

MEMORANDUM

STATE OF ALASKA

Department of Law



To: Monica Wellard
Executive Director
Alaska Board of Fisheries

Date: October 7, 2011

File No.:

Tel. No.: 269-5232

Fax: 278-4607

From: Mike Mitchell 
Lance Nelson 
Senior Assistant Attorney General
Natural Resources Section
Department of Law

Subject: **Comments on Specific
Proposals for October 2011
Board of Fisheries Meeting:
Pacific Cod Fisheries**

The Department of Law has the following comments on certain of the proposals to be considered by the Board of Fisheries at its October 2011 meeting on regulations for Pacific cod fisheries in Prince William Sound, Cook Inlet, Kodiak, Chignik and South Alaska Peninsula areas.

Proposal 1. This proposes that the Board adopt a regulation directing the Department to review fishermen and processor groundfish reporting and licensing requirements for duplication, necessity, and effectiveness with federal agency requirements and to adopt certain methods and technologies for retrieving information. The Board has no administrative, budgeting, or fiscal powers over the Department and lacks authority to direct the Department to undertake review of regulations or to use certain methods or technologies. Also, the proposal is vague in many respects, for example in describing when Departmental review would be triggered (“where harvest and/or processing of State/Federal fisheries may intersect and reporting/licensing requirements applied”) and what criteria would be applied in determining whether requirements should be changed (proposing, for example, that “[r]eporting requirements must be reviewed for their full necessity and reasonable effectiveness” and “methodology of retrieving information should ... require minimum impact on those entities providing the information”).

Proposal 2. This proposes that the Board amend the Prince William Sound Pacific Cod Management Plan to require that a vessel be licensed to fish in adjacent waters under the federal License Limitation Program (LLP) to participate in the parallel Pacific cod fishery. This essentially proposes to limit entry and access to the fishery.

This likely is beyond the authority of the Board because Commercial Fisheries Entry Commission, not the Board, has the authority to “regulate entry into the commercial fisheries for all fishery resources of the state,” AS 16.43.100, and then only under the standards established in AS 16.43.200-.270. The Alaska Supreme Court has “observed that the authority to make allocation decisions ‘does not imply a power to limit admission to a user group,’ as the latter power may conflict with the common use, no exclusive right of fisheries, and equal application clauses of section 3, 15 and 17 [of Article VIII of the Alaska constitution].” *State v. Hebert*, 803 P.2d 863, 866 (Alaska 1990). In *Hebert*, the court upheld the Board’s “superexclusive” herring fishery regulations, finding that “[t]he regulation does not limit one’s ability to fish in a superexclusive district except in the sense that one may not fish in more than one district in any one year.” *Id.* at 867. This proposal, on the other hand, would limit one’s ability to participate in the fishery based on status as holder of a federal endorsement, and thus it risks running afoul of the Article VIII clauses as well as state and federal equal protection clauses and/or federal commerce clause powers.

Proposal 14. This proposes to require a 14-day “stand-down” period for vessels using pot gear in a Pacific cod fishery prior to registering for the Chignik state-waters Pacific cod season. The proposal is intended to protect local fishermen who are said to be losing harvest opportunity to the non-local deep draft fleet coming from the federal fisheries. This could be subject to challenge under *State of Alaska v. Grunert*, 109 P.3d 924 (Alaska 2005), in which the Alaska Supreme Court held that the Board does not have authority to allocate fishery resources *within* a given fishery.

Proposal 36. This proposes to allow only vessels without a federal Pacific cod endorsement to participate in the Prince William Sound state waters Pacific cod fishery. This proposal is said to address the issue that many fishermen have lost federal Pacific cod endorsements and no longer have access to federal waters, and they will now have to compete in state water fisheries against vessels that have access to all waters. We doubt the Board of Fisheries has the authority to adopt this proposal, and even if it does we have significant concerns as to the constitutionality of the proposed regulation.

This essentially proposes to limit entry and access to the PWS state waters Pacific cod fishery to those who cannot fish in federal waters under the federal License Limitation Program. This likely is beyond the authority of the Board, for the same reasons as discussed above in our comments on Proposal 2.

ADF&G - October 7, 2011

E X A M P L E - 2 0 1 1

STATUS QUO 2011		Options	KODIAK	CHIGNIK	SOUTH ALASKA PENINSULA	COOK INLET	PRINCE WILLIAM SOUND
Parallel A-season opening	Concurrent with federal opening	X		X		X	X
	Other date certain						
State GHIL opening	Triggered (following A season sector closure)	7-days after CGOA closes			7-days after WGOA closes	24-hours after CGOA closes	7-days after CGOA closes
	Date Certain (March 15 or department discretion)	15-Mar					
Parallel A-season closure	Close/Open	Close		Close		Close	Close
	Triggered (once GHIL is achieved)	X		X		X	X
State GHIL closing	Date Certain (department discretion)	or Sept. 1		or Sept. 1		or Sept. 1	or Sept. 1
	Once all GHILs are achieved in a federal area						
Parallel B-season opening	Once the GHIL is achieved in a state area						
	Date certain (concurrent with federal B-season)	X		X		X	X
Re-open state GHIL	Triggered (once federal B season sector closes)	X		X		X	X
	Date certain (department discretion)						
Rollover dates		September 1		15-Aug		1-Sep	1-Oct
	Parallel open/closed	N/A		N/A		N/A	N/A
Other gear							

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MEMORANDUM

STATE OF ALASKA

Department of Law

To: Monica Wellard
Executive Director
Alaska Board of Fisheries


Date: October 5, 2011

File No.:

Thru:

Tel. No.: 269-5100

Fax: 279-2834

From: 
Mike Mitchell & Lance Nelson
Senior Assistant Attorneys General
Natural Resources Section
Department of Law

Subject: **General Comments for
Regulatory Meetings During
2011 – 2012 Cycle**

This memorandum presents updated advice on general legal requirements that Board members should be aware of when adopting regulations. No changes to the Board's authorities were enacted during the 2011 legislative session.

Ethics disclosures. To comply with AS 39.52, Board members must disclose personal and financial interests, and the chairman must make determinations about potential or actual conflicts that are substantial and material. This may be done at the beginning of the meeting or any time before deliberations. A board member may not receive any kind of gift under circumstances that could be reasonably be inferred to influence a member's performance of official duties; any gift or gifts of more than \$150 in value must be reported to the chair. (AS 39.52.130(a)-(b)). Any gift from a person required to register as a lobbyist under AS 24.45.041 is presumed to be intended to influence the performance of official duties.

Record-making and "costs." It is important that Board members carefully explain on the record the reasons for the Board's actions and the factual and policy grounds on which the actions are based. The Alaska Supreme Court has stressed the importance of a clear record to show that Board actions are within the bounds of statutory authority and are reasonable. The Department of Law encourages Board members to summarize their reasons for each action on the record. Special attention should be given to past practices. If a particular action does not appear consistent with the Board's past action, Board members should discuss the reasons for the change.

The Administrative Procedure Act requires the Board to "pay special attention to the cost to private persons of the proposed regulatory action."¹ This requires that costs to private persons be one of the factors explicitly discussed during deliberations. Any

¹ AS 44.62.210(a).

reasonably significant costs to private persons should be acknowledged and discussed, including indirect costs, such as loss of harvest opportunity.

Consideration of costs is a procedural requirement, not a substantive one. Essentially, the statute requires that costs to private persons be considered and documented as a necessary aspect of informed decision-making; it does not require that regulatory proposals be rejected if they would impose a cost to private persons. In adopting a regulation that does impose a cost to private persons, the Board may find that the cost is insubstantial, that costs are balanced by public or private benefits that will accrue in the future, that it is necessary for conservation or development, or that it is part of a reasonable allocation plan.

Open Meetings. Meetings of the Board must be properly noticed and open to the public.² By statutory definition, a meeting includes any gathering of four or more Board members when a matter on which the Board may set policy or make a decision is considered.³ To avoid the appearance of a violation of the Open Meetings Act, we recommend that Board members avoid gathering in groups of four or more. Social gatherings of Board members do not need to be open to the public so long as Board business is not discussed.

Prearranged meetings of committees of the Board are also subject to the Open Meetings Act, even when the committee is composed of only two Board members and the committee has only advisory powers.⁴ Accordingly, deliberations of a committee should take place at a meeting that is properly noticed and open to the public, and recommendations of the committee as a whole should be traceable to either deliberations that occurred in the open committee meeting or individual submissions by committee members. Board members may work jointly to prepare a committee report, and that work does not need to be open to the public. Report preparations, however, should not be planned as a time for non-public deliberation among Board members.

Allocation. When allocating fishery resources among nonsubsistence uses, the Board must apply the statutory allocation criteria.⁵ The Alaska Supreme Court has held that the statutory allocation criteria apply to allocations among use categories (*i.e.*, personal use, sport, guided sport, and commercial) as well as among subgroups of those categories (*e.g.*, drift and setnet commercial fisheries). However, the Alaska Supreme Court has also held that the Board may not allocate “within” a particular fishery (same gear and same administrative area). If the Board were to identify commercial setnet

² AS 55.62.310(a).

³ AS 44.62.310(h)(2)(A).

⁴ AS 44.62.310(h)(1), (2)(A).

⁵ AS 16.05.251(e).

fishing and commercial drift net fishing as different fisheries, for example, it would be necessary to discuss the allocation criteria when allocating between those two subgroups, similarly the Board would be required to discuss the allocation criteria when allocating between two drift net fisheries in different areas, however the Board may not allocate between drift net fishers fishing in the same administrative area.

Some regulatory proposals will have significant allocative impacts even though allocation is not their intended purpose. When considering such proposals, the Board should address the allocation criteria or explain why the criteria are not applicable. The Board may determine that a proposal does not have a significant allocative impact, even if the record contains comments to contrary from the public or the Department, as long as the record reflects a reasonable basis for the Board's determination. If there is doubt about whether a proposal has significant allocation impacts, we recommend that the allocation criteria be reviewed on the record.

If the Board does not believe that a proposal has any support and does not wish to discuss the allocation criteria with regard to a proposal a motion may be made to take no action on the proposal rather than to adopt the proposal. Where more than one proposal will have similar effects, Board members may incorporate by reference their discussion of the allocation criteria with regard to a prior proposal (a Board member may also move to take no action based on action on a prior related proposal).

Guiding Principles. For some fisheries and stocks, the Board has adopted guiding principles,⁶ it has also adopted regulations excluding some areas from these guiding principles.⁷ We recommend that the Board, as a matter of practice, expressly address applicable guiding principles on the record when considering regulatory proposals for these fisheries and stocks. We also recommend that the Board carefully evaluate whether adoption or maintenance of guiding principles in regulation is warranted recognizing that failure to address or comply with a guiding principle may result in a court invalidating a Board regulation unless the Board carefully explains its deviation. A Board cannot bind a future board to a particular course of action, thus the Board may adopt regulations inconsistent with any guiding principles or management plans so long as it fully explains the rationale for its action and its deviation from the principles or plan. Although guiding principles and other provisions that purport to restrict the actions of future Boards are generally ineffective in limiting the Board's discretion they create procedural hoops that may serve as bases for legal challenges to Board actions.

⁶ See, e.g., 5 AAC 28.089 (groundfish).

⁷ See, e.g., 5 AAC 28.089(b)(Eastern Gulf of Alaska).

Sustained yield. The Alaska Constitution provides that fish and all other replenishable resources belonging to the State “shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.”⁸ The Alaska Supreme Court has held that the provision “requires resource managers to apply sustained yield principles” but “does not mandate the use of a predetermined formula, quantitative or qualitative.”⁹

For salmon, the Board has adopted a “Policy for the management of sustainable salmon fisheries” at 5 AAC 39.222. Board members should review the policy thoroughly and ensure that the standards outlined in the policy have been considered on the record in any proposal dealing with salmon management. For purposes of the sustainable salmon fisheries policy, the Board has defined sustained yield as: “an average annual yield that results from a level of salmon escapement that can be maintained on a continuing basis; a wide range of average annual yield levels is sustainable; a wide range of annual escapement levels can produce sustained yields.”¹⁰ A checklist to assist Board members in application of the policy should be included in the Board workbooks for each meeting where salmon proposals are scheduled.

The Board has also adopted a “Policy for the management of sustainable wild trout fisheries at 5 AAC 75.222. Board members should review the policy thoroughly and ensure that the standards outlined in the policy have been considered on the record in any proposal dealing with wild trout management.”¹¹

There is no express statutory or regulatory definition of sustained yield for other fisheries.

We recommend that the Board, as a matter of practice, expressly address applicable provisions of the sustainable salmon and wild trout policies on the record when considering applicable fisheries. The Board may adopt regulations inconsistent with those policies, but should expressly note when it is doing so and explain its rationale for doing so. We also recommend that the Board carefully evaluate whether adoption or maintenance of these policies in regulation is warranted, recognizing that failure to address or comply with these policies may result in a court invalidating a Board regulation.

⁸ Alaska Const. art. VIII, § 4.

⁹ *Native Village of Elim v. State*, 990 P.2d 1, 6 (Alaska 1999).

¹⁰ 5 AAC 39.222(f).

¹¹ Similarly the Board should review and consider standards in any area specific management plans such as plans for grayling (i.e. 5 AAC 52.055), wild lake trout (i.e. 5 AAC 52.060) and stocked waters (i.e. 5 AAC 52.065).

If the Board does not believe that a proposal has any support, and significant new information calling into question the compliance of the existing plan with the sustainable salmon policy or sustainable wild trout policy has not been received, a motion may be made to take no action on the proposal rather than to adopt the proposal. Where more than one proposal will have similar effects, Board members may incorporate by reference their discussion of the applicable policy with regard to a prior proposal (a Board member may also move to take no action based on action on a prior related proposal). The Board may also consider adoption of regulations exempting stocks in certain areas from the policies as it has done with its groundfish guiding principles.

Subsistence. If information before the Board indicates that a proposal would affect subsistence uses of fish, the Board should ensure that adoption of the proposed regulation would still allow a reasonable opportunity for subsistence uses of the amount of fish reasonably necessary for those uses. "Reasonable opportunity" means an opportunity "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."¹² The Board could base its determination of reasonable opportunity on information pertaining to the subsistence harvest levels of the fish stock in the specific area, bag limits, seasons, access, and gear necessary to achieve the harvest.

Unless it has done so previously, the Board, when considering a proposal that would affect subsistence, should: (1) identify whether the fish stock or portion of fish stock at issue is customarily and traditionally taken or used for subsistence, (2) determine whether a portion of the fish stock may be harvested consistent with sustained yield, (3) determine the amount reasonably necessary for subsistence uses, and (4) adopt regulations to provide a reasonable opportunity for subsistence uses.¹³ The Board has adopted regulatory criteria that should be followed when making customary and traditional use determinations.¹⁴ In applying the regulatory criteria, the Board is not necessarily required to determine that every single criterion is satisfied, but makes a decision based upon the totality of the evidence. The Supreme Court has held that it is not necessary to find familial relationships among current users and prior generations.¹⁵

If the harvestable amount is insufficient to allow subsistence uses and other consumptive uses, the Board must adopt regulations to reduce or eliminate other uses in order to provide a reasonable opportunity for subsistence uses. If the harvestable portion of the fish stock is not sufficient to provide a reasonable opportunity for all subsistence

¹² AS 16.05.258(f).

¹³ The subsistence statute is AS 16.05.258.

¹⁴ 5 AAC 99.010(b).

¹⁵ *Payton v. State*, 938 P.2d 1036, 1043 (Alaska 1997).

uses, the Board must eliminate nonsubsistence consumptive uses and distinguish among the subsistence users based on the Tier II criteria.¹⁶

Fair and reasonable opportunity. Regulations adopted for the purposes set forth in AS 16.05.251(a), consistent with sustained yield and the subsistence law, must also “provide a fair and reasonable opportunity for the taking of fishery resources by personal use, sport, and commercial fishermen.”¹⁷ That requirement, however, does not prevent the Board from allocating resources among user groups. The Board may make a particular species in a particular area available to one user group without making the same species or area available to another user group.¹⁸ If there is any question as to whether action on a proposal could deprive a user group of a “fair and reasonable opportunity” Board members should discuss this issue and provide their reasoning as to whether the proposal would provide such opportunity.

Guided and unguided sport fish. The Board may regulate and allocate to guided sport fisheries separately from other sport fisheries.¹⁹ As with other regulations, guided sport fish regulations must serve the purpose of conservation or development of Alaska’s fishery resources. The Board may require registration, reporting, and operational standards for guides when necessary to make restrictions on guided sport fishers enforceable, or for other conservation and development purposes. The Board may regulate fishing by guides while guiding clients. The Board may also indirectly regulate guides through methods and means and time and area requirements for guided sport fishers. For example, the Board may place restrictions on the number of clients aboard a guide’s vessel or the amount of gear that may be fished from the vessel.

The Board may also adopt regulations requiring the timely submission of reports by sport fishing guides, including the amount of fishing effort, the locations fished, and other regulations necessary to implement the statute governing the collection of information from sport fishing guides.²⁰ In this area, both the department and the Board have regulatory authority, and coordination of the regulations is advisable.

Mixed stock policy. The mixed stock policy adopted by the Board provides generally that the conservation of wild salmon stocks consistent with sustained yield shall

¹⁶ AS 16.05.258(b)(4)(B)(i), (iii). The Board may not consider the criteria in clause (ii), proximity of domicile to the fish stock, because it is unconstitutional. *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995).

¹⁷ AS 16.05.251(d).

¹⁸ See *Kenai Peninsula Fisherman’s Coop. Ass’n v. State*, 628 P.2d 897, 904 (Alaska 1981).

¹⁹ AS 16.05.251(a)(6), (12), (e).

²⁰ AS 16.40.280(b), (f).

be accorded the highest priority, and that allocation of salmon resources will be consistent with the statutory subsistence preference and the regulatory allocation criteria.²¹ The policy expresses the Board's preference in assigning conservation burdens in mixed stock fisheries through the application of specific fishery management plans set out in the regulations.²² In the absence of a regulatory management plan, and when it is necessary to restrict fisheries due to known conservation problems, the policy provides for the burden of conservation to be shared among all fisheries in close proportion to their respective harvest on the stock of concern.²³ The policy also calls for the restriction of new or expanding mixed stock fisheries unless otherwise provided for by management plans or by application of the Board's allocation criteria.²⁴

Gear Stacking. Under AS 16.05.251(i), during a regularly scheduled meeting for a specific salmon fishery, the Board may adopt regulations allowing a person who holds two entry permits for that fishery additional fishing opportunity. The Board does not have the authority to authorize permit stacking in non-salmon fisheries where holding of multiple permits for the same fishery is statutorily prohibited under AS 16.43.140.

Salmon Enhancement. The Board and Department both have authorities relating to salmon enhancement. Generally, the Department has primary authority over hatchery permitting and associated issues relating to salmon production and cost recovery. *See* AS 16.10.400 – 16.10.430. The Board “may not adopt any regulations or take any action regarding the issuance or denial of any permits required in AS 16.10.400 – 16.10.470.” The Board has management authority over both wild and enhanced stocks under AS 16.05.730 which requires management to be consistent with sustained yield of wild stocks but gives the Board discretion regarding whether enhanced fish stocks will be managed for sustained yield. The Board may exercise indirect authority over hatchery production by regulating the harvest of hatchery-released fish, by regulatory amendment of portions of hatchery permits relating to the source and number of salmon eggs, harvest by hatchery operators, and locations for harvest. AS 16.10.440(b). However, the Board is probably not authorized to take action that effectively revokes or prevents issuance of a permit. *See* 1997 Inf. Op. Att’y Gen. (Nov. 6; 661-98-0127). The Board and the Department have entered into a Joint Protocol on Salmon Enhancement (2002-FB-215) which provides an opportunity for the Board and the Public to receive updates from the Department and for the Board and Department to discuss hatchery issues at mutually agreed upon times during regularly scheduled Board meetings. Joint protocol salmon enhancement meetings are non-regulatory, and ACR’s are not considered as action items in these meetings.

²¹ 5 AAC 39.220(a).

²² 5 AAC 39.220(c).

²³ 5 AAC 39.220(b).

²⁴ 5 AAC 39.220(d).

Interaction of Board and CFEC regulations. The Board has general authority over fishing means and methods, but not to limit access to a fishery to a restricted class of persons.²⁵ The Commercial Fisheries Entry Commission does have authority to limit access to a fishery to a restricted class.²⁶ The CFEC also has authority to issue restricted capacity limited entry permits for new limited entry fisheries in order to limit the amount of effort in a fishery.²⁷ The CFEC cannot authorize the use of a type or quantity of gear (including vessels) prohibited by the Board; however, under restricted capacity limited entry permits, some permit holders may be subject to a maximum gear limitation that is lower than the limit set by the Board. Under AS 16.05.251(i), the Board may provide additional fishing opportunity to those holding a second permit in a particular salmon fishery. A recent Alaska Supreme Court decision indicates that Board regulations must be consistent with the letter and intent of the provisions of the Limited Entry Act. In some cases where action by the Board within its authority may also affect matters within the CFEC's authority, such as action on proposals to allow additional fishing opportunities for permit holders in overlapping administrative areas, a separate CFEC regulatory proceeding may be advisable to determine whether CFEC regulatory changes are needed.

Residency. The Board should not use state residency as a criterion for participation in a commercial fishery.²⁸ The Legislature has authorized the Board to regulate resident or nonresident sport fishermen as needed for the conservation, development, and utilization of fishery resources,²⁹ and noncommercial regulations differentiating between residents and nonresidents have been upheld as constitutional.³⁰ The Board should carefully consider sport fishing regulations that would differentiate users based on residency. Before adopting such a regulation, the Board should identify a conservation or development concern, and determine that the restriction is designed to address the concern without imposing unreasonable limitations on nonresidents. Discrimination against nonresidents should not be the sole purpose of a regulation.

²⁵ The Board can, however, adopt exclusive or superexclusive registration areas, forcing individuals or vessels to choose between participation in a fishery in one area or in another area or areas. AS 16.05.251(a)(14); *see, also, State v. Herbert*, 803 P.2d 863 (Alaska 1990).

²⁶ *See generally* AS 16.43.

²⁷ AS 16.43.270(d).

²⁸ *See* 1988 Inf. Op. Att'y Gen. (Nov. 15, 662-89-0200) (discussing probability that allocation of commercial fishing opportunity based on residency would violate the commerce clause and the privileges and immunities clause of the federal Constitution).

²⁹ AS 16.05.251(a)(15).

³⁰ *See, e.g., Baldwin v. Fish and Game Commission*, 436 U.S. 371 (1978); *Shepard v. State*, 897 P.2d 33, 44 (Alaska 1995).

Maintaining or increasing sport fishing opportunity for residents, however, could in some circumstances be a legitimate basis for restricting sport fishing opportunity for nonresidents.

Petitions. The Board has adopted a regulation governing petitions.³¹ A petition must: (1) state the substance or nature of the regulation or action requested; (2) state the reason for the request; and (3) reference the agency's authority to take the requested action. Any petition not involving subsistence will be denied unless the problem identified justifies emergency rule-making.³² A petition involving subsistence may be considered if: (1) it addresses a fish population that has not previously been considered by the Board for a customary and traditional use finding; or (2) the circumstances otherwise require expedited consideration. After consideration, the Board may decline to act on a petition. The Board has a separate regulation governing petitions for some Bering Sea / Aleutian Islands King and Tanner crab issues.³³

Agenda Change Requests. The Board has adopted a regulatory policy for changing the Board agenda.³⁴ Under this policy, the Board will accept an Agenda Change Request only for its first meeting in the fall, will not accept an agenda change request that is primarily allocative in nature in the absence of compelling new information and will accept a request only: (1) for a fishery conservation purpose or reason, (2) to correct an error in a regulation, or (3) to correct an effect on a fishery that was unforeseen when a regulation was adopted. This policy also provides for the Board's discretionary consideration of proposed regulatory changes to coordinate state and federal fishery programs at any time under the guidelines of the Administrative Procedures Act. The policy does not restrict the Board from considering Board-generated proposals in or out of cycle.

Written findings. The Board has adopted a policy on findings that incorporates suggestions from the Department of Law. The Board should consult that policy to determine whether written findings should be prepared.

³¹ 5 AAC 96.925.

³² 5 AAC 96.625(f).

³³ 5 AAC 39.998.

³⁴ 5 AAC 39.999.