Proposals 242, 243, 286, 316):** Proposal 242 would restrict outboard motor use on the Kenai River to motors of 10 horsepower or less. Proposal 243 would prohibit outdoor motor exhaust from being discharged into the waters of the Kenai River beginning in 2015. Proposal 286 would establish a no-wake zone and maximum speed limit of five miles per hour on the Kenai River between river mile 3.0 and 4.5 during the personal use fishery when a high tide of 21 feet or higher occurs. Proposal 316 would require the use of four-stroke outboard motors on the Little Susitna River and limit the number of outboards on the river each day. The Board has the authority to limit fishing methods and means, including regulations pertaining to the use of boats and motors while fishing. It has some authority to adopt regulations affecting boat and motor use that are necessary for fishery development or watershed or habitat protection purposes; however, the Board should articulate how such restrictions are reasonably necessary to achieve one of these purposes. The Board has restricted outboard motors used in the Kenai River personal use dip net fishery to four-stroke and direct fuel injection two-stroke motors. 5 AAC 77.540(c)(1)(C). In addition to these general comments we note that Proposal 286 would present serious compliance and enforcement challenges in that the Department of Public safety would have to prove the tide level at the time of the violation.

**Proposal 54:** This would prohibit sport fishing in major Cook Inlet spawning areas when spawning fish are present. As written, the proposal likely is too vague to be enforceable. At a minimum, the regulation or the department would need to identify

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<sup>1</sup> “Optimal escapement goal” is defined in the sustainable salmon fisheries policy as a specific management objective for salmon escapement that (a) considers biological and allocative factors and may differ from the SEG or BEG, (b) may be expressed as a range with the lower bound above the level of sustainable escapement threshold, (c) will be sustainable, and (d) will be adopted as a regulation by the Board. 5 AAC 39.222(f)(25). The policy for statewide salmon escapement goals states that the Board, during its regulatory process, will “review a BEG, SEG, or SET determined by the Department and, with the assistance of the Department, determine the appropriateness of establishing an optimal escapement goal (OEG); the Board will provide an explanation of the reasons for establishing an OEG and provide, to the extent practicable, and with the assistance of the Department, an estimate of expected differences in yield of any salmon stock, relative to maximum sustained yield, resulting from implementation of an OEG.” 5 AAC 39.223(c)(2).



“major spawning areas” for all species of fish, and more specificity would be needed as to what is meant by, and how to determine, “presence” of spawning fish. Specific area and time restrictions would be more enforceable.

**Proposal 57:** This would impose a limit of 100 pounds (filet-weight) of sport-caught fish that could be exported from Alaska. While the Board has general authority to adopt regulations for the “utilization” or “use” of fish,<sup>2</sup> most Board regulations have a fairly close connection to the harvest and possession of fish. This proposal would extend regulatory reach to the transportation of fish long after harvest and quite distant from the fishing grounds. Other Board regulations on the use or transportation of fish have a closer tie to the fishery and are adopted to make bag limits and other fishing regulations enforceable.

If the Board is inclined to adopt this proposal, or a modified version of it, it should keep in mind several concerns. First, the Board has rarely, if ever, addressed limitations on the export of sport-caught fish from the state. The legislature, in AS 16.10.240, has itself imposed restrictions on the export of certain species of live crab. But the legislature has not granted the board express authority to regulate the export of fish from the state. Second, this would have a discriminatory impact on non-residents, even though it applies to residents, as well as non-residents, because most residents would not be likely to export large amounts of fish from the state, as most fish caught would be consumed in residents’ homes. While the Board is authorized to allocate between resident and nonresident sport fishing<sup>3</sup> in favor of residents, that is usually done on a fishery-by-fishery basis with a record that explains the need for a resident preference. We do not believe that the proposal necessarily presents federal constitutional concerns, but before adopting this proposal, the Board should make a very careful record as to why the export limit is needed even though bag limits in specific fisheries may allow the total harvest of much more than 100 pounds for nonresidents. Finally, Proposal 57 would present very difficult enforcement challenges. Extensive reporting, recordkeeping, and monitoring procedures would need to be developed to provide for effective enforcement of such an export ban.

**Proposal 81:** This proposal presents a conglomeration of ideas to address the decline of king salmon in Cook Inlet. Part 4 of the proposal states: “Require all salmon aquaculture projects to be certified as not promoting or advancing one stock at the expense of other stocks.” We have opined in the past that the legislature split management authority over aquaculture projects between the Board and the Department, with the Department having primary authority over hatchery operations.<sup>4</sup> While the sustained yield of wild fish stocks is the first priority in hatchery management, and the

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<sup>2</sup> See, e.g., AS 16.05.251(a)(7), (12).

<sup>3</sup> AS 16.05.251(a)(15).

<sup>4</sup> 1997 AG Op. File No. 661-98-0127 (November 3, 1997).



Board does have the authority to adopt regulations to see that hatchery brood stock harvest and cost recovery are consistent with sustained yield,<sup>5</sup> we believe that the Board's authority to decide what species are produced at a particular hatchery is limited. Those decisions are more squarely within the province of the Department in approving and issuing hatchery permits and approving management plans for hatcheries.<sup>6</sup> Other elements of the proposal could impinge on the Department's administrative and budgeting authority by requiring new programs (for example requiring "all commercial salmon setnet gear to be certified as avoiding king salmon interception" or requiring a determination of when "[river] systems' water nitrogen/phosphorus levels return to their historic natural levels from resulting rotting salmon"). The Department's views and authorities should be carefully considered in considering this kind of sweeping proposal.

**Proposal 125:** This proposal is a placeholder proposal to allow selective harvest modules (SHMs) under certain specifications and operations to be used to commercially harvest salmon in the Upper Subdistrict of the Central District of Upper Cook Inlet. SHMs were tested in 2013. The Board should be aware of the statutory prohibition on the erection and operation of "fish traps" under AS 16.10.070 and AS 16.10.100<sup>7</sup> and should indicate on the record the distinguishing features of SHMs if it adopts the

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<sup>5</sup> AS 16.05.730.

<sup>6</sup> AS 16.10.400-445 (salmon); AS 16.40.100-199 (shellfish); *see also* 5 AAC 40.800-.990.

<sup>7</sup> AS 16.10.070 reads:

**Operation of fish traps.** Fish traps, including but not limited to floating, pile-driven, or hand-driven fish traps, may not be operated in the state on or over state land, tideland, submerged land, or water. This section does not prevent the operation of small hand-driven fish traps of the type ordinarily used on rivers of the state that are otherwise legally operated in or above the mouth of a stream or river.

AS 16.10.100 reads:

**Erection of fish traps prohibited on land or water owned by the state.** Fish traps, including but not limited to floating, pile-driven, or hand-driven fish traps, may not be erected, moored, or maintained on or over land, tideland, submerged land, or water owned by the state. This section does not prevent the maintenance, use, or operation of small hand-driven fish traps of the type ordinarily used on rivers of the state which are otherwise legally maintained and operated in or above the mouth of a stream or river.



proposal, for example if the fish are not captive until the SHM net is moved by the operator.

**Proposal 137:** This would proposal remove definitions of Drift Gillnet Areas 1, 2, and 4 from the Central District Drift Gillnet Fishery Management Plans, while using those areas in the plan. This would result in time and area restrictions for areas that are not defined. Management areas that are part of a plan need to be defined.

**Proposal 182:** This would establish a \$5 bounty for the harvest of northern pike in Upper Cook Inlet. A superior court ruled that the Boards do have the power to authorize a bounty, but do not have the authority to order the Department to pay bounties. Thus, if the Board established a bounty, the Legislature or Department would need to fund the program in order for it to be implemented.

**Proposal 183:** As described in the proposal book, Proposal 183 proposes “a policy that prohibits sport fishing within 50 percent of identified salmon spawning areas in all Upper Cook Inlet salmon waters.” The proponent states, “I am not asking for a regulation; I am asking for a statement of policy that would result in the board of fish placing a call for proposals toward the establishment of spawning bed sanctuary on every salmon stream that empties into upper Cook Inlet.” The proponent’s statement indicates no regulatory action is desired, and none is needed since the Board’s meeting cycle for Upper Cook Inlet fisheries already accommodates public proposals to close areas to fishing. If the Board were to adopt regulations prohibiting salmon fishing in certain salmon spawning areas, it would need to specify what areas are closed.

**Proposals 184 and 185:** Proposal 184 would require sport, personal use, and subsistence fishermen to report king salmon harvest information within a 24-hour period via on-line or electronic means. Proposal 185 would require daily reporting of all salmon harvested in Upper Cook Inlet fisheries by all user groups The Department indicates that a new electronic or online reporting program of such magnitude would be cost prohibitive to the department and duplicate current data collection programs, and that existing harvest monitoring programs provide sufficient levels and accuracy of information for management. Because the Board has no administrative, budgeting, or fiscal powers over the Department, any Department concerns about funding for a particular reporting system should be considered before adopting this kind of proposal.

**Proposal 228:** This would direct that the Kenai River be stocked with 50,000 king salmon smolt. The Board has statutory authority to adopt regulations it considers advisable for “stocking of fish,” AS 16.05.251(a)(7), but it can’t require the Department to spend funds or resources actually stocking the fish because it has no “administrative, budgeting, or fiscal powers.” AS 16.05.241. The Board could adopt a regulation to the effect : “The department may stock the Kenai River with up to \_\_\_ king salmon per year,” or “The department will, to the extent practicable, stock the Kenai River with up to



\_\_\_ king salmon per year.” The Board has authority to place conditions on the release or harvest of stocked fish.

**Proposal 235 and 236:** As described in the proposal book, Proposal 235 proposes to amend the riparian habitat fishery management plans for Cook Inlet river systems (5 AAC 56.180, 57.180, 59.180, 60.180, 61.180, and 62.180) and adopt a new regulation section to require ADF&G to conduct habitat assessments on Upper Cook Inlet rivers that would encompass effects from sport and personal use fisheries on a schedule that conforms to Board of Fisheries triennial meeting cycle, and to obligate ADF&G to conduct and publish current riparian habitat assessments for all major and heavily used river systems in Upper Cook Inlet. Proposal 236 is a placeholder proposal for possible regulatory changes and/or management plans based upon results of Kenai River habitat assessments. The Board has no administrative, budgeting, or fiscal powers over the Department and lacks authority to direct the Department to conduct habitat assessments, but it could make findings that such assessments are needed, urge the Department to conduct such assessments, or take other such action that does not purport to direct the Department’s actions. The Board also could make regulatory changes that become effective or conditioned on assessments or determinations by the Department.

**Proposal 260:** This proposal would limit the number of guides on the Kenai River to 200 guides. The Board has limited authority in this area, and any such limitation could not create a preferential right of access and would have to be supported by evidence showing that it is reasonably necessary to address a particular problem. In 1991, we advised the Department of Natural Resources that a proposed limited entry permitting system for Kenai River guides was unconstitutional.<sup>8</sup> The proposal was that permits would be issued for a five-year period to those applicants scoring the highest number of points, which would be awarded based on several factors. The factor of greatest concern from a constitutional perspective was to give significant points for each year of guiding experience on the river, which we found would heavily favor current permittees over new entrants to the program. Beyond the constitutional concerns we found

[T]here is a serious question whether any system to limit guide numbers would be defensible at the present time. ... [The back-up information] that supposedly justifies the proposed guide limits ...

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<sup>8</sup> DNR has authority and responsibility under AS 41.21.506 to develop and adopt a comprehensive management plan for the Kenai River Special Management Area, including establishing a “registration, licensing, or comparable procedure for professional fishing guides and such additional fishing guide controls as the commissioner considers necessary.” DNR’s regulation for Kenai River guide permits is found at 11 AAC 20.885. The Board has authority to regulate guided sport fishing as needed for the conservation, development, and utilization of that and other fisheries, under AS 16.05.251(a)(12).



shows that the actual fishing pressure on the river has not significantly changed [in the past eight years], and in fact it declined in [the previous two years]. Furthermore, the evidence shows that although the actual number of guides has increased over this period, guided angler hours still constitutes only 40% of the total fishing effort on the river.

To survive challenge, a regulation must be reasonably necessary to carry out the purpose of its enabling statutes. When the regulation affects access to fish, it must also impinge as little as possible on the constitution's open fishery clauses (Art. VIII, secs. 3 and 15). Assuming the department has the authority to adopt a regulation to limit the number of guides on the river and proposes to do so in a constitutional manner, the department still must be able to demonstrate that the limitation is reasonably necessary. The data supplied to us supports neither the conclusion that there is a problem of overcrowding or of increasing fishing pressure, nor the conclusion that limiting the number of guides alone would help solve the problem, if it were found to exist.

For the reasons outlined above, we cannot approve for filing any regulations proposing to limit the number of guides through a system that favors existing guides over new entrants. If we assume, however, that your department can find sufficient empirical evidence that a problem of overcrowding or increasing crowding exists on the river and that a limitation on the number of guides would alleviate the problem, we can suggest possible systems that would be defensible. A pure lottery system, in which lottery participants qualify based on criteria that do not favor established guides over new entrants, would be the best system and clearly would not violate constitutional prohibitions. The length of the permit would have to be reasonable, but we believe the proposed five-year period would not cause any serious problems. We recommend the department seriously consider this option.

If the department finds the lottery option unpalatable, a concession system, in which any qualified guide applicant could bid and permits would go to the highest bidders, would arguably be defensible.

1991 Alaska Op. Atty. Gen. (Inf.) 435 (footnotes and citations omitted). While this opinion addressed DNR's authority as manager of a park unit, most of the principles stated also apply to the Board. While the Board could decide that only a certain number



of guides could participate, it does not have authority to decide which particular guides could operate beyond lottery, first come-first served, or highest-bidder type opportunities.

**Proposal 274:** One element of this proposal would be to require online permitting for Cook Inlet personal use permits. The Board has no administrative, budgeting, or fiscal powers over the Department and lacks authority to direct the Department to develop particular systems for issuing permits and licenses.

**Proposal 275:** This proposal would limit the number of Cook Inlet personal use permits that can be issued to 30,000 permits. The Board has authority to regulate personal use fishing as needed for the conservation, development, and utilization of that and other fisheries, under AS 16.05.251(a)(12), but cannot limit entry or access to a fishery. Any such limitation on the number of permits could not create a preferential right of access to the fishery and would have to be supported by evidence showing that a limit on the number of participants is reasonably necessary to address a particular problem. Thus, any regulatory program limiting the number of permits would have to be implemented on a lottery or first come, first served basis, which would need to be spelled out explicitly in regulation. Also, the Board would need to articulate a clear conservation or development reason for the limitation program, explaining why it would be necessary or preferable to other measures that did not limit access. *See also* comments on Proposal 260.

**Proposal 289:** This proposal would require fish waste from the Kenai River personal use fishery to be ground up to three quarters of an inch. The Board has authority over the utilization of harvested fish, but for this proposal the Board would need to articulate a clear reason why such a regulation would be reasonably necessary for the conservation or development of fishery resources or for habitat protection and improvement. The Board should also keep in mind that other agencies, such as the Department of Environmental Conservation, may have the authority to regulate waste disposal or water quality.

**Proposal 299:** This proposal seeks to stock the Deshka River with king salmon. See the comments above on proposal 228 regarding the Board's authority to adopt regulations it considers advisable for "stocking of fish" and the limitations on its authority to actually direct that stocking be undertaken.

**Proposals 311 and 312:** These proposals would direct the department to begin stocking coho salmon into the Little Susitna River by collecting eggs beginning in 2013 and release juveniles beginning 2015. In addition, proposal 312 seeks legislation to eliminate the distinction between subsistence, sport, and personal use, and combine these within newly-defined "personal consumption," which would have first priority in any allocative decisions. See the comments above on proposal 228 regarding limitations on



the Board's regulatory authority to direct fish stocking. The Legislature has the authority to make the desired legislative changes, not the Board.