

MEMORANDUM

State of Alaska

Department of Law

TO: Art Nelson
Executive Director
Alaska Board of Fisheries

DATE: January 4, 2024

TEL. NO.: 907-269-5232

FROM: Aaron Peterson
Senior Assistant Attorney General

SUBJECT: Department of Law comments on proposals for the January 9 – 12, 2024 Board of Fisheries meeting.

The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at its January 9 – 12, 2024 Board of Fisheries meeting for Kodiak Finfish:

Subsistence: For proposals affecting subsistence fisheries the Board should consider whether adoption of the proposed regulation is needed to provide a reasonable opportunity for subsistence uses of the amount of fish reasonably necessary for those uses. “Reasonable opportunity” means an “opportunity as determined by the appropriate board, that allows a subsistence user to participate in a subsistence hunt or fishery that provides a normally diligent participant with a reasonable expectation of success of taking of fish or game.” The Board can base its determination of whether the regulations provide a reasonable opportunity for subsistence uses on amounts of a fish stock that have been established as reasonably necessary for subsistence uses, information pertaining to subsistence harvest data, bag limits, seasons, access, gear necessary to achieve the harvest, and other factors.

Unless it has done so previously, the Board, when considering a proposal that would affect subsistence, should: (1) determine whether the fish stock is in a nonsubsistence area; (2) determine whether the fish stock or portion of the fish stock is customarily and traditionally taken or used for subsistence; (3) determine whether a portion of the fish stock may be harvested consistent with sustained yield; (4) determine the amount reasonably necessary for subsistence uses; (5) adopt regulations to provide a reasonable opportunity for subsistence uses; and (6) if the harvestable amount is not sufficient to allow for subsistence uses and other consumptive uses, adopt regulations to

reduce or eliminate other uses in order to provide a preference and reasonable opportunity for subsistence uses.

If the harvestable amount is insufficient to allow subsistence uses and other consumptive uses, the Board must adopt regulations to reduce or eliminate other uses in order to provide a reasonable opportunity for subsistence uses. If the harvestable portion of the fish stock is not sufficient to provide a reasonable opportunity for all subsistence uses, the Board must eliminate nonsubsistence consumptive uses and distinguish among the subsistence users based on the Tier II criteria. AS 16.05.258(b)(4)(B)(i), (iii). However, the Board may not consider the criteria in clause (ii), proximity of domicile to the fish stock, because it was ruled unconstitutional in *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995) (“The Tier II proximity of the domicile factor violates sections 3, 15, and 17 of article VIII of the Alaska Constitution, because it bars Alaska residents from participating in certain subsistence activities based on where they live.”)

Allocation: 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 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 allocation 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.

Policy for the management of sustainable salmon fisheries: The Board has adopted a “Policy for the management of sustainable salmon fisheries” at 5 AAC 39.222. Board members should review the policy thoroughly and ensure that the standards

outlined in the policy have been considered on the record in any proposal dealing with salmon management. For purposes of the sustainable salmon fisheries policy, the Board has defined sustained yield as: “an average annual yield that results from a level of salmon escapement that can be maintained on a continuing basis; a wide range of average annual yield levels is sustainable; a wide range of annual escapement levels can produce sustained yields.” 5 AAC 39.222(f).

Proposal 51: This proposal seeks to restrict would-be anglers aboard commercial transport vessels from engaging in sport or subsistence fisheries while the vessel is transporting nature viewers or hunters. The board may regulate sport fishing and subsistence fishing and the methods and means utilized by anglers while engaged in fishing. But regulating how anglers arrive at the destination to fish is peripheral. 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.

Proposal 65: This proposal would prohibit the use of aircraft to spot salmon for commercial harvest in the Kodiak Management Area. The Board has prohibited the aerial spotting of salmon in Bristol Bay. The Alaska Supreme Court affirmed the Board’s authority adopt such a prohibition, stating that “the regulation was a permissible limitation on the means and methods which any person may use to take salmon.” *Alaska Fish Spotters Ass'n v. State, Dep't of Fish & Game*, 838 P.2d 798, 802 (Alaska 1992). The Court also expressly held that the regulation did not violate the Constitution's common use clause, uniform application clause, or equal protection clause. *Id.* at 803-4.