MEMORANDUM

STATE OF ALASKA
Department of Law

To: Jim Marcotte
Executive Director
Alaska Board of Fisheries

Thru:

From: Steven Daugherty & Lance Nelson
Assistant Attorneys General
Natural Resources Section
Department of Law

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File No.: 661050436

Tel. No.: 269-5100

Fax: 279-2834

Subject: **General Comments for Regulatory Meetings During 2008 – 2009 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 2008 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

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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 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 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 recently 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 fishing and commercial drift net fishing as different fisheries, for example, it

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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).

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.

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

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

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

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 polices 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 polices may result in a court invalidating a Board regulation.

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

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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).

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

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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.

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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).

Ecotourism Fisheries: There are no statutes dealing expressly with ecotourism fisheries, however the Board's general authorities over the conservation and development of fisheries give it authority to create and regulate these evolving fisheries. During the 2007-2008 regulatory cycle the Board considered several ways to deal with ecotourism fisheries based on both commercial fishery and guided sport fishery models. The Board decided in 2008 to use its general authorities under AS 16.05.251 over conservation and development of fisheries, along with its express authority under AS 16.05.940(14) over definition of fisheries, and its authorities over guided sport fishing (AS 16.05.260, AS 16.05.270), to create and regulate a new category of fishery, "guided sport ecotourism fishing." The basic framework regulations adopted by the Board are found at 5 AAC 75.085 and temporary regulations, sunsetting before the 2009 season, specific to a superexclusive George Inlet guided sport ecotourism Dungeness crab fishery are found at 5 AAC 47.090. In 2007, the Board adopted ecotourism fishery regulations, although not expressly designated as such, using a commercial fishing model in Bristol Bay. (5 AAC 06.390).

When considering ecotourism fishery regulations, the Board should be careful to establish a record thoroughly explaining its decisions and the fishery conservation or development purposes of the regulations. The Board does not have fee authority and does not have authority to change or waive commercial or sport fishery license requirements established by statute where the activities involved in ecotourism fishing fall within the definitions of commercial or sport fishing. If the Board determines that existing authorities and license requirements do not fit well with evolving ecotourism fisheries it may wish to seek legislative changes to better accommodate these fisheries.

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 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]

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21 5 AAC 39.220(a).
22 5 AAC 39.220(c).
23 5 AAC 39.220(b).
24 5 AAC 39.220(d).

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.

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

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[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)0(14); *see, also, State v. Herbert*, 803 P.2d 863 (Alaska 1990).

[26] *See generally* AS 16.43.

[27] AS 16.43.270(d).

entry permits, some permit holders may be subject to a maximum gear limitation that is lower than the limit set by the Board. Under a recent change to the Board's authority at 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.

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. 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]

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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).

31 5 AAC 96.925.

32 5 AAC 96.625(f).

33 5 AAC 39.998.

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 unforseen 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.

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34 5 AAC 39.999.