

Alaska Board of Fisheries
HATCHERY COMMITTEE MEETING
March 7, 2020
Anchorage

Comments
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RE: Board Authority: AS 16.10.440(b)

I direct my comments to the discussion regarding the authority of the Board of Fisheries as stated in AS 16.10.440. I believe I can bring a historical perspective and background surrounding the drafting of the section and provide a historical context to assist in the review and discussion.

At the time of the drafting legislation creating and setting up the legal and legislative framework for the Private Non-Profit Regional Aquaculture Associations (PNP); 1976 – 1980, I worked on the legislation and regulations as an attorney for Southern Southeast Regional Aquaculture Association (SSRAA) and staff to the legislature in 1977 and 1979-80.

The Board has wrestled with the authority of the Board regarding the private non-profit hatchery program for many years. The Department of Law has written memorandums to the Board regarding the question of Board authority over the past 20 – 30 years.

The legislation to set up a comprehensive framework for the creation and management of private non-profit hatcheries was adopted over a few years. It was a new endeavor and as the implementation took place various unknown factors arose and the legislature passed new and clarifying statutes to address the issues. The primary legislation was adopted in 1974, 1976, 1977, 1978 and 1979 and a few additional changes in later years.

It was new territory to balance the oversight of the creation of hatcheries operated by private non-profit entities. The use of common property resources and public resources to build hatcheries that produce salmon for harvest in the commercial, sport and personal use fisheries. The challenges included a balance between public input and consideration of use of public assets, the private financing through assessments on commercial fishermen and loans from the state and the need for stability in the planning, production and financing.

There was also a need to proceed with expediency to get the process going and keep it going. There were many unknown challenges to deal with. This had never been done before. It was a new social experiment in a public – private partnership. There were no models in the world to follow. It was new ground for everybody. The initial legislation creating private non-profit hatcheries was one or two sentences adopted in 1974. From there the idea started and different areas of the state began to explore options. The challenges from how to finance to site selection, brood stock egg takes, organization of managing entities needed solutions. Voluntary assessments in Prince William Sound worked for one year but proved to be unreliable. The legislation was amended in 1977, 1978, 1979 and later years. It was a new program and concept. Mandatory assessments to be collected by processors

and sent directly to associations was found unlawful in the Wayne Alex case. Legislation was amended to recognize the assessments as a tax payable to the state and deposited in the general fund. The enhancement loan fund needed clarification regarding the accrual of interest on outstanding balances.

Many of these issues came to a head in 1977 – 1978. The 1978 legislature appropriated \$100,000 to set up the Aquaculture Policy Study Group. The Letter of Intent for FCC for SCS for CSHB 920 opening paragraph:

“The Aquaculture Study proposes to clarify statutes authorizing private nonprofit salmon hatcheries so that management authorities such as the Department of Fish and Game and the Board of Fisheries can better understand and implement the intent of the Legislature.”

The Aquaculture Study Group organized in July and met in September and later in the fall 1978. Six major areas of concern were chosen to be addressed by the study group:

1. Clearly define the State’s policies on Aquaculture – examine existing statutes/resolutions/policies
2. Stock Management
3. Define roles of organization and groups
4. Land Use problems
5. Cost/Benefit analysis of private and state projects
6. Research Base

As you can see from the list there were a lot of areas of confusion and overlapping jurisdiction and policy and procedures to work through. The ideas, recommendations and concepts from this study group led to many of the provisions adopted in the 1979 legislation. Including the change to AS 16.10.400.

In the 1976. AS 16.10.440 read

- (a) Fish released into the natural waters of the state by a hatchery operator 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.

This section created a layer of confusion in terms of how the nonprofit hatcheries were going to operate. The statute vests detailed authority in the Commissioner to implement and manage the creation, operation and permitting of nonprofit hatcheries. How were the nonprofit hatcheries to get permits if the Board of Fisheries is required to promulgate regulations to implement the same sections as delegated to the Commissioner? The decision was to place the implementation of the nonprofit hatcheries and permitting and comprehensive planning with the Commissioner. And leave the allocation of the fish in the common property water to the Board of Fisheries.

AS 16.10.440 was amended to read:

- (a) Fish released into the natural waters of the state by a hatchery operated under AS 16.10.400 – 16.10.470 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 of Fisheries may, after the issuance of a permit by the commissioner, amend by regulation adopted in accordance with AS 44.62 (Administrative Procedure Act), the terms of the permit relating to the source and number of 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 or take any action regarding the issuance or denial of any permits required in AS 16.10.400-16.10.470.

This amendment is confusing and is causing a great deal of angst among the Board and hatchery operators. What does it mean? The legislature could have just adopted the last sentence and said the Board of Fisheries may not adopt any regulations or take any action. But the legislation includes three carve outs of authority for the Board. Two of the provisions make sense in terms of the Board authority to deal with allocation of fish in the common property. The harvest of fish by hatchery operators and the specific locations. The third provision relating to the source and number of eggs is creating confusion in terms of the management, long term planning and operation of non-profit hatcheries.

My recollection of the history of this section is related to the need to harvest the initial brood stock from wild salmon spawning streams. At the time (1978-79), there was a lot of discussion of how and where to source the initial brood stock and how that may impact the production of wild salmon streams. The selection of the streams for hatchery brood stock involved discussion at the Regional Planning Team, between regional hatchery managers and the Department and the US Forest Service. Access to many streams involved crossing Forest Service land. Setting up temporary camps on streams. Building weirs in the streams to trap salmon. Deciding how many salmon to harvest for hatchery brood stock. Impact of the brood stock taking on the overall production of that stream. It was complicated. And getting it right was important.

This section provided a means for the Board of Fisheries to act upon a permit granted by the Commissioner for the egg take from wild salmon stocks in specific stream. The Board of Fisheries never reviewed or questioned any of the Commissioner decisions on collection of the initial brood stock for hatchery from wild salmon streams either in the state owned and operated hatcheries or the private non-profit hatcheries.

In looking back at this section (b) that is the only conclusion I draw. It was intended for the Board to have an opportunity to look at the gathering of hatchery brood stock from wild salmon streams. The other sections in .440(b) relate to the Board authority for harvest of salmon in the common property including harvest by hatchery operators. The provision dealing with amending permits for source and number of eggs does not fit with the scope of the overall statutory design to place authority for oversight of non-profit hatchery with the Commissioner and allocation of salmon in the common property with the Board of Fisheries.

It is my opinion the reference that the Board may amend a permit issued by the Commissioner relating to the source and number of salmon eggs was intended to apply to the initial egg take of brood stock from the wild streams.

It was not intended to be a vehicle for the Board to step in at any time on a permit by permit basis to amend or revoke permits issued regarding sources and number of salmon eggs taken from stocks returning to the hatcheries or transferred between hatcheries. If that were the case the entire statutory framework for management and operation of non-profit hatcheries is upended. The planning, operations, financing, site selection is placed in limbo. And subject to intervention by the Board of

Fisheries on an ongoing basis. Either through emergency action or through the regular Board cycle. The unknown factor looms very large in every decision. This is what the original planners and drafters of the non-profit hatchery program were trying to avoid.

It is difficult to envision what and how a Board regulation would look like in terms of amending a permit? What criteria would be used? How would the impacts be measured? How would it affect the financial structure of the company? All these issues are considered by the Commissioner when granting the permit. There is a process through the Regional Planning Team, public hearings and staff recommendations to arrive at the decision.

The last sentence in subsection (b) was included as a definitive statement that the Board of Fisheries 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. When this section is read in the context of the of the statutes dealing with non- profit hatcheries it is clear the legislature put the Commissioner in charge of the non-profit hatcheries. And the Board of Fisheries with the authority to regulate the harvest of salmon in the common property.

There is a robust and comprehensive process set out in the statutes providing for public comment and input into the decision-making structure for managing nonprofit hatcheries. If there is a problem or issue that arises after a permit is issued the Commissioner can make a finding the hatchery is not in the best interest of the public and alter the conditions of the permit under AS 16.10.430. There are examples of the Commissioner using the power granted in the statutes to deal with breaches of permits. The Commissioner closed the Meyers Chuck hatchery due to noncompliance. And, revoked the permits for Alaska Aquaculture due to default on debt. There are ways and means built into the existing statutes to deal with many of the issues of concern.

I strongly recommend the Board not to attempt to use the reference to source and number of salmon eggs in AS 16.10.440(b) as a vehicle to amend permits issued by the Commissioner under the nonprofit hatchery statutes.