

# MEMORANDUM

STATE OF ALASKA

*Department of Law*

To: Glenn Haight  
Executive Director  
Alaska Board of Fisheries

Date: February 11, 2015

File No.: JU2014200582

Tel. No.: 269-5232

Fax: 279-2834

From: Lance Nelson  
Seth Beausang *SMB*  
Assistant Attorneys General  
Natural Resources Section  
Department of Law

Subject: **Comments on Proposals for  
2015 Board of Fisheries  
Meeting on Southeast  
Alaska/Yakutat Finfish Issues**

The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at its 2015 meeting in Sitka on regulations for Southeast Alaska and Yakutat Areas finfish issues.

**Proposal 124:** This proposal would authorize equal share quotas for participants in the Sitka Sound sac roe herring fishery during years when 70% of permit holders voted in favor of such quotas. This is likely beyond the authority of the board. The board may not delegate its authority to decide how a fishery is prosecuted to anyone other than the commissioner or department, especially when there are expected to be individual fishers who do not favor the quota.

**Proposal 126:** This proposal would allow herring seiners to opt to use open herring pounds in lieu of their seine gear. Southeast Alaska herring pound limited entry permit holders are generally the only users who can participate in a pound fishery in their administrative area, not seiners. "Herring pound" is generally defined as "an enclosure used primarily to retain herring alive over an extended period of time." 5 AAC 39.105(d)(20). But in Southeast Alaska, a "herring pound" can include an "open pound" which is defined in 5 AAC 27.130(e)(2). The board likely does not have authority to allow additional users into this limited entry fishery without prior action by the Commercial Fisheries Entry Commission (CFEC).

**Proposals 131-134:** These proposals raise similar issues as in Proposal 126. There are already three permit holders in the Southern Southeast sablefish limited entry pot fishery. 20 AAC 05.320(e). The board likely does not have authority to allow additional users into this limited entry fishery without prior action by the CFEC.

**Proposal 148:** If the board authorizes community harvest permits, such permits could not be limited to residents of Hoonah or any other particular community.

**Proposal 155:** This proposal would allow "boat" or "party limits" for sport fishing rather than bag or possession limits that apply to individuals. One consideration

should be that any regulations that apply to fishing for halibut must be consistent with federal halibut regulations.

**Proposal 156:** We would recommend that no certification by a particular organization be required in regulation, but rather that language similar to Board of Game regulations be used to allow fishing by bow and arrow upon “successful completion of a department-approved bowhunter education course.”

**Proposal 164:** This proposal would create a youth only fishery for those under the age of 18; we recommend that any youth only fisheries apply to youth “under 16 years of age” as stated in AS 16.05.251(a)(2)(B).

**Proposal 173:** The language of this proposal does not constitute a regulation; it just states what the proposer deems as the board’s obligations. If the board were inclined to adopt this language, we would recommend the board do so as part of a policy rather than in regulation. The board’s public notice, hearing, and comment processes already provides for community participation and input. The board is not required to go beyond that.

**Proposals 175 and 176:** These proposals call for the board to establish a task force or other process to formulate future recommendations to revisit current enhanced salmon allocation plans and recommend changes to the board. Such actions would not constitute regulations. If the board wants to take such actions it may do so without adoption of a regulation.

**Proposal 192:** This would require reporting of the number of sockeye salmon retained for personal use from commercial catch in Districts 12 and 14. This is already required by 5 AAC 39.130(c)(10), which was recently amended by the commissioner to clarify that the reporting requirement applies to all fish statewide.

**Proposals 193, 199, and 200:** These proposals urge restrictions on commercial fisheries to protect reasonable opportunity for subsistence, which is a proper matter for the board’s consideration. The proposals also variously claim regulatory actions are needed to avoid fishery restrictions by federal subsistence regulations, to uphold Tlingit and Haida land and waters claims based on aboriginal title, and to prohibit fishing in an area within the federally designated Admiralty Monument. We do not believe there is a credible threat of valid federal regulatory actions in state marine waters here. All aboriginal rights to fishing or hunting were extinguished by the Alaska Native Claims Settlement Act,<sup>1</sup> and the Admiralty Monument does not require a ban on commercial fishing. The board should review the facts and limit its consideration of the proposals to the scope of state subsistence law requirements.

**Proposal 213:** There is a regulation for the Kodiak Area in 5 AAC 18.331(e) that is similar to the one proposed here. The board’s authority to authorize co-op style fishing ventures may be questionable after the Alaska Supreme Court’s decision in the *Grunert* cases.

---

<sup>1</sup> *United States v. ARCO*, 435 F. Supp. 1009 (D. Alaska 1977), *aff’d* 612 F.2d 1132 (9th Cir. 1980), *cert. denied* 499 U.S. 888 (1980).