

MEMORANDUM

State of Alaska

Department of Law

TO: Art Nelson
Executive Director
Alaska Board of Fisheries

DATE: October 19, 2022

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FROM: Aaron Peterson
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SUBJECT: Department of Law
comments on proposals
for the October 27-28,
2022 Board of Fisheries
meeting for Alaska
Peninsula, Aleutian
Islands, Bering Sea, and
Chignik Pacific cod

The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at its October 27 - October 28, 2022 meeting for Alaska Peninsula, Aleutian Islands, Bering Sea, and Chignik Pacific cod:

Proposals 2, 3, 4: These proposals ask the Board to limit vessel length and gear and to allocate fisheries resources by modifying open season dates.

When allocating fishery resources the Board must apply the statutory allocation criteria found at AS 16.05.251(e). The Alaska Supreme Court has held that the statutory allocation criteria apply to allocations among use categories (personal use, sport, guided sport, and commercial) as well as among subgroups of those categories (e.g., drift and setnet commercial fisheries). When the Board allocates among subgroups it should discuss the allocation criteria. However, the Board may not allocate within the same subgroup fishing in the same administrative area.

Proposal 161: This proposal asks the Board to adopt a policy regarding the management of groundfish, similar to the “Guiding Principles for Groundfish Fishery Regulations,” which was repealed in 2013.

Law has consistent advised the Board to expressly address applicable guiding principles on the record when considering regulatory proposals concerning fisheries and stocks for which a policy exists.

As an example, 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. 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.

Law also recommends 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, or carefully explaining its deviation from the principle, may result in a Board action being invalidated.

A Board cannot bind a future board to a particular course of action, so 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 obstacles that may serve as bases for legal challenges to Board actions.