

MEMORANDUM

State of Alaska

Department of Law

TO: Glenn Haight
Executive Director
Alaska Board of Fisheries

DATE: February 3, 2020

FROM: Aaron Peterson
Assistant Attorney General

FILE NO.: 2019200569

TEL. NO.: 907-269-5232

SUBJECT: Department of Law
comments on proposals
for the February 7 -
February 19, 2020 Board
of Fisheries meeting for
Upper Cook Inlet finfish

The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at its February 7 - February 19, 2020 meeting for Upper Cook Inlet finfish:

Proposal 15: This proposal would prohibit reselling of guide services by anyone other than licensed guides. The Board probably lacks authority to prohibit reselling of guide services by anyone other than licensed guides. The board may regulate guided fishing and the methods and means utilized by fishing guides and guided anglers while engaged in fishing, but regulating the tangential commerce related to the industry is probably not within the authority of the board.

Proposal 78: This proposes to add a weighted allocation criteria section to 5 AAC 21.363 (Upper Cook Inlet Salmon Management Plan). The proposal incorporates the allocation criteria set out in AS 16.05.251(e) (the history of each personal use, sport, guided sport, and commercial fishery; the number of residents and nonresidents who have participated in each fishery in the past and the number of residents and nonresidents who can reasonably be expected to participate in the future; the importance of each fishery for providing residents the opportunity to obtain fish for personal and family consumption; the availability of alternative fisheries resources; the importance of each fishery to the economy of the state; the importance of each fishery to the economy of the region and local area in which the fishery is located; the importance of each fishery in providing

recreational opportunities for residents and nonresidents.) when considering allocations to user groups. The language of AS 16.05.251(e) does not require weight or point values be assigned to allocation criteria. Rather, the legislature directed the Board to adopt and consider criteria, but left the evaluation of the criteria in a particular allocation decision to the Board's discretion. Assigning a defined value to each allocation criterion may clarify existing relative priority, but the proposal lacks sufficient detail to describe how rankings would be used in Board decisions. In addition, any defined value assigned to each criterion would not necessarily be binding on a future Board, since it could find that a different allocation would be appropriate in particular circumstances notwithstanding the results of the application of the weight assigned to the criteria by this Board.

Proposal 79: The Board can give allocative priority to personal use fishing. The board may not place personal use fishing on the same legal plane as subsistence outside of a nonsubsistence area, as subsistence is given the highest statutory priority among uses. In the nonsubsistence areas in Cook Inlet there are, by definition, no state subsistence fisheries and therefore no fishery which could be assigned equal allocative priority as personal use consistent with the proposal. See generally AS 16.05.258.

Proposal 81: This proposal would create a policy that categorize salmon spawning areas in Upper Cook Inlet. The proposal contains no clear statement as to what regulatory action is desired. If the Board were to adopt regulations prohibiting salmon fishing in certain salmon spawning areas, it would need to specify what areas are closed. The commentary accompanying the proposal notes that for it to be successful ADF&G would have to fund professionals to carry it forward. The Board has no administrative, budgeting, or fiscal powers over the Department, any Department concerns about funding for a particular reporting system should be considered before adopting this kind of proposal.

Proposal 85: This proposal would limit the number of fishing derbies that occur in certain Upper Cook Inlet fisheries. Limiting the number of derbies is outside the authority of the Board. Under AS 05.15.100 the Department of Revenue, not the Board or the Department of Fish and Game, may permit or prohibit fishing derbies.

Proposals 88, 90, 91, 92, 96, 103, 104, 105, 106, 114, 118, 119, 216, and 218: These proposals seek to change, implement, or remove escapement goals. There are three types of escapement goals contemplated in these proposals: sustainable escapement goal (SEG), biological escapement goal (BEG), and optimal escapement goal (OEG). The policy for the management of sustainable salmon fisheries (5 AAC 39.222) and the policy

for statewide salmon escapement goals (5 AAC 39.223) state that BEGs and SEGs, along with sustainable escapement thresholds (SETs), will be determined by the department.

In 5 AAC 39.223(b) the escapement goal policy states that the Board recognizes the department's responsibility to:

- (1) document existing salmon escapement goals for all salmon stocks that are currently managed for an escapement goal;
- (2) establish biological escapement goals for salmon stocks for which the department can reliably enumerate salmon escapement levels, as well as total annual returns;
- (3) establish sustainable escapement goals for salmon stocks for which the department can reliably estimate escapement levels when there is not sufficient information to enumerate total annual returns and the range of escapements that are used to develop a BEG;
- (4) establish sustained escapement thresholds as provided in 5 AAC 39.222 (Policy for the Management of Sustainable Salmon Fisheries);

The escapement goal policy and the sustainable salmon fisheries policy give the Board authority to establish OEGs. "Optimal escapement goal" is defined in the sustainable salmon fisheries policy as a specific management objective for salmon escapement that (a) considers biological and allocative factors and may differ from the SEG or BEG, (b) may be expressed as a range with the lower bound above the level of sustainable escapement threshold, (c) will be sustainable, and (d) will be adopted as a regulation by the board. 5 AAC 39.222(f)(25).

In 5 AAC 39.223(c) the escapement goal policy states that in recognition of its joint responsibilities, and in consultation with the department, the board will:

- (1) take regulatory actions as may be necessary to address allocation issues arising from implementation of a new or modified BEG, SEG, and SET;
- (2) during its regulatory process, review a BEG, SEG, or SET determined by the department and, with the assistance of the department, determine the appropriateness of establishing an optimal escapement goal (OEG); the board will provide an explanation of the reasons for establishing an OEG and provide, to the extent practicable, and with the assistance of the department, an estimate of expected differences in yield of any salmon stock, relative to maximum sustained yield, resulting from implementation of an OEG.

Law has regularly recommended that the Board act consistently with its policy regulations when it considers escapement goal proposals. If the Board chooses to specify a BEG or SEG in regulation, it should explain its reasoning for doing so. Also, while the Board and Department are not confined to using the types of escapement goals defined in the policies, it is best to use defined goals to avoid confusion unless the new goal and the reasons for using it are explained.

Proposal 97: This proposal would create annual sockeye limits for sport and personal use (dip net) fisheries in Kenai River and Kasilof River. 5 AAC 77.525(c) contains annual limits for all salmon taken in the Cook Inlet personal use fisheries and it is unclear from the proposal if the proponent wishes to change those limits. The proponent states that an “accurate daily count of the salmon must be accounted for.” ADF&G comments that a new reporting program of this magnitude would create a substantial budgetary impact to the department, thus creating such a program may conflict with the Board’s lack of administrative, budgeting, or fiscal powers. The Board has the authority to set annual harvest limits, but does not have the budgeting or administrative powers to direct ADF&G to adopt the contemplated reporting program.

Proposal 157: The Board may lack authority to restrict the number of groups to which a guide provides fishing guide services in a given day. The board may regulate guided fishing and the methods and means utilized by fishing guides and guided anglers while engaged in fishing. But regulating how many separate groups of guided anglers fish with a given guide in a defined period of time is likely outside the authority of the Board. The Board has authority to regulate guided sport fishing as needed for the conservation, development, and utilization of that and other fisheries, under AS 16.05.251(a)(12), but cannot limit access to an open fishery. Any such limitation on the number of groups that may contract with a guide in a given time period would have to be supported by evidence showing that a limit on the number of guided participants is reasonably necessary to address a particular problem.

Proposals 160: This proposal seeks to allow guides to operate vessels with more than five people aboard. The current fishing regulation 5 AAC 57.140(g) states that, during July, “a vessel used for guided sport fishing on the Kenai River downstream from an ADF&G regulatory marker located at the outlet of Skilak Lake may not carry more than five persons, including the sport fishing guide, clients, and other passengers.” Additionally, 11 AAC 20.862(a), a DNR regulation, prohibits the operation of “motor powered boat[s] on waters of the Kenai River Special Management Area with more than six persons on board, including the operator” unless issued a special use permit.

Proposals 164, 168, and 169: These proposals would prohibit motorized vessels on the Kenai River. Law has consistently advised that the Board has the authority to limit fishing methods and means, including regulations pertaining to the use of boats and motors while fishing. It has some authority to adopt regulations affecting boat and motor use that are necessary for fishery development or watershed or habitat improvement purposes; however, the Board should articulate how such restrictions are reasonably necessary to achieve one of these purposes. The Board has previously restricted outboard motors used in the Kenai River personal use dip net fishery to four-stroke and direct fuel injection two-stroke motors. See 5 AAC 77.540(c)(1)(C). The current 50 horsepower limit and other boating restrictions on the Kenai River are DNR regulations under 11 AAC 20.860 et seq., they are not regulations of the Board of Fisheries.

Proposal 176: This proposal would allow ADF&G to open the North Kalifornsky Beach area on or after July 8, irrespective of the weekly fishing periods listed in 5 AAC 21.320(a)(2). Currently, salmon may be taken in the set gillnet fishery in the Central District from 7:00 a.m. Monday until 7:00 p.m. Monday and 7:00 a.m. Thursday until 7:00 p.m. Thursday. Should the Board pass this proposal it should make clear that the contemplated area may be opened regardless of the weekly fishing periods listed in 5 AAC 21.320.