

RC029

January 10, 2018

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**Board of Fisheries
January 11 – January 23, 2017
Sitka, Alaska**

Dear Chairman Jensen and Board of Fisheries Members:

SEAS' respectfully submits the following summary from the BoF deliberations during the Prince William Sound Board meeting in 2014 as background information concerning proposal **159**.

Summary of BoF deliberation 2014 PWS on aircraft spotting

Regulation as worded in 2018:

5 AAC 24.378. Use of aircraft unlawful. During open commercial salmon fishing periods no person may use an aircraft to locate salmon for the commercial taking of those fish or to direct commercial fishing operations.

PROPOSALS 19, 20 & 21 AS WRITTEN IN PROPOSAL BOOK

PROPOSAL 19 - 5 AAC 24.378. Use of aircraft unlawful. Allow use of spotter planes in Prince William Sound salmon purse seine fisheries, as follows:

During open commercial salmon fishing periods [NO PERSONS MAY USE AN] **aircrafts may be used** to locate salmon for the commercial taking of those fish or to direct commercial fishing operations.

What is the issue you would like the board to address and why? Fish spotting planes should be able to fly during commercial salmon fishing seine openers in Prince William Sound.

Currently pilots are not allowed to fly during the openers:

- 1) When the fishery is open 7 days a week, for example Port Chalmers and AFK, there is no legal time to fly and some planes have been flying anyway for other reasons- parts, supplies, etc.
- 2) Safety reasons- pilots are being pushed into such a small time slot for flying that they are often being forced to fly in the dark and in poor weather conditions.
- 3) In talking with some troopers, it is a very difficult law to enforce.
- 4) To my knowledge PWS is the only area that planes are restricted to not fly during the fishery openers, for example Southeast and Kodiak salmon seine fisheries do not have this restriction on fish spotting planes.

PROPOSED BY: Scott McKenzie (EF-C14-175)

PROPOSAL 20 - 5 AAC 24.378. Use of aircraft unlawful. Allow use of spotter planes in Prince William Sound salmon purse seine fisheries, as follows:

It is legal to use aircraft in Prince William Sound (PWS) during commercial fishing openers.

What is the issue you would like the board to address and why? Aircraft should be allowed to fly in PWS during commercial fishing openers because the Alaska Department of Fish and Game has no reason for it to be illegal. Therefore, it becomes a law censoring who we can talk to and the content of that conversation.

PROPOSED BY: Kris Phillips (EF-C14-132)

PROPOSAL 21 - 5 AAC 24.378. Use of aircraft unlawful. Allow use of spotter planes in Prince William Sound salmon purse seine fisheries, as follows:

"Aircraft can be flown during openers but not allowed to set boats on fish or communicate in aiding boats to catch fish during the opener."

What is the issue you would like the board to address and why? The issue is flying airplanes during the openers. In the past, the openers were fished one day off, one day on. This allowed the boats who had pilots to be able to fly on the days that where not being fished; however we have seen more and more openers every day and the trend of that happening is more likely. Only being allowed to fly before and after the opener leaves a small window of light and leaves a huge safety issue for the pilots and aircraft. Due to the time at night that it closes, it is very hard to leave Cordova after it closes and do a survey of the fishing area that is open (due to the large area that the Prince William Sounds (PWS) seine fleet has).

Often I am only able to do a small section and then return and make it back before dark. Pilots have even had to stay the night out on the sound with our planes because we ran out of light. Mixed with weather, this is a huge safety risk and a very uncomfortable feeling.

Pilots need to bring parts or crew to boats during the openers and it has become a pain for me to have to call the troopers to let them know I will be out there. First off it's my airplane, and second, I have a valid license from the FAA that allows me to fly anywhere I want at any given time; even during an opener. I feel that I do not have to tell the troopers what I am doing as long as I am not aiding boats in the recovery or catching of fish. But yet I feel someday someone will get a ticket for doing just that and will spend a ton of money to prove that they are innocent. This law is unenforceable, they cannot say when we can and can't fly. They can tell us we can't set boats on fish, but not when we can fly.

As long as I am not setting boats on fish, I am not breaking the law. I feel guilty just taking parts out to boats and the risk factor with the light that is left after an opener is high and someday, if this doesn't get changed, someone will get hurt. What happens when there is a 48 or 60 hour opener for the seine fleet? We need to be able to fly to bring parts and crew or if someone gets hurt take him off the boat. We shouldn't have to feel that we have to notify the troopers to do this.

The solution is to allow aircraft to be flown during the openers but not allowed to set boats on fish or communicate with boats in the aid of catching boats during the opener.

This would also be a lot easier for the troopers so they could ease their work load on trying to catch someone flying during the opener.

So first, this is a safety issue the way it is right now and second, it would allow the pilots to do their job without the fear of getting a ticket just because he dropped off a crew member or took out a part to a boat. And third, if a pilot got a ticket, it would more than likely not hold up in court and only cost the pilot a lot of money to defend. The trooper would have to prove that the pilot put the boat on fish and not only that, but caught the exact fish that he saw, not another school of fish but that exact fish.

PROPOSED BY: Bruce Stamper (EF-C14-133)

ADF&G STAFF COMMENTS ON PROPOSALS 19, 20 AND 21

PROPOSAL 19, 20 and 21 – 5 AAC 24.378. Use of aircraft unlawful.

PROPOSED BY: Scott McKenzie (Proposal 19), Kris Phillips (Proposal 20), and Bruce Stamper (Proposal 21).

WHAT WOULD THESE PROPOSALS DO? These proposals would make using aircraft to locate and direct commercial salmon harvests legal.

WHAT ARE THE CURRENT REGULATIONS? During open commercial salmon fishing periods, no person may use an aircraft to locate salmon for the commercial taking of those fish or to direct commercial fishing operations.

WHAT WOULD BE THE EFFECT IF THESE PROPOSALS WERE ADOPTED? The proposals would allow those commercial salmon permit holders working with spotter pilots to be more efficient at harvesting salmon.

BACKGROUND: The current regulation was adopted at the 1993 board meeting because fishermen using aircraft *had an advantage of locating concentrations of salmon over those not using aircraft.*

DEPARTMENT COMMENTS: The department is **NEUTRAL** on these proposals. Use of aircraft to support salmon harvesting operations would not impact the department’s ability to manage for sustained yield and escapement goals.

COST ANALYSIS: These proposals are not expected to result in additional direct costs for private individuals to participate in this fishery.

ADVISORY COMMITTEE COMMENTS ON PROPOSALS 19, 20 AND 21

Anchorage AC: OPPOSED; 0 support-14 opposed.

Homer AC: OPPOSED; 0 support-6 opposed-3 abstentions. “This proposal tries to fix what isn’t broken. Some of the problems alluded to are questionable. Airplane spotters are more effective at

spotting other boats that are catching fish than fish. Allowing spotter planes imposes an unnecessary expense to a fishery that is overcapitalized and struggling with necessary expenses."

Mat Valley AC: OPPOSED; 0 support-11 opposed. "One member was concerned that if this were adopted that the many recreational aviators in PWS would be mistaken for fish spotters and be reported by some fishermen as such to authorities, requiring that these authorities investigate these incidences for authenticity and subject these planes to unnecessary searches and questions, all because of the perception of fish spotting outside of the times, areas, or other rules created for this portion of the industry. According to another member this is an allocative issue that would increase the efficiency of purse seiners and therefore reduce harvests by other user groups. It would also likely reduce harvests of any seiners who did not employ a spotter pilot/plane."

Copper River/PWS AC: NO ACTION. "There is controversy over enforcement's interpretations of current regulations regarding open airspace."

PUBLIC COMMENT IN OPPOSITION OF PROPOSALS 19, 20 AND 21

Cordova District Fishermen United (CDFU)
Cordova, AK

CDFU was OPPOSED to proposals 19 and 20, and took NO ACTION on proposal 21. Their comment for proposal 20 is as follows: "The proposal is vague and the author's intent is unclear."

CDFU's comment on proposal 21: "We encourage author to request Department of Law to clarify position on intent of regulation."

PUBLIC COMMENT IN OPPOSITION OF PROPOSALS 19, 20 AND 21

Timothy J. Moore
PWS seiner
Homer, AK

To all Board of Fish Members:

I oppose proposals #19, #20, and #21. Making spotters legal to fly during openers would change the fishery as it is today. The efficiency of the seine fleet is remarkable as it stands. It will get more powerful in the future with more new entrants until we reach 266 boats. This number is full utilization of all seine permits in PWS. The fleet is presently contemplating a permit buy back plan to address this worry of overcapitalization and future viability of the fleet. If pilots become legal then congestion and less order will exist during fishing periods. ADF&G managers will be effected by potentially having to manage more conservatively in time and area during openers. Enforcement will be more taxed as law breakers can more easily fish in closed areas where build-ups occur. The Enforcement Department has limited resources now and spotters flying during openers are not something positive for the State Agencies, Fishermen, and maintaining healthy wild stocks of fish in Prince William Sound. Our fleet is

having no problem catching the harvestable surpluses of fish available to them presently. I would respectfully ask the Board to vote no on these proposals.

PUBLIC COMMENT IN OPPOSITION OF PROPOSALS 19, 20 AND 21

Alaska Board of Fish Chairman Karl Johnstone and Board members

I oppose proposals 19, 20 and 21

These proposals would reverse the current ban on spotting for salmon in PWS for the Salmon Purse Seine fishery. There is a long history in PWS and other areas that make it unlawful to assist the commercial Salmon fishery with the use of an aircraft for spotting purposes.

In Bristol Bay **5 AAC 06.379. Use of aircraft unlawful. A person may not use or employ an aircraft to locate salmon for the commercial taking of salmon or to direct commercial fishing operations in the Bristol Bay Area one hour before, during, and one hour after a commercial salmon fishing period.** This ban is also in effect in Cook Inlet under **5 AAC 21.379. Prohibitions on the use of aircraft. A person may not use or employ an aircraft to locate salmon for the commercial taking of salmon or to direct commercial fishing operations in the Central and Northern Districts of the Cook Inlet Area one hour before, during, and one hour after a commercial salmon fishing period.**

The primary reason fishermen in Cook Inlet, Bristol Bay and Prince William Sound requested the ban on spotter aircraft was the frustration of what is known as "Bird Dogging" by the pilots of these planes. When spotter planes were legal in PWS the result was pilots not really spotting for fish in the water but looking at fishing vessels to see how their catches were doing. These aircraft would fly over you while you were in some part of your set and just circle until you have your salmon dried up so they could estimate the size of your set. Then if you were catching more than the vessels the spotter plane was employed by, they would radio your location and very shortly 2 to 6 boats would come boiling around the corner and fish with you or just in front of where you are fishing. Now for the folks whom are thinking, is this a problem or unfair? I will try to explain it. Imagine for a moment you are fishing a river with a fishing pole, you wander up and down looking for a good spot to try your luck or skills, you cast in the water and after a few cast you hook a salmon, life is good. Now let's include "river spotters" folks whom are not even fishing but hired to walk up and down the river to see where folks are catching salmon, they see you with a fish on and radio several fishermen to your location and advise them to come and fish where you just caught a fish. Before you can land your fish several "radio advised fishermen" have crowded in the spot you are fishing. The same would apply to hunting, imagine "game spotters" folks whom do not even have a rifle but just watching for other hunters so they can radio where you are and if you are finding game so they can send a crowd of hunters to where you are hunting. This is what we experience when "spotter planes" are legal.

There is reference in one proposal that planes can not fly parts, crew and other services due to the aircraft ban. This is simply not true, fishermen that complain to the troopers about spotter pilots flying during open periods are not concerned with a plane landing and transferring passengers or supplies. They are complaining about guys that fly up and down the coast spending hours spotting and then landing to talk without using radios to fishing vessels. There are similar laws like flying and hunting the same day. Thousands of planes fly during hunting seasons, they can land and pick up or drop off hunters any day they want. They simply can not fly over the land to spot game and then land and hunt in most areas on the same day.

Leroy L. Cabana, PWS seiner, Homer, Alaska

PUBLIC COMMENT IN OPPOSITION OF PROPOSALS 19, 20 AND 21

To: Board of Fisheries

Proposals 19, 20 and 21 Oppose

These proposals would affect drift gillnet fisheries.

Michael Bowen
PWS drift gillnetter
Anchorage, AK

DEPARTMENT OF PUBLIC SAFETY MEMO ON PROPOSALS 19, 20 AND 21

Dear Mr. Chairman:

The following comments give a brief description of the positions that the Department of Public Safety, Division of Alaska Wildlife Troopers (AWT) has on the proposals that are up for consideration at the Prince William Sound and Upper Copper/Upper Susitna Finfish meeting in Cordova.

Proposal 19-21 — These proposals are allocative in nature. However, as currently written, the regulation can be difficult to enforce.

Captain Burke Waldron
N Detachment Commander
Alaska Wildlife Troopers

TRANSCRIPTS FOR PUBLIC DELIBERATION ON PROPOSALS 19, 20 AND 21

...as pulled from December 7 minutes on the Board's deliberation on the proposal.

Staff introduction for proposals 19 and 20 (Sheridan).

Kris Phillips (spotter pilot): "I wrote proposal 20. If we could work on clarification of the current law, I'd be willing to concede to that. The reason why I don't think it should be illegal...I certainly understand where the fishermen are coming from. They don't want airplanes circling over them while they're fishing and bringing other boats on them. That's understandable. But, we're talking about managing a resource and this law's not necessary to manage this resource. I guess that's the bottom line. We have tens of millions of surplus salmon coming in. The airplane is not affecting the management role in any way."

John Renner (seiner): "We considered this at two different meetings at our AC. We have a spotter pilot on the AC. This stems from local enforcement's interpretation of a law, and local pilot's differing interpretation. Clarification is what most people are seeking. They want to know what they can do and what they can't because they're being told one thing and they're reading another thing in the law. So,

19 and 20 would open it. 21 seeks clarification. That's what's going on. We have people being told one thing and it's affecting the way they do business and they don't want to violate the law. So, they either want it open or clarified so they know what they can do."

Board member Jeffrey: "Speaking of opening, I guess we should wrap 21 into this because that is the discussion here, either opening it or clarifying or doing nothing. Further comments?"

Mike Collins (spotter pilot): "I'm a local aviator on the AC. Actually, I put something together here and will read how I think what the law should state and how it should say it so it is more clear to everyone. It should read as follows: 'Aircraft are allowed to fly any time as long as they comply with Federal Aviation Administration rules. However, aircraft are not allowed to set boats or aid in communicating with boats or communicate in aiding boats to catch fish during an open fishing period in the area that is open.' I stumbled a little bit there, but I can come up with this wording later on if that's deemed necessary."

Board member Jeffrey: "I think it would be helpful if you were to submit that language if you wanted us to consider it as an RC."

Leroy Cabana (seiner): "I'm opposed changing anything for the aircraft. There has been a lot of conversation about confusion, embarrassment, and all this other stuff. The law is perfectly clear here just as it is in Bristol Bay, just as it is in Cook Inlet. You cannot use an airplane to assist fishing in an open area. This law is so close to what the law is for say flying and shooting in the same day. Airplanes fly during the entire hunting season. They land, they do all kinds of business. It's just that you cannot land and assist in shooting that same day. You can't tell somebody where a moose is, you can't land and walk over and shoot a moose. This is very, very similar to this. And for the folks who are confused or don't want to be considered in a gray area of the deal, such as delivering parts or crew. This is simple, you take off from Cordova or Valdez wherever you take off from and climb up to a typical cruising speed and altitude, you fly over to where the boat is, you land, you drop off a part and you go back. Nobody is complaining about that. The complaint is that you see a plane coming in at 300 feet and 65 miles an hour and he flies down Knight Island, and then he flies Prince of Wales, and then he flies Middle Cape, and then he lands at a boat and gives a boat crackers or a water pump or whatever and then he flies away and wonders why are people thinking I'm spotting? Because that's what it looks like. If you don't want to be looking like you're spotting, fly at 2,000 feet, fly in a straight line. This is not an ambiguous law. It's been in place for 21 years without a conviction citation. And now all of the sudden we're beating this law to death in Prince William Sound because there's this big problem. There's not a problem. It's crystal clear. It's operational in two other areas and I strongly think that we should just leave it the way it is."

Board member Jeffrey: "Thank you. Anyone else want to weigh in?"

Greg Gabriel (seiner): "Greg Gabriel Northwestern Alaska Seiners. Our group was unanimously opposed to any of the spotter pilot changes and we view this as a slippery slope. As Mr. Cabana pointed out, the law is clear on this. As a fleet, our membership was unanimous in opposition of any form of flying."

Board member Jeffrey: "Thank you."

John Renner (seiner, PWS/CR AC chair): "The law is maybe clear in its intention. But if seining is open in one area of the Sound, is it illegal to fly anywhere else? For instance, when the seiners are in

Chalmers, seining can be open 7 days per week. So, is it then illegal to fly a plane in PWS? The pilots are asking for clarification. They've been getting pressure from local enforcement. That's the situation. Thank you."

Board member Jeffrey: "Anyone else?"

Kris Phillips (spotter pilot): "The FAA regulates the flight rules. The FCC tells you who you can talk to on the radio. First Amendment protects your right to speak. If we're not managing a resource here, what does this law accomplish? It just takes away a civil right. That's what it looks like to me, from my perspective."

TRANSCRIPTS FOR BOARD DELIBERATION ON PROPOSALS 19, 20 AND 21

Proposal 19 read for the record (Sheridan).

Proposal moved and seconded.

Board member Jeffrey: "There was plenty of comments about this. It did not enjoy much support to allow use of spotter planes in PWS as you all know from on time public comments as well as audience members and public did not support this. What became clear was that some people interpreted the regulation as unclear and I would like to ask the departments of public safety and law for their opinion on the ambiguity of this law."

Mr. Beausang (Department of Law): "The DOL does not see any ambiguity in this regulation."

Mr. McConnell (Department of Public Safety): "I think some of the confusion may be on the trooper end on the department of public safety which can certainly be addressed by upper management to clear that up. **But I think the law is clearly written and its intent is easily followed. There have been no citations on this regulation.**"

Board member Morisky: "We heard several comments indicating that this is an unwanted solution and that this is a perceived problem, and as you indicated there have been no citations on this. So, this appears to be an unwarranted concern and an unwanted solution."

Board member Kluberton: "Looking in Public Safety's comments that are in our packet. Their comment in that was that these proposals are allocative in nature, however as currently written the regulation can be difficult to enforce. And then I have heard that some of the pilots in the area have made a practice of calling public safety before visiting their recreational cabin or delivering parts as part of business as usual. They are informing public safety that they're about to take a flight while there has been an opening going on. So, there does sound as though there have been some difficulties, some confusion. I don't know if we would have heard from as many pilots as we had if there wasn't some issue sensed. I was just curious, we have two RCs 53 and 55 that to me seem no more clear than what we have in the regulation book. I'm curious if public safety might find any improvement in either of those RCs as they have been presented to us. Whether they in any way may make life easier for the troopers and some of these pilots."

Board member Morisky: "If I could ask enforcement what would be a scenario where we might ticket someone on this. If there haven't been any citations issued, and this has been in place for many, many years. What might be a violation that you might ticket for?"

Mr. McConnell (Department of Public Safety): "We would have to be able to document or prove that a communication has taken place between the aircraft and the seine boat resulted in the taking of fish. I think a lot of the conflict that occurs is when an aircraft flies over the seine fishery is it spotting. And with today's communications and the ability to monitor those communications it may be very difficult for us to know, especially if they're using cell phones or texting."

Board chair Johnstone: "And what I'm hearing you say is that there's a proof issue. How do you prove that? There's nothing illegal about flying anywhere you want anytime you want so long as you're not directing commercial fishing operations or trying to help locate salmon during an opener. If people are afraid to fly that's a problem that they'll have to get over it. And I can understand the proof aspect nowadays people use scramblers that they can talk over directing activities means enforcement is 15 miles away they're coming your way you better get your net out of the water. Locating salmon's a little bit difficult, they can fly up to the opener, they can fly over and if they see some fish in clear water up to the opener they can do that, it's perfectly legal. And then they're done during the opener. I think the regulation is as clear as they can get. I'm sorry they feel guilty."

Board member Jensen: "It still allows them to fly parts or allow them to bring people to the boat they just can't spot fish during an opener. I'm perfectly fine with the way it's written."

Board member Jeffrey: "We did hear from pilots who are feeling as though it's not clear. In RC 55 (read out loud), I can go either way if it's necessary. I don't know if this is unnecessary, but perhaps if it helps clarify things for folks it's something we could consider."

Mr. Beausang (Department of Law): "In light of the fact that the board is discussing three proposals at once, I find it worthwhile to point out that 19 and 20 are to allow for the spotting of fish during commercial fishing openers."

Board member Jeffrey: "I am not in favor of passing proposal 19. As far as cost analysis, it could result in increased direct costs."

Board chair Johnstone: "DOL or enforcement: if somebody is flying and they're operating with a vessel that's fishing and they've made an agreement with this vessel to inform them of where enforcement is so that they can continue to fish illegally. Are they committing a crime when they're telling them that enforcement is coming from 15 miles away, you better get your net out of the water...are they participating in a crime?"

Mr. McConnell (Department of Public Safety): "Under the regulation, I would say no. The regulation is about the aircraft directing the operations of the boat. Whereas there may be a complicity if they're assisting with illegal fishing, I don't think it's in violation of this regulation."

Board member Kluberton: "I would like to speak to the two proposals which propose to allow spotting. As much as we've addressed the management plan in this area, were we to allow spotter planes I see that creating an unnecessary or deleterious effect on the balance of the fishery. I think we'd see many things change. There'd be an increase in costs to participants. There'd be an increase in the amount of spotters in the fishery. There'd be a rapid increase in the prosecution of the fishery. I think a lot of

things would change that could affect the allocation plan which is a big part of my opposition to making spotter planes legal. I don't intend to allow spotters due to the balance of the allocation. The on the books were clear to me as I read it. There does appear to be some concern on the part of pilots and they think that there may be an issue. With any luck, these discussions have allowed the department to understand the pilots and vice versa and this will resolve itself without us having to make any changes to the regulations. Any language that we might choose would still be subject to those same problems. I don't think tweaking that language is going to change that and I can't support any of the three proposals."

Board member Morisky: "We heard testimony that passing these two proposals could increase the number of aircraft in the area and that there would be safety issues with aircraft in a small area and that the fishery is being successfully prosecuted without the use of spotter planes."

Board chair Johnstone: "I agree with everybody. If we didn't have these regulations on the books, pilots could be alerting vessels as to where enforcement could be and could be unethical and criminal behavior and this regulation is such that they cannot direct fishing. I don't want to change the regulation."

PROPOSAL 19 FAILS 0 TO 7.

Proposal 20 read for the record (Lewis).

Board member Jensen: "Moves to take no action on this proposal based on the action taken on previous proposal."

Seconded with unanimous consent.

Proposal 21 read for the record (Sheridan).

Motion and second.

Board chair Johnstone: "You can reference your comments to Proposal 19 if you wish."

Board member Kluberton: "I was addressing all three proposals given the staff comment book lumping them together."

Board member Jensen: "I think that the current regulations are adequate and will not be voting to support this one either."

Board chair Johnstone: "The language we have now is adequate. This language does not add anything or enhance the understanding of it."

PROPOSAL FAILS 0 TO 7.