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To: John Wood, Chair
Alaska Board of Fisheries

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From: Reid Johnson, Research Section Lead
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Commercial Fisheries Entry Commission

Subject: CFEC Comments on
BOF Proposal 57

The Commercial Fisheries Entry Commission (CFEC, Commission) has reviewed Proposal 57 which seeks to modify herring seine specifications and operations, fishing season and periods, and the herring harvest strategy for the Kodiak Area in order to increase the overall monetary value of the commercial herring harvest. CFEC would like to address its concerns regarding the proposal's implications on permit usability, as well as its potential effects on the Limited Entry Act.

CFEC is aware of the changing herring markets both in Alaska and internationally. We are fully in support of any efforts that increase the economic viability of Alaskan fisheries. CFEC is currently in the process of undertaking an optimum numbers study regarding the Kodiak food and bait fishery after receiving a petition from the public.

Regulatory proposals before the Board of Fisheries (BOF, Board) that expand for an existing limited entry permit the gear types, the harvestable resources, or the harvesting area, must be addressed by CFEC to be effective. There is no guarantee that if the BOF passes Proposal 57, CFEC would change its regulations in kind. CFEC will view the passage of this proposal as a petition by the BOF to examine the issue and propose regulatory change, which would of course be open to and necessarily influenced by public comment. CFEC makes every effort to be both holistic and exhaustive in its examination of the issues.

Essential to this discussion is the difference between the types of herring permits in Kodiak. Commercial fishing permits are defined by a fishery resource code, a gear code, and an area code. An S03T permit, for example, designates a permit that can harvest salmon as a fishery resource (S), with drift gillnet gear (03), in the Bristol Bay area (T). From both a regulatory and a practical perspective, CFEC views herring roe, and herring used for food or bait, as distinct fisheries resources, each with their own resource code. Herring being harvested for food or bait is indicated by an H fishery resource code, while herring harvested for sac roe is indicated by a G fishery resource code.

CFEC does not wish to discourage the BOF from discussion on this issue or give the impression that we are either for or against Proposal 57. Markets for herring products have changed drastically, and this issue should be discussed in detail. CFEC is currently examining herring fisheries across Alaska, and herring markets both locally and abroad.

Proposal Overview

Proposal 57 encompasses several requests to the Board that would restructure the current herring sac roe fishery into a general “herring” fishery. This proposal makes no modifications to the current fishery for the food and bait permit holders, for which four trawl permits and five seine permits currently exist.

In addition to renaming the current sac roe fishery into a general herring fishery, Proposal 57 asks that the fishing season be changed from April 1 - June 30, to April 1 - December 31. In addition, this new general herring fishing season would be split into “A” season stretching from April 1 – May 15, and “B” season stretching from October 1 – Dec. 31.

The B season for the new general herring fishery would occur at the same time as the current food and bait herring fishery and would likely have fish marketed in the same manner as the harvest being sold for food or bait as Proposal 57 states.

The proposal highlights a market shift from the predominant reliance on “roe herring” to a broader vision which appreciates the increasing value of herring as food and bait. Proposal 57 states that:

[a]s the sac roe market continues to decline and the need to diversify and bring new value to the herring fishery, management must be modified to allow harvest to take place when the herring are past their spawning phase, and into the high fat stage of life.

Currently, the guideline harvest level (GHL) for the food and bait fishery is 10 percent of the GHL for the sac roe fishery as set by 5 AAC 27.535(b). This proposal seeks to add a B season to the sac roe fishery, which would have a GHL set at 1,000 tons, unless the Alaska Department of Fish and Game (ADFG) assesses the total GHL for the sac roe fishery to be less than 2,500 tons. If the GHL is less than 2,500 tons, then the GHL will be split equally between the “A” and “B” season. The proposal also contains language that indicates that unharvested GHL from the A season will rollover to the B season, unless the department determines that there is not a large enough biomass to support an exploitation rate of at least 10 percent.

Finally, the proposal seeks to change gear specifications for the herring fisheries in the Kodiak Area. Although gear types are to some extent the purview of CFEC in that permit cards define the type of gear that can be used, gear specifications are the sole responsibility of the BOF. This memorandum will not discuss matters outside of CFEC’s authority as defined in AS 16.43.100.

The Commission’s Concerns

The Commission is concerned that restructuring the current sac roe fishery into a general herring fishery will have a detrimental impact upon the economic return for food and bait fishery permit holders. Furthermore, it may impact the conservation of the herring resource and impede CFEC’s ability to conduct optimum numbers studies. The Commission believes that a portion of what Proposal 57 requests of the BOF are actions within the authority of the Commission under the Limited Entry Act.

I. Authorities

Under AS 16.05.251 the Board has a very broad scope of authority, while the Commission’s authority is very narrow. The Commission’s narrowly defined role is to act as a “regulatory and quasi-judicial agency” for the purposes of administering the Limited Entry Act. AS 16.43.020. The stated purpose of the Limited Entry Act is:

to promote the conservation and the sustained yield management of Alaska’s fishery resource and the economic health and stability of commercial fishing in

Alaska by regulating and controlling entry into the commercial fisheries in the public interest and without unjust discrimination.¹

In *Commercial Fisheries Entry Comm'n v. Apokedak* the Alaska Supreme Court determined three primary purposes of the Limited Entry Act:

1. Enhancing the economic benefit to fishermen since too many involved in the industry prevented those relying on fishing for a livelihood from securing adequate remuneration;
2. conserving the fishery; and
3. avoiding unjust discrimination in the allocation of a limited number of entry permits.

The Commission administers the Limited Entry Act generally through the regulation of fishing permits and the limitation of fisheries. Thus, while the Commission has authority over the regulation of commercial fishing permits – including the limiting of fisheries, the Board has authority over commercial fishing in general.

II. Implications due to Overlap of Fisheries

It appears that the purpose of Proposal 57 is to turn the preexisting sac roe fishery into a general herring fishery, with the intent of allowing sac roe permit holders to participate in both the sac roe, and food and bait limited fisheries, without having to obtain a food and bait permit from the CFEC.

It is paramount to understand that even though food/bait and sac roe fisheries may target the same species (in this case, herring), their operational timings, gear specifications, and market objectives can be distinctly different. The sac roe herring fishery and the food/bait herring fishery, despite sharing a species target, and both being limited, are separate fisheries.

The Commission only issues permits that allow entry into one fishery at a time. A permit for one type of fishery only authorizes the permit holder to fish in that specified fishery. Renaming or adjusting the parameters of fisheries that share a targeted species does not change the nature of a preexisting permit issued by the Commission. A person with a sac roe herring permit will continue to have a permit that only authorizes them to fish for sac roe herring. If that person fishes for food/bait herring, they will be outside the bounds of their permit according to current CFEC regulations.

III. Conservation Concerns

CFEC is not the authority on either conservation concerns or the management of fisheries resources. It is our understanding that the current food and bait fishery which takes place under the H1DK, H7BK, H7CK and H7DK permits takes place in the form of a voluntary cooperative in which vessel participation is limited. Furthermore, it is our understanding that GHL has not historically been large enough to support more than one or two permits worth of harvest effort in any given year.

The GHL being discussed in this proposal, while larger than the historical food and bait GHL, appears to be far short of the GHL needed to support the number of potential participants in this fishery. There are nine total food and bait permits that could potentially participate in the Kodiak food and bait fishery. In the B season fishery put forth in this proposal a total of 136 permits could participate. As of 2023, there are 60 active G01K permits, 74 active G34K permits, and two active G31K permits.

As always, CFEC defers to questions of resource management and harvest effort to the expertise of the Alaska Department of Fish and Game management biologists.

IV. Interference in Administration of the Limited Entry Act.

It must be noted the proposal to allow sac roe permit holders to participate in both the sac roe and food and bait herring fisheries would most likely violate the Limited Entry Act.

As established in a previous section, the Board has a broad power over commercial fishing, while the Commission's scope is narrowed to permit regulation and limited entry. The Board has the power to change fishing seasons, set gear types, redefine the boundaries of a preexisting fishery, and more under AS 16.05.251. Proposal 57 asks to rename the sac roe fishery, and to change when the sac roe fishing season occurs; both requests are within the power of the Board.

However, Proposal 57 additionally asks the Board to allow the harvest of the food and bait herring resource to sac roe permit holders, which is within the narrow scope of the Commission's authority. The ability to limit participation in fisheries, and to determine what resources a commercial fishing permit allows a permit holder to harvest, are powers reserved for the Commission. Therefore, if a permit holder wishes to change the boundaries of their limited entry permit or would like to change the participation levels of limited fisheries, they would petition the Commission to do so.

In limiting a non-distressed fishery and determining the maximum number of permits issued for a limited fishery, the Commission must balance the Limited Entry Act's legislative purposes of allowing fishermen to receive adequate earnings, while also conserving fishery resources. *Pasternak v. State, Commercial Fisheries Entry Com'n*, 166 P.3d 904 (Alaska 2007); *Simpson v. State, Commercial Fisheries Entry Com'n*, 101 P.3d 605 (Alaska 2004). While one purpose of the Limited Entry Act is to avoid unjust discrimination in the allocation of limited entry permits, the standard of "unjust discrimination" applies to fishermen who are historically reliant on the fishery in question, and thus have the most to lose by exclusion from it. *Rutter v. State*, 668 P.2d 1343 (Alaska 1983).

AS 16.43.260 defines how applications for a limited entry permit shall be considered and is specific regarding whom and under what conditions an initial issuance of a limited entry permit shall occur. This statute, in short, states that the Commission needs to consider an individual's historic participation in the harvest of a specific fishery resource when considering an application for a limited entry permit. Allowing individuals with potentially no historic participation in the harvest of the food and bait herring resource could possibly be in violation of this statute.

V. Implications due to an Increase in Marketable Products

Proposal 57 effectively increases the amount of food and bait herring brought to market in the Kodiak area. The proposal sets the GHL at either 1,000 tons, or if the GHL is under 2,500 tons, then the GHL is split evenly among use for food and bait and use for sac roe. This harvest of food and bait herring is in addition to the harvest from the existing food and bait fishery.

This proposal does not ask for access to the food and bait herring resource because sac roe permit holders are historically reliant or have the most to lose by exclusion from the fishery, but because sac roe permit holders would like to substitute their lost sac roe earnings with earnings from the food and bait resource. An increase in food and bait herring into the market will likely cause a resulting drop in price and may ultimately harm existing food and bait permit holders. The permit holders who are historically reliant on the food and bait herring fishery, and thus have the most to lose in this instance, are food and bait permit holders.

It is not for CFEC to provide guidance in any way regarding the GHL or the setting of the GHL, but we are obligated to point out that an increase in the number of participants into a limited fishery has the potential to negatively impact existing limited entry permit holders.

VI. Optimum Numbers Studies

Opening the food and bait fishery to sac roe permit holders has a high likelihood of interfering with the Commission's ability to conduct an optimum numbers study on the food and bait fishery. The Commission is required by the Limited Entry Act to set the maximum number of permits for a fishery no lower than the number of units of gear fished in a fishery during any year out of a four-year period. *Doubleday v. State, Commercial Fisheries Entry Com'n*, 238 P.3d 100 (Alaska 2010). *Simpson v. State, Commercial Fisheries Entry Com'n*, 101 P.3d 605 (Alaska, 2004).

Similar to the concerns the Alaska Supreme Court raised in *Grunert*, opening the food and bait fishery resource to sac roe permit holders will “destroy[] any relation between the number of permits issued per fishery and the ultimate number of participating vessels and units of gear.” *State of Alaska, Alaska Bd. of Fisheries v. Grunert*, 139 P.3d 1226 (Alaska 2006).

Action Needed by CFEC

If the Board passes Proposal 57 with the end goal of allowing sac roe harvesters to fish in the fall for food and bait, CFEC would be obligated to:

1. Undertake a regulatory review examining the economic effect of allowing additional permits to enter the food and bait fishery. This review would involve gathering public input, as well as thoroughly examining both fisheries. We cannot predict the outcome of this public regulatory process.
2. CFEC is currently conducting an optimum number study for the Kodiak food and bait herring fishery; this optimum numbers study will expand in scope if Proposal 57 passes. The regulatory review would likely result in the expansion of the current optimum numbers study so that it considers the potential for 136 additional entrants into the food and bait market. CFEC would have to determine if this change results in a significantly different earning potential for the affected permit types, and if so, how much. If permit earning potential is affected, CFEC would have to determine the appropriate number of permits for the food and bait fishery given the change in economics. This would be very difficult, as CFEC would be examining two distinct permit types that overlap in some ways but are separate in others.

Conclusion

We do not wish to dissuade the BOF from thoroughly discussing this proposal or sway the Board in their decision one way or the other. The market troubles facing all participants in the herring fisheries may require more focused discussions outside of the regulatory process to determine a path forward. CFEC is currently conducting a detailed examination of herring markets both in Kodiak, and across Alaska.

The Commission acknowledges the importance of evolving with market demands and diversifying fishery products. However, it is crucial to approach such evolutions with clarity, particularly concerning permit usability. We hope that this document is informative, and useful in your deliberations.

Should there be any questions or need for further clarification, the CFEC remains at your disposal for assistance. Please feel free to contact us at your convenience: reid.johnson@alaska.gov, (907) 717-6512.