



Alaska Department of Fish and Game

Board of Fisheries

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ALASKA BOARD OF FISHERIES

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Work Session 2018 Meeting

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BOARD OF FISHERIES AGENDA CHANGE REQUEST REGULATIONS

5 AAC 39.999. Policy for changing board agenda

(a) The Board of Fisheries (board) will, in its discretion, change its schedule for consideration of a proposed regulatory change in response to an agenda change request, submitted on a form provided by the board, in accordance with the following guidelines:

(1) the board will accept an agenda change request only

(A) for a fishery conservation purpose or reason;

(B) to correct an error in a regulation; or

(C) to correct an effect on a fishery that was unforeseen when a regulation was adopted;

(2) the board will not accept an agenda change request that is predominantly allocative in nature in the absence of new information that is found by the board to be compelling;

(3) the board will consider an agenda change request only at its first meeting in the fall; a request must be sent to the executive director of the board at least 60 days before the first meeting in the fall.

(b) The board will, in its discretion, change its schedule for consideration of proposed regulatory changes as reasonably necessary for coordination of state regulatory actions with federal fishery agencies, programs, or laws.

(c) If the board accepts an agenda change request under this section, the executive director shall notify the public and the department of the change in the board's schedule and when the board will consider the proposed regulatory change requested.

Eff. 7/25/82, Register 83; am 1/12/92, Register 121; am 1/1/2000, Register 152; am 8/17/2000, Register 155; am 6/22/2001, Register 158; am 3/19/2014, Register 209

Authority: AS 16.05.251

REVISED JOINT PROTOCOL (December 2009)
BETWEEN
NORTH PACIFIC FISHERY MANAGEMENT COUNCIL (NPFMC)
ANCHORAGE, ALASKA

and

ALASKA BOARD OF FISHERIES (BOF)
JUNEAU, ALASKA

ON

MANAGEMENT OF FISHERIES
OFF ALASKA

Recognizing that NPFMC has a legal responsibility for reviewing and recommending to the Secretary of Commerce measures for the conservation and management of the fisheries of the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska, with particular emphasis on the consistency of those measures with the National Standards of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act); and

Recognizing that the State of Alaska has a legal responsibility for conservation and management of fisheries within State waters; and further, that the State system centers around BOF policy, regulations, and procedures which provide for extensive public input; is sufficiently structured to ensure annual revisions; is flexible enough to accommodate resource and resource utilization emergencies; and is understood and familiar to the users of North Pacific fisheries resources; and

Recognizing that many of the fish populations in the Gulf of Alaska and the Bering Sea and Aleutian Islands migrate freely between or spend some of the year in both Federal and State waters; and

Recognizing that State and Federal governmental agencies are limited in fiscal resources, and that the optimal use of these monies for North Pacific fisheries management, research, and enforcement occurs through a clear definition of agency roles and division of responsibilities.

Therefore, NPFMC and BOF enter into this Joint Protocol to achieve coordinated, compatible, and sustainable management of fisheries within each organization's jurisdiction in the Gulf of Alaska, the Bering Sea and Aleutians, and the Arctic.

I. Applicable Fisheries

This Joint Protocol applies to all fisheries off Alaska of mutual concern.

II. Duration of the Agreement

This agreement shall be reviewed by both NPFMC and the BOF and revised as necessary.

III. NPFMC and BOF shall undertake the following activities:

- A. NPFMC and BOF shall jointly agree upon and implement an annual management cycle that provides for coordinated, compatible, and sustainable fisheries management in State and Federal waters. Management measures shall be consistent with the respective legal requirements of each body.

- B. With regard to groundfish and shellfish, the annual management cycle shall have the following elements:
1. The NPFMC and BOF will endeavor to coordinate their proposal schedules to the greatest extent practicable.
 2. On an annual basis, the NPFMC will provide the BOF with a summary of management proposals or ongoing management actions of mutual interest, noting any special management or conservation concerns with individual groundfish fisheries. The NPFMC will provide such report to the BOF prior to any final action by the Council. The NPFMC will make available all pertinent information concerning such actions and will identify particular issues that should be considered before taking final action.
 3. The BOF at its fall meeting will review groundfish or shellfish proposals which are under BOF consideration. Those proposals identified as being of mutual concern to both the BOF and NPFMC, will be forwarded to the NPFMC for its consideration and potential input prior to final action by the BOF. The BOF will provide any information available concerning the proposals, and will identify particular issues that should be considered before taking final action. After a BOF final decision, the BOF shall provide written explanation of the basis for the regulation. This provision shall not apply to emergency regulations, however, justification should be provided to the NPFMC in a timely manner, not less than ten days after the emergency action.
- C. A joint NPFMC-BOF Protocol committee, not to exceed three members from each body, will be formed and will meet as necessary to review available analyses, proposals, and any other matters of mutual concern, and to provide recommendations to the joint NPFMC and BOF. The Council/BOF may determine issues for consideration by the Protocol Committee, or the Executive Directors/Chairs of the Council and BOF may jointly call for a meeting of the Protocol Committee.
- D. The NPFMC and BOF will meet jointly in Anchorage as necessary and appropriate to consider proposals, committee recommendations, and any other issues of mutual concern. All interested persons and agencies shall have the opportunity to submit comments to the NPFMC and BOF at these meetings on proposals identified as being of mutual concern, and other matters as appropriate.
- E. NPFMC and BOF shall encourage ADF&G and NMFS, in carrying out their responsibilities, to consult actively with each other, with NPFMC and BOF, and other agencies as appropriate, in order to prevent duplication of research, management, and enforcement effort and to make optimum use of the resources available for management of the fisheries.
- F. The intent of this protocol is to provide long term cooperative, compatible management systems that maintain the sustainability of the fisheries resources in State and Federal waters.

Approved:

For the North Pacific Fishery
Management Council



Council Chairman – Eric A. Olson

12/28/2009
Date

For the Alaska Board Fisheries



Board of Fisheries Chairman – Vince Webster

12/28/2009
Date

**Alaska Board of Fisheries
and
Alaska Department of Fish and Game**

Joint Protocol on Salmon Enhancement
#2002-FB-215

Background: In actions taken in January 2001 and June 2002 the Alaska Board of Fisheries stated its intent to institutionalize a public forum to bring a statewide perspective to issues associated with hatchery production of salmon. Accordingly, the department and board agreed to enter into this joint protocol to coordinate department and board interaction on certain aspects of salmon hatchery policy and regulation.

Authorities: The commissioner of the Department of Fish and Game has exclusive authority to issue permits for the construction and operation of salmon hatcheries. The Board of Fisheries has clear authority to regulate access to returning hatchery salmon and to amend, by regulation, the terms of the hatchery permit relating to the source and number of salmon eggs. The Board of Fisheries' authorities also include the harvest of fish by hatchery operators and the specific locations designated by the department for harvest (see AS 16.10.440(b) and Department of Law memorandum to the board dated November 6, 1997).

Statement of Intent: It is the intention of the commissioner of the Department of Fish and Game and the chairman of the Board of Fisheries that meetings be held on a regular basis wherein the department will update the board and the public on management, production, and research relating to Alaska's salmon enhancement program

Protocol: The joint department-board meeting on hatchery described here will take place at a mutually agreeable time and place during regularly scheduled meetings of the board. The meetings will provide a forum for open discussion on a mutually agreed upon agenda of hatchery topics. The agenda may include site-specific as well as regional or statewide hatchery issues. These salmon enhancement meetings will not be open for regulatory actions and no hatchery-related petitions or agenda change requests (ACRs) will be considered as action items. These meetings are open to the public. At its discretion and upon appropriate notice, the board may open the meeting to public comment.

The hatchery meetings will provide an opportunity for the board and the public to receive reports from the department on hatchery issues including: production trends, management issues, updates on hatchery planning efforts, wild and hatchery stock interactions, biological considerations, and research. Requests for report from the department may be made during the board's work session during meeting years when there is a hatchery forum scheduled.

As appropriate, the board and department may agree to invite other state and federal agencies, professional societies, scientists, or industry spokespersons to attend and to contribute information on particular topics, or sponsor other discussions, such as marketing or intrastate effects.

Dated: June 28, 2002



Ed Dersham, Chairman
Alaska Board of Fisheries



Frank Rue, Commissioner
Alaska Department of Fish and Game

MEMORANDUM

State of Alaska
Department of Law

TO: Dr. John White
Chair
Alaska Board of fisheries

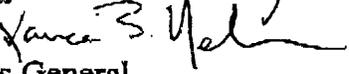
DATE: November 6, 1997

FILE NO.: 661-98-0127

The Honorable Frank Rue
Commissioner
Department of Fish & Game

TELEPHONE NO.: 269-5240

SUBJECT: Authority of the Board of
Fisheries Over Private
Nonprofit Hatchery
Production

FROM: Robert C. Nauheim 
Lance B. Nelson 
Assistant Attorneys General
Natural Resources-Anchorage

I. Introduction

In your memorandum of June 24, 1997, and in discussions at the recent Board of Fisheries (Board) work session, you requested guidance regarding the authority of the Board over private, nonprofit salmon hatcheries and their operations. Specifically, you asked for a review of (1) statutes and regulations relating to the authority of the Board and the Commissioner of the Department of Fish and Game (commissioner) over hatchery salmon production and cost recovery, (2) the historical development of Board authority in this area, (3) the scope of the Board's authority over hatchery salmon production, and (4) the relationship between the Department of Commerce and Economic Development's hatchery loan program, the Board, and the Department of Fish and Game (department). We understand that you require an analysis of these issues to assist the Board in its discussions during its upcoming meetings.

II. Summary Answers

1. The legislative scheme for the regulation of private, nonprofit hatcheries vests the more detailed, comprehensive authority in the commissioner and department.

2. Although the board initially had broad rule-making authority over all aspects of the private, nonprofit hatchery program, the legislature significantly restricted that authority by an amendment to AS 16.10.440(b) in 1979.

3. The Board may exercise indirect authority over hatchery production by regulating the harvest of hatchery-released fish in the common use fishery, hatchery brood stock and cost-recovery harvests, and by amending those portions of hatchery permits relating to the source and number of salmon eggs, hatchery harvests, and the designation of special harvest areas by the adoption of appropriate regulations. However, Board action that effectively revokes, or prevents the issuance of, a hatchery permit is probably not authorized.

4. The Commissioner of the Department of Commerce and Economic Development is independently responsible for the implementation of the hatchery loan program under AS 16.10.500 - 16.10.560.

III. Discussion

This discussion focuses primarily upon an evaluation of existing Board authority over the operation of private, nonprofit salmon hatcheries. It opens with a review of the extensive statutory authority of the commissioner and the department over hatcheries.

Beginning in 1974, the legislature adopted various statutory provisions regulating the construction and operation of private, nonprofit salmon hatcheries in Alaska. The goal of the program was "the rehabilitation of the state's depleted and depressed salmon fishery." Sec. 1, ch. 111, SLA 1974. Although the legislature initially granted both the department and the Board responsibility for the program, it limited what was initially a broad grant of rule-making authority to the Board over the implementation of the program by statutory amendment in 1979.

A. Commissioner/Department Authority over Hatcheries

The hatchery statutes place direct and nearly comprehensive responsibility for the private, nonprofit hatchery program in the hands of the commissioner and the department. The legislature has granted exclusive authority to the commissioner to issue permits for the construction and operation of salmon hatcheries. *Id.* at § 2; AS 16.10.400-16.10.430 (as amended). We believe this broad and detailed permitting authority was intended to assign responsibility for the fundamental policy determination of whether to authorize the operation of a private, nonprofit hatchery to the commissioner and department.

1. Pre-permit Responsibilities

Pursuant to AS 16.10.375 the commissioner must designate regions of the state for salmon production and develop a comprehensive salmon plan for each region through teams consisting of department personnel and nonprofit regional associations of user groups. The commissioner also has the task of classifying an anadromous fish stream as suitable for enhancement purposes before a permit for a hatchery on that stream may be issued. AS 16.10.400(f). AS 16.10.400(g) requires a determination by the commissioner that a hatchery would result in substantial public benefits and would not jeopardize natural stocks. The statutes also require the department to conduct public hearings near the proposed hatcheries, and to consider comments offered by the public at the hearings before issuance of a permit. AS 16.10.410.

2. Permit Issuance and Hatchery Operation Responsibilities

For issuing a private, nonprofit hatchery permit, the legislature delegated to the department the power to control the following:

- (1) the specific location where eggs or fry may be placed in the waters of the state (AS 16.10.420(2));
- (2) the source of salmon eggs procured by the hatchery (AS 16.10.420(1));
- (3) the resale of salmon eggs procured by the hatchery (AS 16.10.420(3));
- (4) the release of salmon by the hatchery (AS 16.10.420(4));
- (5) the designation of the manner and place for the destruction of any diseased salmon (AS 16.10.420(5));
- (6) the specific locations for the harvest of adult salmon (AS 16.10.420(6));

- (7) the first option to purchase surplus eggs from a hatchery and inspection of eggs and the approval of sale of those eggs to other hatcheries (AS 16.10.420(7));
- (8) the determination of reasonable segregation by location) of hatchery from natural stocks (AS 16.10.420(10));
- (9) the source and number of salmon eggs to be used by the hatchery (AS 16.10.445(a)); and
- (10) the inspection of hatchery facilities (AS 16.10.460).

3. Alteration, Suspension, or Revocation Authority

The commissioner may suspend or revoke a permit after determination of a failure to comply with conditions and terms of the permit. AS 16.10.430(a). Upon a finding "that the operation of the hatchery is not in the best interests of the public, the commissioner may alter the conditions of the permit to mitigate the adverse effects" and, in extreme cases, may "initiate termination of the operation under the permit over a reasonable period of time under the circumstances, not to exceed four years." AS 16.20.430(b).

The foregoing authorities demonstrate that the legislature granted detailed and broad authority to the commissioner and the department for the implementation and day-to-day regulation of salmon hatcheries. On the other hand, the specific authority given to the Board is more circumscribed.

B. Board of Fisheries' Authority over Hatcheries

Although the legislature placed primary administrative authority over the permitting and day-to-day operation of hatcheries within the department, it also vested considerable general and specific authority in the Board of Fisheries. The Board's regulatory authority over private, nonprofit hatcheries is governed primarily by AS 16.05.251, 16.10.440 and 16.10.730.

1. Board Authority under AS 16.05.251

The Board's general rule-making powers over fish and the taking of fish are set out in AS 16.05.251. These powers include setting time, area, and methods and means limitations on the taking of fish. AS 16.05.251(a)(2), (4). The Board also establishes quotas, bag limits and harvest levels. AS 16.05.251(a)(3).

The Board has broad authority to "adopt regulations it considers advisable . . . for regulating commercial, sport, guided sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries." AS 16.05.251(a)(12). This authority includes the power to allocate fishing opportunities between competing user groups. *Meier v. State*, 739 P.2d 172, 174 (Alaska App. 1987); AS 16.05.251(e). The Board's authority extends to the regulation of the harvest of hatchery fish and egg collection. *See* 1990 Inf. Op. Att'y Gen. 41 (August 1; 663-90-0327) (Board's regulatory authority extends to management of hatchery brood stock and allocation of cost-recovery fishing). Existing regulations reflect this principle. *See* 5 AAC 40.005 (harvest of hatchery-produced fish governed by Board regulation). The Board also has general authority to adopt regulations for "prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs." AS 16.05.251(a)(9). This provision would include, but is not limited to, regulation of the capture, possession, transportation, and release of salmon and their eggs by hatcheries. *Id.*

2. Board Authority under AS 16.10.440

In former AS 16.10.440, the legislature initially vested broad rule-making authority in the Board of Fisheries and Game¹ over hatchery-produced fish and the implementation of the hatchery program in general. Sec. 2, ch. 111, SLA 1974. Former AS 16.10.440 provided:

¹ Prior to 1975, regulatory authority over the harvest of fish and game resources was vested in the Board of Fisheries and Game. In 1975 the legislature abolished the Board of Fisheries and Game and simultaneously created a separate Board of Game and Board of Fisheries, each having broad regulatory powers. Ch. 206, SLA 1975; *see also* AS 16.05.221, 16.05.241, 16.05.251, 16.05.255. The legislature also amended AS 16.10.440(b) to clarify that the authority over hatcheries formerly resting in the Board of Fisheries and Game was to be held by the newly created Board of Fisheries.

REGULATION: (a) Fish released into the natural waters of the state by a hatchery operated under secs. 400 - 470 of this chapter are available to the people for common use and are subject to regulation under applicable law in the same way as fish occurring in their natural state until they return to the specific location designated by the department for harvest by the hatchery operator.

(b) The board may promulgate regulations necessary to implement secs. 400 - 470 of this chapter.

Alaska Statute 16.10.440 (a), which has remained unchanged since 1975, confirms that fish released by hatcheries into the natural waters of the state are, as are all wild fish and game within the state, available for common use and subject to lawful regulation. *See generally McDowell v. State*, 785 P.2d 1, 5-9 (Alaska 1989)(equal access clauses of art. VIII of Alaska Constitution are intended to provide the broadest possible public access to state's fish and game.)

Alaska Statute 16.10.440(a) does purport to exempt the effect of at least some applicable law to hatchery-produced fish once the fish arrive at areas designated by the department for harvest by the hatchery operator. *See AS 16.10.440(a)* (fish subject to regulation "until they return to the specific location designated by the department for harvest by the hatchery operator"). For reasons discussed in greater detail below, AS 16.10.440(a) does not significantly limit the authority of the Board or the department to regulate hatchery-produced fish at these locations, since AS 16.10.440(b) goes on to grant specific authority for regulation at the point of return.

Former AS 16.10.440(b) vested in the Board of Fisheries and Game broad authority to "promulgate regulations necessary to implement sec. 400 - 470 of this chapter." This broad language purported to give the Board of Fisheries and Game expansive rule-making authority over all aspects of carrying out the hatchery program.

In 1979, the legislature amended AS 16.10.440(b), eliminating the broad authority "to promulgate regulations necessary to implement" the hatchery program, and replacing it with more specific, but limited responsibilities:

(b) The Board of Fisheries may, after the issuance of a permit by the commissioner, amend by regulation adopted in accordance with the

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Administrative Procedures Act (AS 44.62), the terms of the permit relating to the source and number of salmon eggs, the harvest of fish by hatchery operators, and the specific locations designated by the department for harvest. The Board of Fisheries may not adopt any regulations nor take any action regarding the issuance or denial of any permits required in AS 16.10.400-16.10.470.

Sec. 3, ch. 59, SLA 1979.²

The legislative history of the 1979 amendment reveals the legislative intent behind the new, more restricted language:

Section 2 of the bill [HB 359] amends AS 16.10.440(a)(b). The amendment clarifies the role of the Board of Fisheries. The role of the Board of Fisheries as envisioned by the original legislation was to *regulate the harvest of salmon returning to the waters of the state. That role extends to regulating those fish which are returning as a result of releases from natural systems and also from hatchery releases.* There are provisions in other portions of the non-profit hatchery Act which allow the designation of specific locations for the harvest of salmon by the hatchery operator for sale, and use of the money from that sale, for the specific purposes as stated in AS 16.10.450. *The added language clarifies that the Board of Fisheries may adopt regulations relating to the harvest of the fish by hatchery operators at the specifically designated locations.* The Board of Fisheries in the past year or two has enacted regulations relating to those harvests for several of the private non-profit hatcheries in the state.

² In 1979, the legislature also authorized the Commercial Fisheries Entry Commission to issue special harvest area limited entry permits to operators of private, nonprofit hatcheries. Sec. 1, ch. 64, SLA 1979; AS 16.43.400-16.43.440. Special harvest areas may be designated by the department in a hatchery permit, by emergency orders under AS 16.10.420, or by regulation adopted by the Board under AS 16.05.251 or AS 16.10.440(a). See 1993 Inf. Op. Att'y Gen. 273 (July 16; 663-93-522).

The intention of the original bill relating to the non-profit hatchery Act as amended in recent years was that the permits for the construction and operation of the private non-profit hatcheries were to be issued by the Commissioner of the Department of Fish and Game. Specific language in AS 16.10.400 lays out the grounds for the issuance of the permits and AS 16.10.420 lays out the statutory guidelines that must be included in such a permit. Those statutory provisions remain the same under this amendment.

In this bill AS 16.10.440(b) is deleted and the necessary powers are substituted in the language which is added to (a).³ That deletion helps clarify a technical problem which has arisen because the original section (b) stated that the Board of Fisheries may promulgate regulations necessary to implement subsections 400 - 470 of this chapter. That in effect gave the Board of fisheries the power to enact regulations regarding a requirement by the Department of Commerce and Economic Development. In section .470(b) the Department of Commerce and Economic Development is instructed to provide a form to the permit holder for submission of an annual report regarding the financial aspects of the hatchery operation, if such a hatchery operator has obtained a loan from the State of Alaska.

House Journal, March 15, 1979 (remarks of Rep. Fred Zharoff, Chm. House Resources Committee regarding HB 359) (emphasis added).

³ In the final version of the bill passed by the legislature, the language referenced here was again divided into two subsections, leaving AS 16.10.440(a) intact and moving the new language into subsection (b).

3. Board Authority under AS 16.05.730

In 1992, the legislature enacted AS 16.05.730⁴, which requires the department and Board to manage all fish stocks consistent with the sustained yield of wild fish stocks and authorizes, but does not require, management consistent with the sustained yield of enhanced stocks. AS 16.05.730(a). In addition, the statute mandates Board consideration of the need of enhancement projects to obtain brood stock when allocating enhanced fish stocks, and authorizes the Board to direct the department's management to achieve an

⁴ AS 16.05.730 provides:

Management of wild and enhanced stocks of fish. (a) Fish stocks in the state shall be managed consistent with sustained yield of wild fish stocks and may be managed consistent with sustained yield of enhanced fish stocks.

(b) In allocating enhanced fish stocks, the board shall consider the need of fish enhancement projects to obtain brood stock. The board may direct the department to manage fisheries in the state to achieve an adequate return of fish from enhanced stocks to enhancement projects for brood stock; however, management to achieve an adequate return of fish to enhancement projects for brood stock shall be consistent with sustained yield of wild fish stocks.

(c) The board may consider the need of enhancement projects authorized under AS 16.10.400 and contractors who operate state-owned enhancement projects under AS 16.10.480 to harvest and sell fish produced by the enhancement project that are not needed for brood stock to obtain funds for the purposes allowed under AS 16.10.450 or 16.10.480(d). The board may exercise its authority under this title as it considers necessary to direct the department to provide a reasonable harvest of fish, in addition to the fish needed for brood stock, to an enhancement project to obtain funds for the enhancement project if the harvest is consistent with sustained yield of wild fish stocks. The board may adopt a fishery management plan to provide fish to an enhancement project to obtain funds for the purposes allowed under AS 16.10.450 or 16.10.480(d).

(d) In this section, "enhancement project" means a project, facility, or hatchery for the enhancement of fishery resources of the state for which the department has issued a permit.

adequate return for brood stock. AS 16.05.730(b). The Board may also consider the need for enhancement projects to harvest and sell fish to obtain funds for project operation, may direct the department to provide a reasonable harvest of fish to the hatchery for those purposes, and may adopt management plans to provide fish to a hatchery to obtain funds for the purposes allowed under AS 16.10.450 or AS 16.10.480(d). AS 16.05.730(c). Significantly, while the statute requires Board consideration of hatchery brood stock needs, it does not mandate any particular level of hatchery harvest of enhanced fish stocks. Consideration of harvest and sale of fish for project funding is authorized, but not required.

C. The Balance between Department Commissioner and Board Authority over Private Nonprofit Hatchery Production

As the foregoing discussion suggests, the department and the Board share regulatory authority over private, nonprofit hatcheries. Although primary responsibility over permitting and the administration of the hatchery program rests with the department, the Board has substantial, indirect control over hatchery production by virtue of its regulatory authority to amend hatchery permits with respect to special harvest areas, the harvest of brood stock⁵ and cost-recovery fish.⁶

Though no statute expressly grants the Board regulatory authority over hatchery production *per se*, it may exercise considerable influence over hatchery production by virtue of its authority to directly amend hatchery permit terms relating to fish and egg harvesting.⁷ We have previously advised that while the Board is authorized to do so, it is not required to allocate cost recovery fish to a hatchery. 1990 Inf. Op. Att'y Gen. 41 (Aug. 1;

⁵ In this memorandum, we use the term "brood stock" to designate fish returning to the hatchery as a result of hatchery operations that are harvested for the purpose of the biological reproduction of fish.

⁶ In this memorandum, we use the term "cost-recovery" fish to designate those fish or eggs authorized to be harvested for purposes of sale under AS 16.10.450.

⁷ It might be argued that the authority set out in AS 16.10.440(b) to amend hatchery permits, particularly as to the "source and number of salmon eggs," is express and direct authority to regulate hatchery production. Since the statute does not expressly address "hatchery production" or any similar concept, we have, in previous oral comments to the Board, characterized the authority over this area to be "indirect" and "implied." We continue to believe that this advice is correct.

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663-90-0327); AS 16.05.730(c). Similarly, we have advised that the Board has authority to regulate brood stock harvest. *Id.*

The Board must *consider* hatchery brood stock needs in determining appropriate harvest levels. AS 16.05.730(b). The Board may also consider hatchery cost recovery needs. AS 16.05.730(c). However, it is not *required* to provide harvest opportunities that are inconsistent with what the Board reasonably determines to be appropriate. 1990 Inf. Op. Att'y Gen. 41 (August 1; 663-90-0327). For example, to the extent the Board believes that a hatchery permit issued by the department provides too liberal or restrictive an opportunity to harvest salmon or collect eggs,⁸ it may amend the permit by adopting appropriate regulations.

As previously noted, AS 16.05.730 requires the Board to manage all stocks of fish consistent with the sustained yield of wild fish stocks and to consider the need of fish enhancement projects for brood stock. Accordingly, in evaluating whether to amend a hatchery permit or adopt regulations governing hatchery harvests, the Board must carefully consider the needs of fish enhancement projects to obtain brood stock and manage harvests so as to be consistent with the sustained yield of wild fish stocks. AS 16.05.730(a), (b).

The Board's authority over hatchery production is circumscribed by the 1979 amendment to AS 16.10.440(b) and, to a lesser extent, by AS 16.05.730. The Board's authority to amend permits is limited to terms in the permit "relating to the source and number of salmon eggs, the harvest of fish by hatchery operators, and the specific locations designated by the department for harvest."⁹ Under AS 16.10.440(b) the Board "may not adopt any regulations or take any action regarding the issuance or denial of any permits

⁸ It has been suggested that the Board's authority to regulate the harvest of eggs from returning hatchery fish may be distinguishable from its authority to regulate the harvest of eggs from wild fish stocks. We see no reason to distinguish between these two. The Board has authority to amend hatchery permits as they relate to "the source and number of salmon eggs." AS 16.10.440(b). We believe this language covers the harvest of eggs from both wild and hatchery stocks.

⁹ AS 16.10.440(a) provides that hatchery-released fish are subject to Board regulation "until they return to the specific location designated by the department for harvest by the hatchery operator." However, given the Board's general authority over the allocation of fishery resources under AS 16.05.251 and its specific authority to amend hatchery permits by regulation under AS 16.05.440(b), it may, therefore, regulate the harvest of salmon or collection of eggs *after* salmon have returned to the location designated for harvest or egg collection in that manner.

Dr. John White, Chair, Alaska Board of Fisheries
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required in AS 16.10.400-16.10.470.” Although the meaning of this limitation is not completely clear, we conclude for the reasons set forth below that the limiting language contained in AS 16.10.440(b) was intended to clarify that the Board’s specific regulatory authority over the amendment¹⁰ of hatchery permits is to be limited to the authority set out in AS 16.10.440(b).¹¹

The following principles would guide a court in interpreting AS 16.10.440(b). In interpreting a statute, a court’s goal is to give effect to the intent of the legislature with due regard to the plain meaning of the statute. *Cook v. Botelho*, 921 P.2d 1126, 1129 (Alaska 1996). In addition, a court may consider the overall purpose of a statute and its legislative history. *Muller v. BP Exploration (Alaska), Inc.*, 923 P.2d 783, 789-91 (Alaska 1996). Whenever possible, each part or section of a statute must be interpreted to create a harmonious whole. *Rydwell v. Anchorage School District*, 864 P.2d 526, 528 (Alaska 1993). Finally, where a potential conflict or ambiguity exists, a statute that deals more specifically with a particular issue must govern over a more general statute. *Welch v. City of Valdez*, 821 P.2d 1354, 1363 (Alaska 1991).

Given (1) the detailed statutory scheme granting specific authority to the department over nearly every aspect of the permitting and operation of nonprofit hatcheries, (2) the more general statutory authority of the Board over the harvest of fishery resources, and (3) by contrast, the limitations imposed upon the specific statutory authority of the Board over hatchery permits by the amendment to AS 16.10.440(b) in 1979, we conclude the following. Though the Board may effectively amend hatchery permits by regulation in a manner that affects hatchery fish production, we do not believe the Board may either (1) adopt regulations that effectively veto or override a fundamental department policy

¹⁰ The legislature’s use of the concept of “amending” permits by the adoption of Board regulation presents an unusual mixture of administrative law principles. We believe the legislature’s use of the concept of amending a hatchery permit by regulation was not intended to vest the Board with administrative adjudicatory authority over permits. See AS 16.05.241 (the Board has rule-making authority, but does not have other administrative powers). Instead, we interpret the legislature’s use of the term “amend” to allow the Board to adopt regulations that may *effectively* change or modify an existing permit by virtue of the change in regulatory setting created by appropriate Board regulation. See also AS 16.10.400(a) (commissioner-approved permits are “subject to the restrictions imposed by statute or regulation under AS 16.10.400-16.20.470”).

¹¹ This view is supported by AS 16.10.400(a), which specifically provides that permits are subject to “restrictions imposed by . . . regulation under AS 16.20.400-16.10.470.”

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decision regarding whether to authorize the operation of a particular hatchery or (2) adopt regulations preventing the department from exercising its authority to permit a hatchery operation. We believe that Board actions falling into either of these two categories would risk being viewed by a court as constructing an impermissible impediment to the department's role as the primary government agency responsible for the regulation of hatcheries. In particular, such actions would risk being deemed incompatible with the limitations imposed by the 1979 amendment to AS 16.05.440(b).

A recent decision by the Alaska Supreme Court supports this view. In *Peninsula Marketing Ass'n v. Rosier*, 890 P.2d 567, 573 (Alaska 1995), the court held that in absence of specific statutory authority for the commissioner to issue emergency orders concerning a question previously considered by the Board, the commissioner could not effectively veto a decision by the Board for which there was specific statutory authority. The court ruled that "[i]nferring a broad veto power would make superfluous the detailed provisions dividing power and authority within the Department" and effectively eviscerate the powers explicitly granted to the Board. *Id.* Similarly, to read the limited grant of authority to the Board over hatcheries set out in AS 16.10.440(b) to permit the Board to effectively veto fundamental policy decisions by the department for which there is specific statutory authority would upset the balance of the statutory scheme chosen by the legislature.

Additional reasons support that conclusion. As previously noted, the Board "may not adopt any regulations or take any action regarding the *issuance* or *denial* of any permits required under AS 16.10.400-16.10.470." AS 16.10.440(b) (emphasis added). We believe that a Board regulation that so drastically amends a hatchery permit to render the hatchery's operation impracticable might be viewed by a court to be an impermissible action by the Board "regarding the issuance or denial . . . of a permit." *See* AS 16.10.440(b). In other words, a Board amendment that puts a hatchery out of operation might be construed as an effective revocation or denial of a hatchery permit, an action that is expressly prohibited by AS 16.10.440(b). Similarly, Board regulations prohibiting the establishment of a hatchery in a particular area deemed by a court as an action by the Board regarding the issuance of a permit and, therefore, unlawful under AS 16.10.440(b).¹²

¹² We realize that without additional clarification from the legislature the parameters of permissible Board regulations remain somewhat murky. However, we believe that the more significantly a particular Board regulation restricts the effective functioning of a hatchery in a way that is incompatible with a departmental decision to permit the hatchery's operation, the greater is the risk that the Board regulation may be invalidated by a reviewing court.

One additional aspect of Board and department authority merits some discussion. AS 16.05.251(a)(9) specifically authorizes the Board to adopt regulations "prohibiting and regulating the live capture, possession, transport, or *release* of native or exotic fish or their eggs" (emphasis added). This statute must be read, if possible, to be harmonized with AS 16.10.420, the statute governing the department's authority to issue hatchery permits, and the limitation on Board authority with respect to Board "amendment" of hatchery permits set out in AS 16.10.440(b). See *Borg-Warner v. Avco Corp.*, 850 P.2d 628 (Alaska 1993). Although AS 16.10.420 requires the department to issue hatchery permits specifying that a hatchery may not place or release salmon eggs or fry in the waters of the state other than those provided in the permit, the statute does not directly conflict with the Board's authority over the release of fish set out in AS 16.05.251(a)(9). However, AS 16.10.440(b) does not specifically authorize the Board to adopt regulations that amend the terms of the permit governing the release of hatchery fish.

Currently, the Board has delegated its authority over the release of fish to the department commissioner by the adoption of 5 AAC 41. These regulations establish a process for the issuance of permits by the commissioner according to regulatory criteria for the release of fish. Accordingly, absent a repeal by the Board of this delegation of authority, there may not be significant potential for conflict between the Board and the department.

D. Fisheries Enhancement Loan Program

In 1977, the legislature created the fisheries enhancement revolving loan fund within the Department of Commerce and Economic Development for making loans to private, nonprofit hatchery permit holders and to regional associations for long-term, low-interest loans for the planning, construction, and operation of salmon hatcheries, and the rehabilitation and enhancement of salmon fisheries. Sec. 9, ch. 154, SLA 1977; AS 16.10.500-16.10.500. The Commissioner of the Department of Commerce and Economic Development independently administers this loan program.¹³ See AS 16.10.500-16.10.560.

¹³ As the legislative history set out previously in this memorandum suggests, the broad rule-making authority under former AS 16.10.440 created uncertainty regarding whether the Board could, by adopting appropriate regulations, affect the requirement of hatcheries to report to the Department of Commerce and Economic Development under AS 16.10.470. The 1979 amendment to AS 16.10.440 clarifies that the Board may not regulate in this area.

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The Commissioner of the Department of Commerce is authorized to make loans from the fisheries enhancement revolving loan fund to holders of private, nonprofit salmon hatchery permits issued by the Department of Fish and Game under AS 16.10.400-16.10.470. AS 16.10.505, 16.10.510. The commissioner may also make grants to qualified regional associations for "organizational and planning purposes." AS 16.10.510(9).

While this loan and grant program is administered independently from the Department of Fish and Game and the Board, only qualified regional associations and private, nonprofit hatchery permit holders are eligible to receive them. See AS 16.10.510-16.10.520.

IV. Conclusion

We hope this discussion provides answers to your questions. Please do not hesitate to contact us if we can provide additional assistance.

- 2) Schedule a reasonable length of time between sessions for board members and staff to take care of personal and business needs. A minimum of 7-10 days between sessions.
- 3) Leave as much of the month of October available for Joint Board of Fisheries and Game meetings as possible.
- 4) Leave as much of the month of March available for Joint Board of Fisheries and Game meetings as possible.
- 5) Do not schedule any board meetings past March 15, when possible.
- 6) Locate meetings in the region of the call for proposals.
- 7) Have each meeting session address one region. The current regional arrangements: Kodiak/Chignik; Alaska Peninsula/Aleutian Islands, Bristol Bay; Arctic/Yukon/Kuskokwim; Cook Inlet; Prince William Sound; and Southeast.
- 8) If one session for one region is projected to last longer than 15 days, schedule more than one session for that region (i.e. Upper Cook Inlet and Lower Cook Inlet or Southeast Commercial fisheries and Other Southeast Finfish).
- 9) Schedule one session for all herring fish proposals. Have this session early in the meeting cycle.
- 10) Schedule one session for all shellfish proposals. Have this session late in the meeting cycle.
- 11) Review each region as noted above approximately every _____ years.
- 12) Administrative items will be considered at the end of the agenda.
- 13) When funding is available, a Joint meeting of the Board of Fisheries and Board of Game will be scheduled before the meeting cycles of the two boards.
- 14) When funding is available, a meeting of the Board of Fisheries to discuss the policies and goals of the board will be scheduled prior to the meeting session's beginning.
- 15) In creating the administrative record, insure that the allocation criteria is fully discussed.

GENERAL ORDER OF BOARD AGENDA

- Call Meeting to Order
- Introduction of Board Members and Staff
- Election of Chair and Vice-Chair (where appropriate)
- Board Member Ethics Disclosures
- All Agency Reports
- All Public Testimony
- All Advisory Committee and Regional Council Reports
- Board Deliberations
- Administrative Items (i.e. Petitions, Resolutions, Findings, Letters, Policy Papers, etc.)
- Adjourn/Recess

GENERAL ADMINISTRATIVE ITEMS

The objective is to provide adequate notice to the potentially affected public of the proposed regulation changes. These tasks are suggested:

- 1) Publish the legal notice in the region where the proposals will be considered (effect).
- 2) During Public Testimony, each individual will be allocated 7 minutes to testify before the board. Each individual will be allowed to testify only once during that session. If they testified at another session on these proposals at another meeting session, they will not be allowed to re-testify on the same proposals.
- 3) During Public Testimony, each organization will be allocated 10 minutes to testify before the board. Each organization will be allowed only one 10 minute block. Other people associated with the organization will need to testify as individuals.
- 4) Official Advisory Committee and Regional Council representatives will be allocated 15 minutes to report on the actions of their organization.
- 5) The blue cards for public testimony will be shuffled, then the list posted for the order of testimony. Special requests for changes in the posted order are to be arranged with the chair and director.

Board of Fisheries

Criteria for Consideration on Reviewing Meeting Locations

Identified March 20, 2009

From Jim Marcotte, Executive Director, memo to the Board of Fisheries, October 13, 2010 –

“In March 2009 the board decided it would identify the factors used when determining the location for holding future meetings. The board intended that no single items shall be the sole determining guideline but rather the preponderance of the items shall be considered significant in final selection of a meeting site.

1. Whether the community has commercial jet or turbine service.
2. Cellular phone service.
3. High speed internet available.
4. Adequate dining facilities/capacity for the Board of Fisheries, Fish and Game staff, and expected members of the public travelling from other communities.
5. Adequate meeting room facility and associated staff requirements (i.e.: copy machine, etc.).
6. Relative comfort (temperature inside, tables/chairs, etc.)
7. Adequate ground transportation
8. Adequate hotel rooms and capacity of rooms for expected influx.
9. Hospital.
10. Relationship of community to Board of Fisheries topic of discussion.
11. Cost to Department of Fish and Game.
12. Travel time required.
13. Economic and cultural importance to the location.
14. Economic impact on stakeholder travel.”