

# MEMORANDUM

## State of Alaska Department of Law

TO: Kristy Tibbles Executive Director  
Alaska Board of Game

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SUBJECT: March 2013 Bd. of Game meeting

### GENERAL COMMENTS

**In general, ethics disclosures:** Before staff reports begin on any new agenda item, or, if preferred, at the very beginning of the meeting, Ethics Act disclosures and determinations must be made under AS 39.52.

**In general, record-making:** It is very important that Board members carefully explain and clearly summarize on the record the reasons for their actions and the grounds upon which the actions are based. The Alaska Supreme Court has stressed the importance of a clear record to facilitate the courts in determining that the Board's actions are within its authority and are reasonable. A clear record also assists the public in understanding the Board's rationale. If Board members summarize the reasons for their actions before they vote, it will help establish the necessary record.

In considering each proposal, and the specific requirements that apply in some cases, such as with the subsistence law, it is important that the Board thoroughly discuss and summarize on the record the basis and reasons for its actions. Consistency with past approaches is another important point for discussion. If a particular action does not appear to be consistent, Board members should discuss their reasons for a different approach.

The Alaska Administrative Procedure Act requires that State agencies, including the Board of Game, "[w]hen considering the factual, substantive, and other relevant matter, ... pay special attention to the cost to private persons of the proposed regulatory action." AS 44.62.210(a). This requirement to pay special attention to costs means, at a minimum, that the Board should address any information presented about costs, or explicitly state that no such information was presented, during deliberation of any proposal likely to be adopted. In our view, this requirement does not go so far as to mandate that the Board conduct an independent investigation of potential costs, nor does

it require that cost factor into the Board's decision more than, for example, conservation concerns might. However, it does require the Board to address and "pay special attention to" costs relevant to each regulation adopted.

**In general, written findings:** If any issue is already in court, or is controversial enough that you believe it might result in litigation, or if it is complex enough that findings may be useful to the public, the Department, or the Board in the future, it is important that the Board draft and adopt written findings explaining its decisions. From time to time, the Department of Law will recommend that written findings be adopted, in order to better defend the Board's action. Such recommendations should be carefully considered, as a refusal to adopt findings, in these circumstances, could mean that the Board gets subjected to judicial oversight and second-guessing which might have been avoided. The Alaska Supreme Court has stressed the importance of an adequate decisional document, or written finding, to a determination that the Board has acted within its authority and rationally in adopting regulations, and has deferred to such findings in the past.

**In general, subsistence:** For each proposal the Board should consider whether it involves or affects identified subsistence uses of the game population or sub-population in question. If action on a proposal would affect a subsistence use, the Board must be sure that the regulations provide a reasonable opportunity for the subsistence uses, unless sustained yield would be jeopardized. If the Board has not previously done so, it should first determine whether the game population is subject to customary and traditional uses for subsistence and what amount of the harvestable portion, if any, is reasonably necessary for those uses. *See* 5 AAC 99.025 for current findings on customary and traditional uses and amounts reasonably necessary for subsistence uses. The current law requires that the Board have considered at least four issues in implementing the preference:

- (1) Identify game populations or portions of populations customarily and traditionally taken or used for subsistence; *see* 8 criteria at 5 AAC 99.010(b);
- (2) determine whether a portion of the game population may be harvested consistent with sustained yield;
- (3) determine the amount of the harvestable portion reasonably necessary for subsistence uses; and
- (4) adopt regulations to provide a reasonable opportunity for subsistence uses.

Reasonable opportunity is defined to mean "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 of fish or game.” AS 16.05.258(f). It is not to be construed as a guarantee of success.

The amount of the harvestable portion of the game population that is reasonably necessary for subsistence uses will depend largely on the amount of the game population used for subsistence historically and the number of subsistence users expected to participate. This may require the Board to determine which users have been taking game for subsistence purposes, and which ones have not. Once the Board has determined the amount reasonably necessary for subsistence uses, the Board should by regulation provide an opportunity that allows the predicted number of normally diligent participants a reasonable expectation of success in taking the subject game. In doing so, the Board must distinguish among the various uses, unless the harvestable surplus is so numerous as to be able to provide for all uses. The Board may base its determination of reasonable opportunity on all relevant information including past subsistence harvest levels of the game population in the specific area and the bag limits, seasons, access provisions, and means and methods necessary to achieve those harvests, or on comparable information from similar areas.

If the harvestable portion of the game population is not sufficient to provide for subsistence uses and any other consumptive uses, the Board is required to eliminate non-subsistence uses in order to continue to provide a reasonable opportunity for subsistence uses. If the harvestable portion of the game population is still not sufficient to provide a reasonable opportunity for all subsistence uses, the Board is required to eliminate non-subsistence consumptive uses and distinguish among the subsistence users based on the following Tier II criteria:

- (1) The customary and direct dependence on the game population by the subsistence user for human consumption as a mainstay of livelihood; and
- (2) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated. AS 16.05.258.

**In general, intensive management:** Under AS 16.05.255 (e), (f) and (g), the Board should assure itself that the steps outlined below have been followed when acting on proposals dealing with ungulate populations.

**First** - Determine whether the **ungulate** population is **important for high levels of human consumptive use**. The Board has already made many of these determinations. *See* 5 AAC 92.108. However, these past findings do not preclude new findings, especially if based on new information.

– If so, then subsequent intensive management analysis may be required.

– If not, then no further intensive management analysis is required.

**Second** - Is the ungulate population **depleted** or will the Board be **significantly reducing the taking** of the population? See 5AAC 92.106(5) for the Board’s current definition of “significant” as it relates to intensive management.

The Board must determine whether depletion or reduction of productivity, or Board action, is likely to cause a significant reduction in harvest.

– If either is true, then subsequent intensive management analysis is required.

– If not, then further intensive management analysis is not required.

**Third** - Is intensive management appropriate?

(a) If the population is depleted, has the Board found that consumptive use of the population is a preferred use? Note that the Legislature has already found that “providing for high levels of harvest for human consumption in accordance with the sustained yield principle is the highest and best use of identified big game prey populations in most areas of the State ...” In the rare cases where consumptive use is not a preferred use, then the Board need not adopt intensive management regulations.

(b) If consumptive uses are preferred, and the population is depleted or reduced in productivity so that the result may be a significant reduction in harvest, the Board must consider whether enhancement of abundance or productivity is feasibly achievable using recognized and prudent active management techniques. At this point, the Board will need information from the Department about available recognized management techniques, including feasibility. If enhancement is feasibly achievable, then the Board must adopt intensive management regulations.

(c) If the Board will be significantly reducing the taking of the population, then it must adopt, or schedule for adoption at its next meeting, regulations that provide for intensive management *unless*:

1. Intensive management would be:
  - A. Ineffective based on scientific information;
  - B. Inappropriate due to land ownership patterns; or
  - C. Against the best interests of subsistence users;

*or*

2. The Board declares that a biological emergency exists and takes immediate action to protect and maintain the population and also schedules for adoption those regulations necessary to restore the population.

### **Comments on Individual Proposals**

**Proposals 127, 128, 129, 131, 132, 133, 134, 135, 146, 148, 149:** Each of these proposals seeks to reauthorize or create an antlerless moose season. Under AS 16.05.780, the Board may only adopt regulations allowing for antlerless moose hunts after: (1) “the Department recommends the season be opened in that year, based on biological evidence”; and (2) “a majority of active local advisory committees for that unit or subunit have recommended an opening for that year, after each has taken a vote and a majority of the members of those committees have voted in the affirmative.” Under 5 AAC 98.005, an “active advisory committee” for the purposes of implementing antlerless moose hunts “is a committee that holds a meeting and acts on the proposal.”

**Proposal 130:** The Board has previously determined that black bear in Unit 6 is a game population customarily and traditionally taken or used for subsistence and that the amount reasonably necessary for subsistence uses is between 80 and 120 bears. 5 AAC 99.025(a)(2). This proposal suggests limitations on existing hunting opportunity that could also affect subsistence uses. The Board needs to determine whether it is able to still provide a reasonable opportunity for subsistence uses and, therefore, whether other uses may be allowed. AS 16.05.258(b).

**Proposal 136:** This proposal suggests giving the Department greater flexibility to manage drawing permits for sheep. Under the existing regulation, 5 AAC 85.055(a)(7), the Board has authorized the Department to issue “up to 240 permits” for full curl rams and ewes and “up to 150 permits” for ewes. This language already authorizes the Department to issue fewer permits and 5 AAC 92.052(17) authorizes the Department to restrict the hunt to a specified sex.

The proposal also suggests removing or relaxing the full curl requirement for rams—this part of the proposal would require action by the Board.

**Proposal 140:** The Board has previously determined that deer in Unit 8 is a game population customarily and traditionally taken or used for subsistence and that the amount reasonably necessary for subsistence uses is between 3600 and 4100 deer. 5 AAC 99.025(a)(5). This proposal suggests limitations on existing hunting opportunity that could also affect subsistence uses. The Board needs to determine whether it is able to still provide a reasonable opportunity for subsistence uses and, therefore, whether other uses may be allowed. AS 16.05.258(b).

In considering changes to Unit 8 deer regulations, the Board should also consider the requirements of AS 16.05.255(d), which requires Board regulations provide that “the

taking of moose, deer, elk, and caribou by residents for personal or family consumption has a preference over taking by nonresidents.”

Finally, in considering changes to Unit 8 deer regulations, the Board should consider if regulatory changes may “significantly reduce the taking” of deer thus triggering its obligations under the intensive management statute. AS 16.06.255(f); *see also* 5 AAC 92.106(5) for a definition of “significant.” The Board has previously identified Unit 8 deer as important for providing for high levels of harvest for human consumptive use and set a population objective of 70,000 to 75,000 and a harvest objective of 8,000 to 8,500. 5 AAC 92.108.

**Proposal 147:** In evaluating findings and objectives for intensive management, the Board should apply the criteria of 5 AAC 92.106.

**Proposals 162, 163, 164, 165, 166, 167, 168, 169, 170:** Each of these proposals suggests discriminating, in some way, in favor of residents and against nonresidents. While the Board has an obligation to provide a resident preference for the taking of moose, deer, elk, and caribou for personal or family consumption over nonresident taking, many of these proposals suggest resident preferences beyond the four species listed in statute. The Board may discriminate in favor of residents and against nonresidents in allocating hunting opportunity if it concludes that the game populations in question cannot sustain the expected demand by both residents and nonresidents. *Shepherd v. State, Dep’t of Fish and Game*, 897 P.2d 33, 40-41 (Alaska 1995). In such cases, the Board may exclude or limit nonresident opportunity as appropriate under the circumstances.

**Proposals 167, 168, 169, 170, 171:** Each of these proposals would allocate a certain percentage of drawing permits to residents and nonresidents. Current Board policy, 2007-173-BOG, states: “Allocations will be determined on a case by case basis and will be based on upon the historical data of nonresident and resident permit allocation over the last 10 years.”

**Proposal 167:** In addition to the comments above, this proposal suggests removing the nonresident guide requirement brown bear, grizzly bear, mountain goat, and sheep, and raising nonresident fees. The nonresident guiding requirement is in statute, AS 16.05.407, and the Board may not adopt a regulation that is inconsistent with statute. Nor does the Board have the authority to set tag or permit fees.

**Proposals 173 & 174:** Both of these proposals seek to prohibit bear snaring throughout Region II, which is already prohibited under existing regulations in the Region.