

# MEMORANDUM

STATE OF ALASKA

*Department of Law*

To: Monica Wellard  
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Alaska Board of Fisheries

Date: October 5, 2011

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Subject: **Comments on Specific  
Proposals for October 2011  
Board of Fisheries Meeting:  
Pacific Cod Fisheries**

The Department of Law has the following comments on certain of the proposals to be considered by the Board of Fisheries at its October 2011 meeting on regulations for Pacific cod fisheries in Prince William Sound, Cook Inlet, Kodiak, Chignik and South Alaska Peninsula areas.

**Proposal 1.** This proposes that the Board adopt a regulation directing the Department to review fishermen and processor groundfish reporting and licensing requirements for duplication, necessity, and effectiveness with federal agency requirements and to adopt certain methods and technologies for retrieving information. The Board has no administrative, budgeting, or fiscal powers over the Department and lacks authority to direct the Department to undertake review of regulations or to use certain methods or technologies. Also, the proposal is vague in many respects, for example in describing when Departmental review would be triggered (“where harvest and/or processing of State/Federal fisheries may intersect and reporting/licensing requirements applied”) and what criteria would be applied in determining whether requirements should be changed (proposing, for example, that “[r]eporting requirements must be reviewed for their full necessity and reasonable effectiveness” and “methodology of retrieving information should ... require minimum impact on those entities providing the information”).

**Proposal 36.** This proposes to allow only vessels without a federal Pacific cod endorsement to participate in the Prince William Sound state waters Pacific cod fishery. This proposal is said to address the issue that many fishermen have lost federal Pacific cod endorsements and no longer have access to federal waters, and they will now have to

compete in state water fisheries against vessels that have access to all waters. We doubt the Board of Fisheries has the authority to adopt this proposal, and even if it does we have significant concerns as to the constitutionality of the proposed regulation.

This essentially proposes to limit entry and access to the PWS state waters Pacific cod fishery to those who cannot fish in federal waters under the federal License Limitation Program. This likely is beyond the authority of the Board because Commercial Fisheries Entry Commission, not the Board, has the authority to “regulate entry into the commercial fisheries for all fishery resources of the state,” AS 16.43.100, and then only under the standards established in AS 16.43.200-.270. The Alaska Supreme Court has “observed that the authority to make allocation decisions ‘does not imply a power to limit admission to a user group,’ as the latter power may conflict with the common use, no exclusive right of fisheries, and equal application clauses of section 3, 15 and 17 [of Article VIII of the Alaska constitution].” *State v. Hebert*, 803 P.2d 863, 866 (Alaska 1990). In *Hebert*, the court upheld the Board’s “superexclusive” herring fishery regulations, finding that “[t]he regulation does not limit one’s ability to fish in a superexclusive district except in the sense that one may not fish in more than one district in any one year.” *Id.* at 867. This proposal, on the other hand, would limit one’s ability to participate in the fishery based on status as holder of a federal endorsement, and thus it risks running afoul of the Article VIII clauses as well as state and federal equal protection clauses and/or federal commerce clause powers.