

MEMORANDUM

State of Alaska

Department of Law

TO: Art Nelson
Executive Director
Alaska Board of Fisheries

DATE: February 14, 2024

FROM: Aaron Peterson
Sr. Assistant Attorney General

SUBJECT: Department of Law
comments on proposals
for the February 23 -
March 5, 2024 Board of
Fisheries meeting for
Upper Cook Inlet finfish

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The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at its February 23 - March 7, 2024 meeting for Upper Cook Inlet finfish:

Proposals 75 - 85, 95, 97, 99, 102, 109, 111 - 114, 118, 119: 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 81 seeks to open a set gillnet fishery when late-run king salmon 75 cm mid-eye to tail fork or longer are projected to meet the SEG of 13,500 fish. 5 AAC 21.359 contains an OEG of 15,000-30,000 king salmon of that length. 5 AAC 21.359 currently requires closure of the set gillnet fishery in the Upper Subdistrict of the Central District when the lower bound of the OEG is unmet. The proposal does not seek to amend or repeal the OEG yet it requests that the Board open commercial fishing opportunity when the lower bound of the SEG (13,500) is met without regard for the lower bound of the OEG. An SEG is "the primary management objective for the

escapement, unless an optimal escapement or inriver run goal has been adopted by the Board.” Because the Board has adopted an OEG here, it is the primary management objective for the stock. 5 AAC 39.222(36). To the extent the Board wants to allow for harvest opportunity before the lower bound of an OEG is met, it should explain its departure from the regulations on the record and apply the sustainable salmon fisheries and escapement goal policies accordingly.

Proposals 85, 148, 151, 152, 198, 199, 238: These proposals would limit or prohibit motorized vessels in various River under certain conditions. 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 88, 89: These proposals appear to prohibit nonresidents from participating in the guided vessel sport fishery for salmon species other than king salmon when the lower bound of the OEG is not met. The Board has authority to regulate resident and nonresident sport fisherman as needed for the conservation, development, and utilization of fishery resource under AS 16.05.251(14). The regulation referenced in the proposal with differential rockfish bag limits is one such example of that authority. For only Proposal 88, it is unclear based on the proposed regulatory language and purpose statement if the proposer seeks to prohibit charter vessel operators and crew members from retaining salmon while fishing with a client. To the extent the Board seeks to regulate guides potential harvest while guiding, the Board should clarify if the guide’s residence determines their harvest opportunity and the conservation, utilization, or development reason for this limitation on the guided sport fishery. AS 16.05.251(12).

Proposal 182: The Board has authority to regulate resident and nonresident sport fisherman as needed for the conservation, development, and utilization of fishery resource under AS 16.05.251(14). In times of scarcity, the Board can limit nonresidents participation in fisheries. See *Shepherd v. State, Dep’t of Fish & Game*, 897 P.2d 33, 40–41 (Alaska 1995). The Board should explain its conservation, development, or utilization basis for adopting this regulation on the record.

Proposal 233: This proposal would create a new undefined process for “approving” sport fish derbies prior to permitting from the Department of Commerce, Community, and Economic Development. Under AS 05.15.100 the DCCED, not the Board or the Department of Fish and Game, issues fishing derbies permits. If the harvestable portion of a particular stock or population is not sufficient to provide for all consumptive uses, then the board must adopt regulations in accordance with AS 16.05.258.