

# 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  
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## 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 Game<sup>1</sup> 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:

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.

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<sup>1</sup> 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.

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 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.<sup>2</sup>

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<sup>2</sup> 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,

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.

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).<sup>3</sup> That deletion helps

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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).

<sup>3</sup> 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).

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. Board Authority under AS 16.05.730**

In 1992, the legislature enacted AS 16.05.730<sup>4</sup>, 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 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.

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<sup>4</sup> 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

**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 stock<sup>5</sup> and cost-recovery fish.<sup>6</sup>

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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.

<sup>5</sup> 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.

<sup>6</sup> 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.

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.<sup>7</sup> 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; 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,<sup>8</sup> 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).

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<sup>7</sup> 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.

<sup>8</sup> 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.

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."<sup>9</sup> 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 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 amendment<sup>10</sup> of hatchery permits is to be limited to the authority set out in AS 16.10.440(b).<sup>11</sup>

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).

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<sup>9</sup> 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.

<sup>10</sup> 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").

<sup>11</sup> 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."

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 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).<sup>12</sup>

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

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<sup>12</sup> 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.

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.<sup>13</sup> *See* AS 16.10.500-16.10.560.

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.

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<sup>13</sup> 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.