

# MEMORANDUM

# State of Alaska

## Department of Law

TO: Glenn Haight  
Executive Director  
Alaska Board of Fisheries

DATE: October 12, 2016

FILE NO.: AN2014102724

FROM: Seth M. Beausang *SMB*  
Assistant Attorney General

TEL. NO.: 269-5289

SUBJECT: Department of Law  
comments on the ACRs to  
be considered at the  
October 18-20, 2016 work  
session

The Department of Law has the following comments on the ACRs to be considered by the Board of Fisheries at its October 18-20, 2016 work session:

As set forth below, two requests are not actually ACRs because they do not require a change of the Board's agenda for the upcoming 2016-17 regulatory cycle because the matters raised are already on the Board's agenda.

ACR 6 proposes to create vessel restrictions for the Kenai River personal use dipnet fishery, a subject within the scope of the scheduled February 23-March 8, 2017 Upper Cook Inlet Finfish meeting.

ACR 7 would remove the 45-mesh depth restriction for drift gillnets in the Upper Cook Inlet commercial salmon fishery, a subject within the scope of the scheduled February 23-March 8, 2017 Upper Cook Inlet Finfish meeting.

ACRs 6 and 7 are simply late proposals that missed the filing deadline of the call for proposals. If the Board nevertheless considers any of these ideas to be worthy of consideration, it should generate its own proposals, consistent with Board policy, so they can be distributed to the public and advisory committees and considered at the appropriate meeting. The criteria in 5 AAC 39.999 to do not apply to Board-generated proposals.

ACRs 9 and 10 seek to add to the Board's agenda proposals similar to proposals that have been recently been before by the Board. Attached for the Board's reference are two prior memos from Law that discuss legal issues related to these ACRs. Law's memo dated February 11, 2015 relates to ACR 9 and Law's memo dated August 18, 2016 relates to ACR 10.

Attachments

# MEMORANDUM


## State of Alaska

### Department of Law

TO: Glenn Haight  
Executive Director  
Alaska Board of Fisheries

DATE: August 18, 2016

FILE NO.: AN2014102724

FROM: Seth M. Beausang   
Assistant Attorney General

TEL. NO.: 269-5289

SUBJECT: Department of Law  
comments on emergency  
petition by Bill Connor

The Department of Law has the following comments on the email emergency petition submitted by Bill Connor to the Board of Fisheries dated June 10, 2016, which was denied by the Commissioner of the Department of Fish and Game on July 7, 2016, and which is to be considered by the board at a meeting on August 30, 2016.

Mr. Connor's petition appears to request that the board adopt emergency regulations (1) allowing limited entry permit holders in the Southern Southeast Inside longline sablefish fishery to use pot gear at their option; or (2) extending the season for the Southern Southeast Inside longline sablefish fishery. Should the board determine that an emergency exists under 5 AAC 96.625(f) and AS 44.62.250 (which requires a written statement of facts and finding that the emergency regulation is "necessary for the immediate preservation of the public peace, health, safety, or general welfare"), the board would have legal authority to adopt emergency regulations extending the longline season specified in 5 AAC 28.110(a)(2), but would not have legal authority to adopt regulations allowing limited entry longline permit holders to use pot gear at their option.

Board regulations at 5 AAC 28.130(a) already allow sablefish to be taken in the Southern Southeast Inside District with longlines and pots. The Commercial Fisheries Entry Commission has limited entry into both fisheries, allowing a maximum of 18 longline entry permits and 3 pot entry permits. *See* 5 AAC 05.320(e)(2). CFEC is the agency with authority to potentially allow additional users to participate in this limited entry pot fishery, not the board. A board regulation attempting to allow longline permit

holders to use pot gear at their option would likely be viewed as an invalid attempt by the board to allow additional users to participate in the limited entry pot fishery. The board can take other non-regulatory action, such as expressing the board's view to CFEC and the public as to whether allowing longline permit holders in this fishery to use pot gear at their option would serve a fishery conservation and development purpose.

# 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   
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(c)(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.

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<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).