

# MEMORANDUM

## State of Alaska Department of Law

TO: Kristy Tibbles  
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Alaska Board of Game

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SUBJECT: Comments on February 2014  
Interior Region Board of Game  
Meeting Proposals, Fairbanks

### 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. In doing so, the Board must distinguish among the various uses, unless the harvestable surplus is so numerous as to be able to provide for all uses. 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 continue 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**

**Proposals 39 - 46, 48, 49:** Each of these proposals suggests discriminating, in some way, in favor of residents and against nonresidents. While the Board has an obligation to provide a resident preference for the taking of moose, deer, elk, and caribou for personal or family consumption over nonresident taking, many of these proposals suggest resident preferences beyond the four species listed in statute. AS 16.05.255(d). The Board may discriminate in favor of residents and against nonresidents in allocating hunting opportunity if it concludes that the game populations in question cannot sustain the expected demand by both residents and nonresidents or that restrictions are necessary to provide increased opportunities to residents. *Shepherd v. State, Dep't of Fish and Game*, 897 P.2d 33, 40-41 (Alaska 1995). In such cases, the Board may exclude or limit nonresident opportunity as appropriate under the circumstances.

**Proposals 39, 40, 44, 45, 46, 48:** Each of these proposals would allocate a certain percentage of drawing permits to residents and nonresidents. Current Board policy, 2007-173-BOG, states: "Allocations will be determined on a case by case basis and will be based on upon the historical data of nonresident and resident permit allocation over the last 10 years."

**Proposals 52, 122:** These proposals would eliminate brown bear tag fees for residents in certain GMU's. As noted by the proposals, resident brown bear tag fee exemptions are only effective for one year. For reference, the statute provides: "The Board of Game may, by regulation effective for not more than one year, eliminate the resident brown or grizzly bear tag and fee for all or a portion of a game management unit." AS 16.05.340(a)(16)(A).

**Proposal 54:** If the board wishes to adopt a proposal allowing black bear trapping by permit, it would need to set seasons and bag limits in 5 AAC 84.270.

**Proposal 55:** This proposal seeks to prohibit bear trapping and snaring throughout Region III, which is already prohibited under existing regulations in the Region.

**Proposals 59, 74, 75, 86, 107, 112, 115, 118:** Each of these proposals suggests limitations or changes to existing resident hunting opportunity or expansions of non-resident hunting opportunity that could also affect subsistence uses. The Board needs to

determine, in each case, whether it is able to still provide a reasonable opportunity for subsistence uses and, therefore, whether other uses may be allowed.

**Proposal 65:** This proposal suggests that changes are needed because the current regulations do not provide a reasonable opportunity for subsistence uses of sheep in Unit 19C. The board has previously made a positive C&T finding for sheep in unit 19 and set an ANS of 1-5 sheep. 5 AAC 99.025(10). The board should consider whether current regulations provide reasonable opportunity for subsistence hunting. Although it is an important factor to consider, the fact that harvest data from all Alaska residents is below the ANS amount in a particular year does not necessarily mean that reasonable opportunity is not being provided. The Board should consider all available information in deciding whether more opportunity is reasonably necessary.

**Proposal 66:** This proposal suggests opening a subsistence hunt for musk ox in Units 18 and 19. The Board has previously found that musk ox in Unit 18 are not customarily and traditionally taken or used for subsistence. 5 AAC 99.025(a)(9). The Board has not made a finding for Unit 19, so a positive C&T finding would be required before opening a subsistence hunt. For Unit 18, we recommend that the Board first decide whether reconsideration of its previous negative C&T finding is appropriate by identifying any new information since that decision or possible errors in the previous determination.

**Proposal 69:** This proposal would authorize hunting guides to transfer a drawing permit from one of their clients to another. A regulation allowing a private party to transfer another individual's drawing permit to a third party raised the issue of an impermissible delegation of board and department authority and, more importantly, raises constitutional equal access issues because those clients who receive the transferred permits receive preferential treatment over other unsuccessful drawing permit applicants.

**Proposals 74, 75, 112, 113:** These proposals would create youth hunts for caribou, antlerless moose or sheep. In developing youth hunts, the Board should consider the requirements of AS 16.05.255(i).

**Proposals 74, 75, 107, 115:** These proposals would have some impact on resident/nonresident allocations of game. The board has an obligation to provide a resident preference for the taking of moose, deer, elk, and caribou for personal or family consumption over nonresident taking. AS 16.05.255(d). The board has discretion in determining the form of the preference.

**Proposal 76:** This proposal seeks to open the Dalton Highway Corridor Management Area (DHCMA) to hunting with certain muzzleloaders. Currently, the board's regulations only allow hunting within the DHCMA with bow and arrow or falconry. 5 AAC. 92.530(7)(B). The legislature, through statute, has prohibited "hunting with firearms" within 5 miles of the Dalton highway between the Yukon River and the Arctic Ocean. AS

16.05.789(a). The DHCMA is generally the same geographic area as described in AS 16.05.789. While muzzleloaders are not firearms under federal law, muzzleloaders would generally be considered firearms under Alaska law. *Compare* 18 U.S.C § 922(a)(3) & (16) *with* AS 11.81.900(b)(26)<sup>1</sup> (definition of firearm for purposes of the criminal code). We believe a court would likely find that the muzzleloaders described in this proposal would be disallowed as firearms under AS 16.05.789(a). The Board may not adopt a regulation that is inconsistent with a statute.

**Proposals 90, 97, 101, 106, 112, 123 - 132:** Each of these proposals seeks to reauthorize or create an antlerless moose season. Under AS 16.05.780, the Board may only adopt regulations for antlerless moose hunts after: (1) “the Department recommends the season be opened in that year, based on biological evidence”; and (2) “a majority of active local advisory committees for that unit or subunit have recommended an opening for that year, after each has taken a vote and a majority of the members of those committees have voted in the affirmative.” Under 5 AAC 98.005, an “active advisory committee” for the purposes of implementing antlerless moose hunts “is a committee that holds a meeting and acts on the proposal.”

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<sup>1</sup> In AS 11.81.900(b)(26), “firearm” means a weapon, including a pistol, revolver, rifle, or shotgun, whether loaded or unloaded, operable or inoperable, designed for discharging a shot capable of causing death or serious physical injury.” A pellet guns was deemed not to be a firearm under this definition because it did not act by force of gunpowder. *Kinnish v. State*, 777 P.2d 1179, 1181 (Alaska App. 1989). Since muzzleloaders act by force of gunpowder, they would be qualify as firearms under this ruling.