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July 9, 2018

VIA EMAIL: dsg.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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“emergency” and essentially veto this permit without engaging in the notice and comment rulemaking required by statute. The Petition establishes no “emergency,” nor does the Board of Fisheries (“Board”) have the statutory authority to veto the Department’s prior permit decision regarding salmon production.

A permit granted four years ago does not qualify as an “emergency” under any definition of the word, let alone the strict definition governing emergency petitions under Alaska law. By statute, true regulatory emergencies are held to a minimum and rarely found.¹ The reason for this strict standard is that enacting regulations outside of the notice and comment rulemaking procedures mandated by the Administrative Procedure Act is strongly disfavored. Here, establishing an emergency requires “unforeseen” and “unexpected” threats against fish and game resources.² VFDA’s long-standing permit is neither unforeseen nor unexpected. The fact that Petitioners chose not to engage in the public process leading to the permit grant does not make the permit “unforeseen.”

Even if there were an emergency, the Board lacks statutory authority to grant the relief requested by Petitioners. As set forth in detail below, the legislature invested the Department with the legal duty to oversee all aspects of hatchery creation, operation, and

¹ AS 44.62.270.

² 5 AAC 96.625(f).



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production,³ including but not limited to how many fish hatchery operators are allowed to incubate and release each year. By statute, the Department, not the Board, regulates hatchery activities that directly impact production levels, such as the harvest of eggs from hatchery broodstock.⁴ The Board, on the other hand, is tasked with regulating and allocating the harvest of both hatchery and wild salmon among all user groups that the hatcheries were established to serve, including commercial, personal use, sport, subsistence, and hatchery cost recovery.⁵ The Department and the Board have respected and abided by this division of labor and authority for over 30 years. To our knowledge, the Board has never before attempted to second guess a decision by the Department to authorize a specific level of egg take in a hatchery permit.

The Petition seeks to disrupt this well-established division of authority by interjecting the Board into the realm of production management. Specifically, the Petition asks the Board to micro-manage egg take levels from hatchery broodstock, which is squarely within the Department's sphere of authority and expertise, and outside the Board's jurisdiction over allocation of harvest levels. The Petition's only ground for this change in the *status quo* is a narrow statutory subsection, AS 16.10.440(b), addressing

³ AS 16.10.400-.470; 5 ACC 40.005-.990.

⁴ AS 16.10.445; 5 AAC 40.300; 5 AAC 40.340; 5ACC 40.840.

⁵ *E.g.*, AS 16.05.251.



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the Board's authority to amend hatchery permits regarding the "source and number of salmon eggs." This provision cannot bear the weight Petitioners place on it.

When this statute was enacted in 1979, the legislative's reference to "the source and number of salmon eggs" (almost certainly) referred to the collection of *wild* salmon eggs, before the hatcheries' cost recovery operations had been fully established. Back in 1979, collection of salmon eggs from wild stocks involved the harvest of wild salmon still swimming out in the ocean. In those early days, egg take had a potential to affect the Board's allocative decisions. By contrast, hatchery egg take today is conducted entirely from returning hatchery broodstock, captured in terminal harvest areas, not out in the Sound, with little or no allocative implications.

Even if the statute could be construed to apply to eggs recovered from returning hatchery broodstock, it is an insufficient legal basis for disrupting the Department's comprehensive regulatory regime, which includes hatchery production planning and detailed permitting requirements. Again, the Board has jurisdiction over harvest levels, and the Department has jurisdiction over all aspects of hatchery production, including egg take levels.⁶

⁶ *E.g.*, AS 16.10.445, granting the Department exclusive authority over "the source and number of salmon eggs taken" by hatchery operators.



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The Petition is also premature. The potential effects of hatchery fish straying into wild salmon streams, which is the stated impetus for the Petition, have been closely watched by the Department's biologists over the years. These effects are now the subject of an ongoing, in-depth scientific study. Until the study results are known, it is premature to consider curtailment of hatchery production that has already been permitted by the Department. Further, the Board has already stated its intent to address hatchery issues during its regular fall meeting cycle. These important issues can be addressed at that time where there is full opportunity for public participation and comment.

ABOUT ASHBURN & MASON AND PWSAC

Ashburn and Mason is submitting these comments, which focus on the relevant statutes, regulations, and established administrative practice, as a supplement to the comments submitted directly by the Prince William Sound Aquaculture Corporation ("PWSAC"). Ashburn & Mason has represented PWSAC since its creation in 1974. Our firm worked closely with PWSAC's visionary founders in the legislative process that resulted in the creation of the private nonprofit hatcheries ("PNPs") regional aquaculture associations, now codified at AS 16.10.375, *et. seq.*

PWSAC's founders were commercial fishers and community leaders who were responding to repeated wild salmon run failures, and the resulting economic distress



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throughout the Prince William Sound region in the early 1970s. Working together, the fishermen, local community representatives, the Department, and key legislators developed an innovative legal framework for the creation and operation of the state's PNPs and regional aquaculture associations.

Over the past 40-plus years, the statewide hatchery system has been a resounding success, and is an integral part of Alaska's world class sustainable fisheries. Alaska's hatcheries have generated tens of millions of dollars of economic benefit every year spread across all user groups, supplementing, but not displacing, the sustained yield of Alaska's wild salmon stocks. In fact, all of PWSACs hatcheries were started with salmon eggs collected originally from local wild stocks. The genetics of all Prince William Sound hatchery fish are therefore traceable back to local streams.

DISCUSSION

I. NO EMERGENCY EXISTS TO JUSTIFY THE PETITION TO RESTRICT VFDA'S PERMITTED EGG TAKE

By statute, true regulatory emergencies, which allow the Board to issue regulation without public notice and comment, are held to a minimum and rarely found.⁷ This is because public notice and comment are essential to the fairness and transparency of

⁷ AS 44.62.270.



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regulatory rulemaking in Alaska. The explicit state policy against the adoption of emergency regulations is so fundamental to the function of regulatory rule-making that it is codified in the Administrative Procedure Act.⁸ The Commissioner's decision to deny the emergency Petition reflects this well-established policy and decades of Alaska law and regulation, and must be respected.

The Petition does not present an emergency. Rather, it challenges a permit granted several years ago. The narrow exception for adoption of emergency regulations is limited to "unforeseen" and "unexpected" threats against fish and game resources.⁹ These threats must be so imminent that regulatory intervention cannot wait for the usual notice and comment process under the Administrative Procedure Act.¹⁰ For example, the Board adopted an emergency regulation to reorganize the Chignik fishery in 2005 when the Supreme Court issued a decision invalidating the previous fishery rules just six weeks before the season was slated to open.¹¹ The Superior Court agreed that the timing of the Supreme Court's decision created a legitimate emergency because no one could

⁸ *Id.*

⁹ 5 AAC 96.625(f).

¹⁰ 5 AAC 96.625(f).

¹¹ As referenced *infra.* at 3-4, the Commissioner currently has standing authority to review petitions for emergency regulation. See, 2015-277-FB. Prior to the adoption of this policy in 2015, the Board retained the authority to review petitions for emergency regulation.



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reasonably rely on when the Supreme Court would issue its decision, or what that decision would be. In addition to the “unexpected” and “unforeseen” nature of the Supreme Court’s decision, the timing also created a sense of imminence. With less than six weeks before the fishing season opened, the Board “had to act quickly...because it had to have something in place for the June opening.”¹²

Here, the Petition fails to demonstrate how VFDA’s long-standing permit, or the current conditions in the Sound, present an unexpected or unforeseen situation threatening the salmon fisheries. No acute biological or environmental event has impacted the Sound or Cook Inlet in recent months, creating an unpredictable threat. Rather, the purported justification for an emergency petition is an alleged trend, observed over the last several *years*. There is no reason why the proposed Board action could not have been presented a year ago or, more to the point, why it could not wait until the next regularly scheduled Board meeting, which will provide a fuller and fairer opportunity for interested parties and members of the public to comment and participate in the process.

In short, the Commissioner properly exercised his authority under AS 16.05.270 and 2015-277-FB to determine that the Petition failed to present an emergency under the

¹² See, *State of Alaska, Alaska Bd. of Fisheries v. Grunert*, 139 P.3d 1226, 1241 (Alaska 2006).



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Administrative Procedure Act. For the reasons explained in the Commissioner's June 14, 2018 letter to Petitioners, emergency action is unwarranted under these circumstances.

II. THE BOARD DOES NOT HAVE VETO AUTHORITY OVER HATCHERY PRODUCTION PERMITS

A. The Commissioner Has Primary Authority Over Hatchery Permitting and All Hatchery Operations

1. History and Purpose of the Hatchery Program

The desire of Alaskans to manage their abundant salmon fisheries was a driving force behind Alaska Statehood.¹³ The importance of protecting and developing natural resources such as salmon is embedded in the Alaska Constitution, which directs the legislature to "provide for the utilization, development, and conservation of all natural

¹³ See, e.g., *Pullen v. Ulmer*, 923 P.2d 54, 57 n. 5 (Alaska 1996); Alaska Legislative Affairs Agency, *Alaska's Constitution: A Citizen's Guide* (4th ed. 2002) at http://w3.legis.state.ak.us/docs/pdf/citizens_guide.pdf (Many Alaskans concluded "that the notion of the federal government's superior vigilance as a trustee of the public interest was really a cloak for the institutional interests of bureaucrats and the economic interests of nonresident corporations exploiting those resources (principally Seattle and San Francisco salmon canning companies)."); HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, *Act Providing for the Admission of the State of Alaska into the Union of 1957*, H.R. REP. No 85-624 (1958) (The Statehood Act "will enable Alaska to achieve full equality with existing States, not only in a technical juridical sense, but in practical economic terms as well. It does this by making the new State master in fact of most of the natural resources within its boundaries"); Univ. of Alaska Anchorage, Institute for Social and Economic Research, *Salmon Fish Traps in Alaska* (1999), at 14, at <http://www.iser.uaa.alaska.edu/publications/fishrep/fishtrap.pdf> ("Alaska political entrepreneurs used the [fish] trap issue to rally the citizens of the territory around the quest for statehood.").



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resources belonging to the State, including land and waters.” It also requires the legislature to make decisions that “provide for the maximum benefit of its people.”¹⁴ The Alaska Constitution proclaims that “fish, wildlife, and waters are reserved to the people for common use,”¹⁵ and dictates that “Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.”¹⁶ Further, the Constitution expressly references the goal of “promot[ing] the efficient development of aquaculture in the State,” and protecting Alaska’s economy from outside interests:¹⁷

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood *and to promote the efficient development of aquaculture in the State.*

By the early 1970s, salmon runs were in steep decline throughout Alaska. In

Prince William Sound, seining did not open at all in 1972 and 1974 due to dangerously

¹⁴ ALASKA CONST. art. VIII, § 2.

¹⁵ ALASKA CONST. art. VIII, § 3.

¹⁶ ALASKA CONST. art. VIII, § 4.

¹⁷ ALASKA CONST. art. VIII, § 15. The Constitution has since been amended to provide for the limited entry permit system now in place, *See infra* n. 7, but the reference to promoting the “efficient development of aquaculture” remains unchanged.



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low wild stock returns. In response, the State of Alaska resolved to restore the salmon fisheries. A constitutional amendment provided the basis for limited entry legislation for commercial fisheries,¹⁸ and the state hatchery program was initiated through the creation of the Fisheries Rehabilitation & Enhancement Division (FRED).¹⁹

Under AS 16.05.020, the Commissioner must “manage, protect, maintain, *improve, and extend* the fish, game ... of the state in the interest of the economy and general well-being of the State.” The Department is further required to: “develop and continually maintain a comprehensive, coordinated state plan for the orderly present and long-range rehabilitation, *enhancement*, and development of all aspects of the state’s fisheries for the perpetual use, benefit, and enjoyment of all citizens” and “through rehabilitation, *enhancement*, and development programs do all things necessary to ensure perpetual *and*

¹⁸ AS 16.43.400 *et seq.* Alaska’s limited entry fishery essentially provides that only permit holders may engage in commercial fishing. The granting of these permits, and the management of the commercial fisheries, are tightly regulated by numerous state agencies including the State Commercial Fisheries Entry Commission (CFEC), the Alaska Department of Fish & Game (ADF&G), and the Board of Fisheries (BOF). *See generally Johns v. CFEC*, 758 P.2d 1256, 1263 (Alaska 1988) (“The Limited Entry Act has two purposes: enabling fishermen to receive adequate remuneration and conserving the fishery.”).

¹⁹ AS 16.05.092. As explained more fully below, FRED no longer exists as a distinct division within the Department. However, the operation of most or all of the original hatcheries owned and operated by FRED has been transferred to the regional aquaculture associations, under long-term professional services agreements. PWSAC, for example, currently operates the Cannery Creek, Main Bay, and Gulkana Hatcheries, all of which were constructed and initially operated as FRED hatcheries in the early 1970s.



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increasing production and use of the food resources of state waters and continental shelf areas.”²⁰ Similarly, the Department is required generally to “manage, protect, maintain, improve, and extend the fish, game and aquatic plant resources of the state in the interest of the economy and the general well-being of the state.”²¹ The Department is also generally charged to do everything possible to assist with hatchery operations.²²

In addition, the legislature created the Fisheries Enhancement Revolving Loan Fund to promote the enhancement of Alaska’s fisheries by, among other things, providing long-term, low-interest loans for hatchery planning, construction, and operation.²³ PWSAC has received significant support from this program over the years, particularly for capital investments.

In 1974, the FRED state-owned and managed hatchery program was expanded to include private ownership of salmon hatcheries with the passage of the Private Non-Profit (PNP) Hatchery Act.²⁴ The Act stated that its purpose was to “authorize the private ownership of salmon hatcheries by qualified non-profit corporations for the purposes of

²⁰ AS 16.05.092(3) (emphasis added).

²¹ AS 16.05.020(2) (emphasis added).

²² AS 16.10.443.

²³ AS 16.10.500-.560; see generally Alaska Division of Investments, “Fisheries Enhancement Revolving Loan Fund Program Overview,” April 2007 at <http://www.commerce.state.ak.us/investments/pdf/FEover07.pdf>.

²⁴ These provisions are now codified at AS 16.10.375 *et seq.*



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contributing, by artificial means, to the rehabilitation of the State's depleted and depressed salmon fishery." Further, as noted above, a separate fisheries enhancement loan program was created in 1976 to provide state financing for nonprofit hatcheries.²⁵

Over time, the State has transferred operation of some of the FRED hatcheries to other entities, including the nonprofit hatcheries operated by the regional aquaculture associations, concluding that it would be more cost-effective for these hatcheries to be operated by the regional associations. The legislature specifically authorized the subcontracting of state hatcheries in 1988,²⁶ acknowledging that after 17 years of the State planning, building and operating hatcheries, Alaska sought an even more efficient way of ensuring a healthy, robust, and sustainable salmon fishery.²⁷

²⁵ AS 16.10.500 *et seq.*; see also *State Commercial Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851 (Alaska 2003) ("The state operates a revolving loan fund to support investments in developing and operating fish hatcheries and other fish enhancement projects.").

²⁶ AS 16.10.480.

²⁷ Alaska's partnership with the nonprofit hatcheries is unique. Almost all states operate hatcheries of some kind (salmon, trout, walleye, catfish, etc.), but no state operates a hatchery program like Alaska's, and no state works with private nonprofit entities to assist the state government in its hatchery programs. By way of example, California has 21 state hatcheries (<http://www.dfg.ca.gov/fish/Hatcheries/HatList.asp>), Oregon has 33 state hatcheries (<http://www.dfw.state.or.us/fish/hatchery/>), and Washington has 91 state hatcheries (<http://wdfw.wa.gov/hat/facility.htm>), and all of these hatcheries are operated by the government.

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Alaska law provides that the hatcheries may only be non-profit.²⁸ By design, the hatcheries are allowed to recover operating and capital expenses, as well as costs for research and development and expansion of the production system, including wild stock rehabilitation work.²⁹ The system is designed to provide benefits to the common property resource users. The nonprofit regional aquaculture associations have no stock-holders, owners, or members. Today, five regional aquaculture associations, from Southeast Alaska to Kodiak, including PWSAC, produce hatchery salmon for common property fisheries.

Thus, the Alaska Constitution, combined with numerous statutes, including those creating the Department of Fish and Game,³⁰ the Limited Entry Act,³¹ the Private Non-Profit Hatcheries Act,³² and the Fisheries Enhancement Revolving Loan Fund,³³ together

²⁸ AS 16.10.380.

²⁹ AS 16.10.455.

³⁰ AS 16.05.010, *et.seq.*; *see also* 5 AAC 40.100-.990.

³¹ AS 16.43.400 *et seq.* Alaska's limited entry fishery essentially provides that only permit holders may engage in commercial fishing. The granting of these permits, and the management of the commercial fisheries, are tightly regulated by numerous state agencies including the State Commercial Fisheries Entry Commission, the Alaska Department of Fish & Game (ADF&G), and the Board of Fisheries (BOF). *See generally Johns v. CFEC*, 758 P.2d 1256, 1263 (Alaska 1988) ("The Limited Entry Act has two purposes: enabling fishermen to receive adequate remuneration and conserving the fishery.").

³² AS 16.10.375-480.

³³ AS 16.10.500-.560.



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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 PNPs 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 PNPs 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

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⁴⁸ See e.g. *Marathon Oil Co. v. State, Dep't of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011), *Premora 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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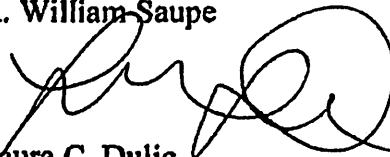


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