

MEMORANDUM

State of Alaska

Department of Law

TO: Art Nelson
Executive Director
Alaska Board of Fisheries

DATE: November 23, 2022

TEL. NO.: 907-269-5232

FROM: Aaron Peterson
Senior Assistant Attorney General

SUBJECT: Department of Law comments on proposals for the November 29 - December 3 Board of Fisheries meeting for Bristol Bay finfish.

The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at its November 29 - December 3 Board of Fisheries meeting for Bristol Bay finfish:

Proposal 17: This proposal seeks to regulate the guided sport fishery in a portion of the Naknek River drainage. Were the board inclined to adopt this proposal the Department of Law would need to review proposed regulatory language, and there may be aspects of this proposal that are beyond the board's authority, such as the proposal to include rental boat operators and "fishing clubs" within the definition of "commercial entity."

Proposal 21: This proposal seeks to prohibit harvest of rainbow trout by nonresident anglers in a certain portion of the Naknek River drainage. While the board is authorized to allocate between resident and nonresident sport fishing in favor of residents, that is usually done on a fishery-by-fishery basis with a record that explains the need for a resident preference. The board should articulate for the record a rationale justifying the prohibition of nonresident fishing, such as the possibility that the available harvestable surplus is not sufficient to meet expected resident demand.

Proposals 22 - 29: Many of the proposals, including these in particular, would have significant allocative impacts on the user groups. When allocating fishery resources among nonsubsistence uses, the board should reference the allocation criteria in AS 16.05.251(e) in accordance with 5 AAC 39.205 and 91-129-FB. The Alaska Supreme

Court has held that the allocation criteria apply to allocations among use categories (i.e., personal use, sport, guided sport, and commercial) as well as among subgroups of those categories (e.g., drift and setnet commercial fisheries). However, the Alaska Supreme Court has also held that the Board may not allocate “within” a particular fishery (same gear and same administrative area).

Some regulatory proposals will have significant allocative impacts even though allocation is not their intended purpose. When considering such proposals, the board should address the allocation criteria or explain why the criteria are not applicable. The Board may determine that a proposal does not have a significant allocative impact, even if the record contains comments to the contrary from the public or the Department, as long as the record reflects a reasonable basis for the board's determination. If there is doubt about whether a proposal has significant allocative impacts, Law recommends that the allocation criteria be reviewed on the record.

Where more than one proposal will have similar effects, Board members may incorporate by reference their discussion of the allocation criteria with regard to a prior proposal.

Proposal 27: This proposal seeks to reduce harvest of coho salmon by nonresident anglers in the Naknek River drainage. As with Proposal 21, if the board wishes to adopt this kind of proposal it should build a record that explains the need for a resident preference. The board should articulate for the record a rationale justifying the prohibition of nonresident fishing.

Proposal 31, 32, 61: These proposals would require reporting of king salmon harvested in sport and commercial fisheries. The board does have authority to require reporting, but, lacking any administrative, fiscal, or budgeting powers, it does not have authority to require the Department to expend funds on the administration of a reporting program.

Proposal 39: The Shore Fishery Leasing Program at the Department of Natural Resources issues leases for state-owned tidelands for set net fishing. Pursuant to 11 AAC 64.020, a set gillnetter must remove “any net or nets from the site or tract of the lessee if the lessee personally begins to commercially fish the lease site.” The Board of Fisheries may not regulate lease sites, but it may establish or modify the minimum distance between nets, including those operated by a lessee holding a valid shore fishery lease.

This proposal also seeks a regulation that would impose a fine upon commercial fishers “for complaining to the Troopers, if the Troopers determine the commercial fishers are just trying to gain advantage of other commercial fishers for competitive reasons.” While it is unclear precisely what this means, it is highly likely that the board of Fisheries lacks authority to implement such a regulation.

Proposal 56: This proposal would allow drift gillnet fishermen to deploy fishing gear during closed periods for “test set” purposes. This would make enforcement of fishing during closed periods very difficult to prove beyond a reasonable doubt. Confining the test set area to a defined area would lessen the problem, but it would still introduce another variable—whether the gear was deployed in the test set area—into closed period cases.