

MEMORANDUM

State of Alaska

Department of Law

TO: Art Nelson
Executive Director
Alaska Board of Fisheries

DATE: November 22, 2023

TEL. NO.: 907-269-5232

FROM: Aaron Peterson
Senior Assistant Attorney General

SUBJECT: Department of Law comments on proposals for the November 28 – December 1, 2023 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 November 28 – December 1, 2023 Board of Fisheries meeting for Lower Cook Inlet 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 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 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 29: This proposal seeks to “prohibit use of helicopters to transport anglers to select Cook Inlet waters.” 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. The board should be clear that any regulation is of an activity in aid of sport fishing. The board has broad authority to regulate various aspects of sport fishing and guided sport fishing as needed for the conservation, development, and utilization of fisheries but does not have authority to regulate the transportation of persons without a fishing nexus.

Proposal 35: This proposal would purportedly create a “wild fish priority” in Kachemak Bay. Sustained yield of wild fish stocks already holds the highest priority in Alaska fisheries management. *See e.g.* AK Const. Art. 8, § 4 (“Fish... shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.”); AS 16.05.730(a) (“Fish stocks in the state *shall* be managed consistent with sustained yield of wild fish stocks and *may* be managed consistent with sustained yield of enhanced fish stocks.” (emphasis added))

Proposal 43: This proposal would amend the Basic Management Plan to reduce hatchery production of pink salmon in Cook Inlet to 25% of the year 2000 production level, apparently without defining “production level.” As proposed, this is likely beyond the Board's authority, which is limited by AS 16.05.251(f) and AS 16.10.400 - 16.10.440.

Generally, the Department has primary authority over hatchery permitting and associated issues relating to salmon production and cost recovery. See AS 16.10.400 - 16.10.430. Further, the legislature has specified that “[e]xcept as expressly provided in AS 16.40.120(e) [authorizing board regulations for the conservation, maintenance and management of species for which an acquisition permit is needed] and AS 16.40.130 [authorizing regulations for the importation of aquatic plants or shellfish for stock], the Board of Fisheries may not adopt regulations or take action regarding the issuance, denial, or conditioning of a permit under AS 16.40.100 or AS 16.40.120, the construction or operation of a farm or hatchery required to have a permit under AS 16.40.100, or a harvest with a permit issued under AS 16.40.120.” AS 16.05.251(f). Law has consistently

advised that the Board is not authorized to take action that effectively revokes or prevents the issuance of a permit. See 1991 Inf. Op. Att’y Gen. (Nov. 6; 661-98-0127). However, the legislature has specified in AS 16.10.440(b) that the Board may, after the commissioner issues a permit for a hatchery, “amend by regulation ... 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 does have authority to prohibit and regulate the capture, possession, transport or release of native or exotic fish or their eggs, AS 16.05.251(9), and to amend by regulation the terms of hatchery permits relating to the source and number of salmon eggs, harvest by hatchery operators, and locations for harvest, AS 16.10.440(b), which may indirectly affect hatchery production.