

RC0034

To: Alaska Board of Fisheries
From: Salmon Hatcheries for Alaska
Northern Southeast Regional Aquaculture Assn.
Cook Inlet Aquaculture Assn.
Kodiak Island Regional Aquaculture Assn.
Re: Lower Cook Inlet December, 2019
Proposal numbers 22 and 23
Submission for the record
Date: December 11, 2019

In July, 2019, the Board of Fish reviewed and denied an emergency petition to review certain hatchery programs in the Prince William Sound region. The Board received into its record for that meeting a legal opinion prepared on behalf of the Prince William Sound Aquaculture Association addressing the powers and authority of the Board of Fisheries and the Commissioner of the Department of Fish and Game. The opinion was authored by the firm of Ashburn & Mason, dated July 9, 2019.

Certain parts of that submission bear on your consideration of proposals #22 and 23, and are attached for your review and for submission to the record of the current meeting.

If any of the Board would like to see the whole of the opinion submitted in July, 2019, we would be happy to provide that.



ASHBURN & MASON P.C.

LAWYERS

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July 9, 2018

VIA EMAIL: dfg.bof.comments@alaska.gov

Chairman John Jensen
Alaska Board of Fisheries
P.O. Box 115526
Juneau, AK 99811-5526

Re: Public Comments of Ashburn & Mason, P.C., Counsel for Prince William Sound Aquaculture Corporation In Opposition To May 16, 2018 KRSA et al. Emergency Petition Regarding VFDA Hatchery Production (Comment Due Date July 9, 2018).

Dear Chairman Jensen and Members of the Board of Fisheries,

Ashburn & Mason, P.C., counsel to Prince William Sound Aquaculture Corporation (“PWSAC”), submits the following opposition and public comments to the above-referenced petition:

INTRODUCTION

Petitioners ask the Board to declare an emergency and reduce the current permitted salmon production at Valdez Fisheries Development Association’s (“VFDA”) Salmon Gulch Hatchery. The Department of Fish and Game (the “Department”) granted VFDA’s production permit in 2014, which provided for gradual production increases on a yearly basis. In year three of the permit, Petitioners now ask the Board to declare an



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demonstrate a strong and long-standing state policy in Alaska of promoting hatchery development for the purpose of enhancing and ensuring the long-term vitality of Alaska's fisheries.

2. The Department Strictly Regulates All Aspects of Hatchery Creation, Operation, and Production

The Alaska Department of Fish and Game has been charged by the Alaska legislature with final authority over how many fish hatchery operations are allowed to incubate and release each year,³⁴ and to regulate all other details of hatchery operation.³⁵

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 issuing a permit for a hatchery on that stream. As 16.10.400(f).

Of particular relevance to the issue presently before the Board, 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

³⁴ AS 16.10.445; 5 AAC 40.300; 5 AAC 40.340; 5 AAC 40.840.

³⁵ AS 16.10.400-.470; 5 AAC 40.005-.990.



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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.³⁶

All state hatcheries are operated pursuant to a permit issued by the Department.³⁷ Standard permit conditions include: (1) provisions that eggs used for broodstock come from a source approved by the Department;³⁸ (2) no placement of salmon eggs or resulting fry into waters of the state except as designated in the permit; (3) restrictions on the sale of eggs or resulting fry; (4) no release of salmon before department inspection and approval; (5) destruction of diseased salmon; (6) departmental control over where salmon are harvested by hatchery operators; and (7) hatchery location to prevent commingling with wild stocks.³⁹

Further, there is an intricate system of basic and annual hatchery plans that are reviewed annually by the Department and provide for performance reviews, and in

³⁶ AS 16.10.410.

³⁷ AS 16.10.400; 16.40.100-.199; 5 AAC 40.110-.240.

³⁸ AS 16.10.445. This requirement is related to regulations regarding fish transport permitting. *See* 5 AAC 41.001-.100. These regulations provide that no person may transport, possess, export from the state, or release not the waters of the state any live fish unless that person holds a fish transport permit issued by the Commissioner.

³⁹ *See generally* McGee, *Salmon Hatcheries in Alaska – Plans, Permits, and Policies Designed to Provide Protection for Wild Stocks*, Published for 2004 American Fisheries Society Symposium, at 327.



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appropriate cases, permit alterations.⁴⁰ The basic management plans include a complete description of the facility, including the special harvest area, broodstock development schedules, and description of broodstock and hatchery stock management.⁴¹

Year-to-year hatchery production is regulated through the annual management plans (AMPs) approved and adopted by the Department. For example, each year, PWSAC and the other PNP's across the state work with the Department, which ultimately formulates an AMP for each hatchery. That plan, among other things, determines the number of eggs the hatchery will collect, how the eggs will be collected, the number of fish it will incubate, and how many fish will be released from the hatchery.⁴² The AMP also addresses how PNP's will conduct their cost recovery harvest at each hatchery and addresses other specifics of hatchery operation.⁴³

3. The Board's Proper Role is to Allocate Harvest, Not to Override the Department's Permitting and Production Decisions

⁴⁰ 5 AAC 40.800-990. As noted above, there is also an extensive Regional Comprehensive Planning Program established under AS 16.10.375 and 5 AAC 40.300-.370, with full public participation. This process creates Regional Planning Teams who are charged to "prepare a regional comprehensive salmon plan . . . to rehabilitate natural stocks and supplement natural production . . ." 5 AAC 40.340.

⁴¹ See generally McGee, at 329.

⁴² 5 AAC 40.840.

⁴³ McGee, at 329.



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The Board of Fisheries is established by AS 16.05.221, “for purposes of the conservation and development of the fishery resources of the state.”⁴⁴ In general terms, the Board’s duties complement those performed by the Department. While it has broad statutory authority, the Board has historically focused on allocation of fisheries resources between and among the various user groups and gear types. For example, under AS 16.05.251(a) the Board has the power to set time, area, and methods and means limitations on the taking of fish. Under AS 16.05.251(a)(3), the Board also establishes quotas, bag limits, and harvest levels. To the best of our knowledge, however, the Board has always deferred to the Department’s expertise and experience with respect to the detailed management of hatchery permitting and production levels.

B. The Board Cannot Override Annual Hatchery Production Permits Issued by the Department

Petitioners contend that AS 16.10.440(b) grants the Board the authority to upend the Department’s carefully constructed regulatory framework governing hatchery

⁴⁴ AS 16.05.221.



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production.⁴⁵ This interpretation of the statute reads it out of context and is inconsistent with its historical origins. Under Alaska law, this statutory provision must be construed in light of the overall statutory scheme governing Alaska's salmon hatcheries,⁴⁶ its legislative history and intent,⁴⁷ and over 40 years of consistent administrative interpretation and practice, during which the Board (to our knowledge) has never

⁴⁵ AS 16.10.440 provides: (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 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 or take any action regarding the issuance or denial of any permits required in AS 16.10.400 - 16.10.470.

⁴⁶ See, e.g. *Monzulla v. Voorhees Concrete Cutting*, 254 P.3d 341, 345 (Alaska 2011), citing *In re Hutchinson's Estate*, 577 P.2d 1074, 1075 (Alaska 1978), where the Supreme Court articulated the doctrine of *in pari materia*: the "established principle of statutory construction that all sections of an act are to be construed together so that all have meaning and no section conflicts with another."

⁴⁷ See, e.g. *Native Village of Elim v. State* 990 P.2d 1, 5 (Alaska 1999), *Kochutin v. State*, 739 P.2d 170, 171 (Alaska 1987) citing *Hammond v. Hoffbeck*, 627 P.2d 1052, 1056 & n. 7 (Alaska 1981).



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attempted to use this statute as the basis for usurping the Department's traditional control over hatchery production.⁴⁸

At the time Section 440(b) was enacted in 1979, the hatchery system was in its infancy. Most hatchery egg take was from wild stocks, not returning hatchery fish, which is how egg take is conducted today. The thinking at the time was that salmon eggs harvested from wild stocks were still a "public resource" while the fish were swimming out in the ocean, and the harvest of wild fish for egg take had allocation implications that could potentially fall within the Board's purview. In contrast, today's egg take procedures are conducted almost exclusively from returning hatchery broodstock that are captured in the special harvest areas directly in front of the hatcheries. At that point, the hatchery salmon cease to be a public resource and their capture and the collection of their eggs have very limited allocative implications. Further, as the Commissioner noted in his January 14, 2018 Memorandum to the Board on the subject of the current Petition, "the

⁴⁸ See e.g. *Marathon Oil Co. v. State, Dep't of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011), *Premera Blue Cross v. State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins.*, 171 P.3d 1110, 1119 (Alaska 2007), and *Bullock v. State, Dep't of Cmty. & Reg'l Affairs*, 19 P.3d 1209, 1219 (Alaska 2001), where the Alaska Supreme Court held that agency decisions based on "longstanding, consistent and widely known" interpretations of agency expertise should be given "great weight."



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Board's authority over the possession, transport and release of live fish had not been delegated to the department when AS 16.10.440(b) was amended."⁴⁹

Moreover, the legislative history of Section 440(b) indicates that it was never intended to be used by the Board as back door means of overriding the Department's permitting authority or limiting hatchery production. The Resources Committee's letter of intent on HB 359, which included the language in question, states as follows:

There are three other major changes made by the bill:

- (1) Section 2 of the bill 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 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 nonprofit hatcheries in the state.⁵⁰

⁴⁹ Memorandum from Sam Cotton, Commissioner, to John Jensen, Chair, dated January 14, 2018, Re: Emergency Petition to the Alaska Board of Fisheries requesting the Board to reverse a department decision to allow a 20 million increase in the number of pink salmon eggs to be harvested by VFDA in 2018.

⁵⁰ House Journal, March 15, 1979, pp. 601-602 (emphasis added).



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The exclusive reference to regulation of harvest, and the absence of any mention of production controls, corroborates the conclusion that the legislature never intended to authorize the Board to limit hatchery production.

The Board's traditional function has always been to allocate harvests among competing user groups, not to regulate production of fish. This legislative history, with its emphasis on "harvest," is also consistent with PWSAC's long-held belief (apparently shared by the Department) that Section 440(b) was intended to cover egg take from wild salmon streams, not to apply to egg take from returning hatchery fish.

Further corroboration of this conclusion is found in AS 16.10.445(a), which unambiguously requires the Department, not the Board, to "approve the source and number of salmon eggs taken under AS 16.10.400-16.10.470." Additional evidence that the Department, not the Board, is responsible for regulating hatchery egg take can be found in 5 AAC 41.001, *et. seq.* For example, 5ACC 41.005 prohibits the release of hatchery fish without a permit issued by the Commissioner. Regulation of egg take and release of the resulting salmon fry are obviously two sides of the same coin. The regulatory scheme clearly and consistently assigns exclusive responsibility for regulating those two closely related hatchery activities to the Commissioner.



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Given the legislative history, the 30-plus year pattern of administrative interpretation, the anomalous language in Section 440(b) regarding regulations to “amend...the terms of a permit,” and the mandate of Section 445(b), it is quite clear that the Board has little or no role in regulating hatchery production, including but not limited to egg take permit restrictions.

Moreover, regulation of hatchery production by the Board would overlap and almost certainly conflict with the comprehensive and detailed hatchery regulations that are currently in place and operating effectively. As noted above, the Department has a rigorous permitting process for new hatcheries, 5 AAC 40.100-.240. There is an extensive Regional Comprehensive Planning program established under AS 16.10.375 and 5 AAC 40.300-.370, with full public participation. By regulation, the responsibility of the Regional Planning Teams is to “prepare a regional comprehensive salmon plan ... to rehabilitate natural stocks and *supplement* natural production . . .” 5 AAC 40.340 (emphasis added). As mentioned earlier, there is also an intricate system of basic and annual hatchery plans that are reviewed annually by the Department, performance reviews, and, in appropriate cases, permit alterations. 5 AAC 40.800-.900. Production levels are carefully monitored by the Department under these regulations and adjusted if necessary for economic or biological reasons. The Department's statutory authority for



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this intense level of hatchery regulation is quite clear, and there seems to be little room for the Board to insert itself into a very public process that has been working well for many years.

CONCLUSION

Back in the early 1970s, Prince William Sound experienced recurring wild salmon run failures, which caused serious financial distress throughout the region. In response, the framers of the Constitution and the Alaska Legislature took active and far-sighted steps to first establish a state run hatchery system and, shortly thereafter, the private non-profit and regional hatchery regime that has consistently stabilized the runs and enhanced salmon harvests throughout the state since 1976. Overall, Alaska's hatcheries have been a remarkable success and have helped the state's salmon resources to thrive and expand over the past 40 years, creating millions of dollars of positive economic impact, without any demonstrable harm to wild salmon stocks.

From the very beginning, every aspect of Alaska's hatcheries' creation, operation, and production have been closely supervised and regulated by the Department, with harvest area and allocation decisions made by the Board. This division of responsibility has served Alaska well for many years and there is no good reason to abandon it now.

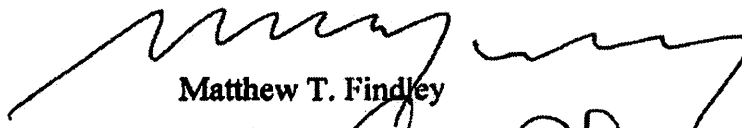
For these reasons, the Board should deny the Petition.



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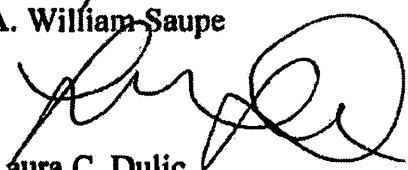


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