

STATE OF ALASKA

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DIVISION OF COMMERCIAL FISHERIES

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Memorandum

TO: Mel Morris, Chair
Alaska Board of Fisheries

DATE: June 23, 2008

THROUGH: John Hilsinger, Director
Commercial Fisheries Division

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FROM: Jeff Regnart, Region II Regional Supervisor
Commercial Fisheries Division

SUBJECT: Petition to amend
the UCI 200 fathom net regulation

Action Requested

The petitioner requests that the Alaska Board of Fisheries (BOF) amend the regulatory provisions at 5 AAC 21.333 regarding use of 200 fathom nets when two permit holders are on board a vessel. These regulations were adopted by the BOF at its Upper Cook Inlet (UCI) finfish regulatory meeting in February 2008 (Proposal 107). The stated intent of the petition is to address an "unintended legal outcome." The proponents argue that the intention of the proposal adopted by the BOF was to allow the use of 200 fathom nets in all areas during normal district wide openings but to prohibit such use when fishing is restricted to less than 150 fathoms and to prohibit such use when fishing is restricted to the Kenai and/or Kenai sections, the Kasilof terminal fishery, closed areas described in 21.350, or the Chinitna Bay subdistrict. The proponents seek changes to accomplish this purpose and to allow possession of 200 fathoms of gear on a vessel while in areas restricted to fishing less than 200 fathoms of gear.

The proposal adopted by the BOF was based on a similar provision in Bristol Bay, 5 AAC 06.333, which prohibits use of 200 fathom nets in specified special harvest areas, and thus does not accomplish the intent now expressed by the petition proponents; instead it prohibits use of 200 fathom nets in the Chinitna Bay Subdistrict, the Kenai Section, and the Kasilof Section at all times. In conjunction with other regulatory provisions, it also prohibits fishing in specified subdistricts while 200 fathoms of gear is onboard.

To grant the petition as requested, the BOF must make a finding of emergency under the criteria listed in 5 AAC 96.625. In subsection (f), an emergency is described as an unforeseen,

unexpected event that either threatens a fish or game resource, or an unforeseen, unexpected resource situation where a biologically allowable resource harvest would be precluded by delayed regulatory action and such delay would be significantly burdensome to the petitioners because the resource would be unavailable in the future. The BOF also has discretion to take up a Board-generated proposal to amend the regulation or to delegate authority to the Commissioner if it determines that the final regulation does not reflect its intent. Action on a Board-generated proposal would require a finding of emergency under the more general standards of AS 44.62.250, which allows changes “necessary for the immediate preservation of the public peace, health, safety, or general welfare.”

Analysis

There was very little discussion of proposal 107 at the February BOF meeting, and it is not clear whether the BOF intended the proposal language to have the same effect that the similar language has in Bristol Bay. There was no discussion on the record by the BOF or the Alaska Department of Fish and Game (ADF&G) of the enforcement issues that would be raised due to possession of 200 fathoms of gear on board a vessel if the fishery opened district wide and then was extended, but restricted to an area where 200 fathoms is not allowed.

The current regulation, if enforced as written, is likely to discourage use of the 200 fathom provision. Those using 200 fathoms will face prosecution if they drift over the line; they will also be required to offload gear, with potentially significant fuel costs and fishing time losses, before switching from a fishing period in which extra gear is allowed to fishing in an area where such gear is not allowed. If it was not the BOF’s intent for the language adopted in proposal 107 to function in UCI in the same way the similar language functions in Bristol Bay, then this could be considered an unforeseen, unexpected event which may reduce the amount of gear fished and catching power of the fleet in a fishery of short duration and could possibly contribute to preclusion of a biologically allowable resource harvest, which could be significantly burdensome to the petitioners because the resource would be unavailable in the future. If this was not the BOF’s intent, then, under a Board-generated proposal, changes could also be considered necessary for protection of the public peace and general welfare if the BOF anticipates significant economic or fishery management impacts or displacement of enforcement efforts.

Findings of Emergency

Although emergencies are held to a minimum and rarely found to exist, it is ADF&G’s conclusion that a finding of emergency under 5 AAC 96.625 (f) or the more general standards of AS 44.62.250 could be satisfied in this case if the BOF did not intend the language adopted on proposal 107 to have the same effect that similar language has in Bristol Bay, or if the BOF intended to allow possession of 200 fathoms of gear on board a dual permit holder vessel even where fishing with such gear is prohibited. If the BOF intended the language to have the same effect it has in Bristol Bay, and did not intend to allow possession of 200 fathoms of gear on board a dual permit holder vessel during restricted periods, then application of the regulation would not be an unforeseen, unexpected event and a finding of emergency could not be satisfied. Because the BOF’s record does not clearly address this issue, the BOF members will need to

decide whether the result is unintended and unexpected as well as whether the result is significant enough to warrant a finding of emergency.

Substitute Language

If the board decides that the result of the adopted regulatory language under 5AAC 21.333 is unintended and unexpected, and that it is warranted of a finding of an emergency, the substitute language below should satisfy the petitioner's request.

5 AAC 21.333. REQUIREMENTS AND SPECIFICATIONS FOR USE OF 200

FATHOMS OF DRIFT GILLNET IN THE COOK INLET AREA. (a) Except as specified in (e-g) of this section, two Cook Inlet drift gillnet CFEC permit holders may concurrently fish from the same vessel and jointly operate up to 200 fathoms of drift gillnet gear under this section.

(b) Before operating drift gillnet gear jointly under this section, both permit holders shall register with the department office in Anchorage, Soldotna, or Homer.

(c) When two Cook Inlet drift gillnet CFEC permit holders fish from the same vessel and jointly operate **additional** drift gillnet gear under this section, the vessel must display its ADF&G permanent license plate number followed by the letter "D" to identify the vessel as a dual permit vessel. The letter "D" must be removed or covered when the vessel is operating with only one **registered** drift gillnet CFEC permit holder on board the. The identification number and letters must be displayed

- (1) in letters and numerals 12 inches high with lines at least one inch wide;
- (2) in a color that contrasts with the background;
- (3) on both sides of the hull; and
- (4) in a manner that is plainly visible at all times when the vessel is being operated.

(d) When two permit holders jointly operate gear under this section, each permit holder is responsible for ensuring that the entire unit of gear is operated in a lawful manner.

(e) The joint operation of **additional** drift gillnet gear under this section is not allowed in any other area, or during any time when a single CFEC permit holder is restricted to operating less than 150 fathoms of drift gillnet gear, or when the drift gillnet area is restricted to any of the following areas:

- (1) Chinitna Bay Subdistrict;

(2) Kenai Section;

(3) Kasilof Section;

(4) Kasilof River Special Harvest Area as described in 5 AAC 21.365.

(f) For a vessel operating under this section with two registered permit holders on board, transport through any area where the legal compliment of gear is less than 200 fathoms of gillnet gear is permissible with 200 fathoms aboard as long as no portion of the gear is deployed into the water;

(g) While fishing under this section in any area where gear is restricted to less than 200 fathoms of gillnet, the remaining gear may remain on the reel or aboard the vessel but must be physically detached from the gillnet gear that is being fished.