

MEMORANDUM

State of Alaska Department of Law

To: Glenn Haight
Executive Director
Alaska Board of Fisheries

Date: April 24, 2018

File No.:

RC 026

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From: Brad Meyen
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Subject: Comments from Department of
Law on proposal 242 and the
emergency petition for the April
24, 2018 Board of Fisheries
meeting

The Department of Law has the following comments for the Board of Fisheries at its April 24, 2018 meeting to be held in Anchorage.

Proposal 242: The board should consider the allocation criteria in AS 16.05.251(e). In addition, the board should explain in detail the reasons for any action it takes that differ from the board's actions in February concerning this fishery.

Emergency Petition Upper Yentna River Subsistence Fishery: The board can adopt emergency regulations if it "makes a written finding, including a statement of the facts that constitute the emergency, that the adoption of the regulation or order of repeal is necessary for the immediate preservation of the public peace, health, safety, or general welfare." AS 44.62.250. The board typically evaluates whether an emergency exists with respect to a petition before considering whether to take action in response to the petition. The board has defined in regulation at 5 AAC 96.625(f) what constitutes an "emergency," and for petitions dealing with subsistence, the board should also consider the two criteria in 5 AAC 96.615(a):

(1) the proposal must address a fish or game population that has not previously been considered by the board for identification as a population customarily and traditionally used for subsistence under AS 16.05.258; or

(2) the circumstances of the proposal otherwise must require expedited consideration by the board, such as where the proposal is the result of a court decision or is the subject of federal administrative action that might impact state game management authority.

Should the board find an emergency and take action at this meeting, for this and all proposals affecting subsistence fisheries, the board should consider whether adoption of the proposed regulation is needed to provide a reasonable opportunity for subsistence uses of the amount of fish reasonably necessary for those uses. "Reasonable opportunity" means 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 fish or game." The board can base its determination of whether the regulations provide a reasonable opportunity for subsistence uses on: the amounts of a fish stock that have been established as reasonably necessary for subsistence uses, information pertaining to subsistence harvest data, bag limits, access, methods and means regulations and gear necessary to achieve the harvest, and other factors.

Unless it has done so previously, the board, when considering a proposal that would affect subsistence, should: (1) determine whether the fish stock is in a nonsubsistence area; (2) determine whether the fish stock or portion of the fish stock is customarily and traditionally taken or used for subsistence; (3) determine whether a portion of the fish stock may be harvested consistent with sustained yield; (4) determine the amount of the harvestable portion that is reasonably necessary for subsistence uses; (5) adopt regulations to provide a reasonable opportunity for subsistence uses; and (6) if the harvestable amount is not sufficient to allow for subsistence uses and other consumptive uses, adopt regulations to reduce or eliminate other uses in order to provide a preference and reasonable opportunity for subsistence uses.