

MEMORANDUM

State of Alaska Department of Law

TO: Kristy Tibbles
Executive Director
Alaska Board of Game

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SUBJECT: March 2016 Statewide
Board of Game meeting

GENERAL COMMENTS

In general, ethics disclosures: Before staff reports begin on any new agenda item, or, if preferred, at the very beginning of the meeting, Ethics Act disclosures and determinations must be made under AS 39.52.

In general, record-making: It is very important that Board members carefully explain and clearly summarize on the record the reasons for their actions and the grounds upon which the actions are based. The Alaska Supreme Court has stressed the importance of a clear record to facilitate the courts in determining that the Board's actions are within its authority and are reasonable. A clear record also assists the public in understanding the Board's rationale. If Board members summarize the reasons for their actions before they vote, it will help establish the necessary record.

In considering each proposal, and the specific requirements that apply in some cases, such as with the subsistence law, it is important that the Board thoroughly discuss and summarize on the record the basis and reasons for its actions. Consistency with past approaches is another important point for discussion. If a particular action does not appear to be consistent, Board members should discuss their reasons for a different approach.

The Alaska Administrative Procedure Act requires that State agencies, including the Board of Game, "[w]hen considering the factual, substantive, and other relevant matter, ... pay special attention to the cost to private persons of the proposed regulatory action." AS 44.62.210(a). This requirement to pay special attention to costs means, at a minimum, that the Board should address any information presented about costs, or explicitly state that no such information was presented, during deliberation of any proposal likely to be adopted. In our view, this requirement does not go so far as to mandate that the Board conduct an independent investigation of potential costs, nor does

it require that cost factor into the Board's decision more than, for example, conservation concerns might. However, it does require the Board to address and "pay special attention to" costs relevant to each regulation adopted.

In general, written findings: If any issue is already in court, or is controversial enough that you believe it might result in litigation, or if it is complex enough that findings may be useful to the public, the Department, or the Board in the future, it is important that the Board draft and adopt written findings explaining its decisions. From time to time, the Department of Law will recommend that written findings be adopted, in order to better defend the Board's action. Such recommendations should be carefully considered, as a refusal to adopt findings, in these circumstances, could mean that the Board gets subjected to judicial oversight and second-guessing which might have been avoided. The Alaska Supreme Court has stressed the importance of an adequate decisional document, or written finding, to a determination that the Board has acted within its authority and rationally in adopting regulations, and has deferred to such findings in the past.

In general, subsistence: For each proposal the Board should consider whether it involves or affects identified subsistence uses of the game population or sub-population in question. If action on a proposal would affect a subsistence use, the Board must be sure that the regulations provide a reasonable opportunity for the subsistence uses, unless sustained yield would be jeopardized. If the Board has not previously done so, it should first determine whether the game population is subject to customary and traditional uses for subsistence and what amount of the harvestable portion, if any, is reasonably necessary for those uses. *See* 5 AAC 99.025 for current findings on customary and traditional uses and amounts reasonably necessary for subsistence uses. The current law requires that the Board have considered at least four issues in implementing the preference:

- (1) Identify game populations or portions of populations customarily and traditionally taken or used for subsistence; *see* 8 criteria at 5 AAC 99.010(b);
- (2) determine whether a portion of the game population may be harvested consistent with sustained yield;
- (3) determine the amount of the harvestable portion reasonably necessary for subsistence uses; and
- (4) adopt regulations to provide a reasonable opportunity for subsistence uses.

Reasonable opportunity is defined to mean "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.” AS 16.05.258(f). It is not to be construed as a guarantee of success.

The amount of the harvestable portion of the game population that is reasonably necessary for subsistence uses will depend largely on the amount of the game population used for subsistence historically and the number of subsistence users expected to participate. This may require the Board to determine which users have been taking game for subsistence purposes, and which ones have not. Once the Board has determined the amount reasonably necessary for subsistence uses, the Board should by regulation provide an opportunity that allows the predicted number of normally diligent participants a reasonable expectation of success in taking the subject game. The Board may base its determination of reasonable opportunity on all relevant information including past subsistence harvest levels of the game population in the specific area and the bag limits, seasons, access provisions, and means and methods necessary to achieve those harvests, or on comparable information from similar areas.

If the harvestable portion of the game population is not sufficient to provide for subsistence uses and any other consumptive uses, the Board is required to eliminate non-subsistence uses in order to provide a reasonable opportunity for subsistence uses. If the harvestable portion of the game population is still not sufficient to provide a reasonable opportunity for all subsistence uses, the Board is required to eliminate non-subsistence consumptive uses and distinguish among the subsistence users based on the following Tier II criteria:

- (1) The customary and direct dependence on the game population by the subsistence user for human consumption as a mainstay of livelihood; and
- (2) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated. AS 16.05.258.

In general, intensive management: Under AS 16.05.255 (e), (f) and (g), the Board should assure itself that the steps outlined below have been followed when acting on proposals dealing with ungulate populations.

First - Determine whether the **ungulate** population is **important for high levels of human consumptive use**. The Board has already made many of these determinations. *See* 5 AAC 92.108. However, these past findings do not preclude new findings, especially if based on new information.

- If so, then subsequent intensive management analysis may be required.
- If not, then no further intensive management analysis is required.

Second - Is the ungulate population **depleted** or will the Board be **significantly reducing the taking** of the population? See 5AAC 92.106(5) for the Board's current definition of "significant" as it relates to intensive management.

The Board must determine whether depletion or reduction of productivity, or Board action, is likely to cause a significant reduction in harvest.

- If either is true, then subsequent intensive management analysis is required.
- If not, then further intensive management analysis is not required.

Third - Is intensive management appropriate?

(a) If the population is depleted, has the Board found that consumptive use of the population is a preferred use? Note that the Legislature has already found that "providing for high levels of harvest for human consumption in accordance with the sustained yield principle is the highest and best use of identified big game prey populations in most areas of the State ..." In the rare cases where consumptive use is not a preferred use, then the Board need not adopt intensive management regulations.

(b) If consumptive uses are preferred, and the population is depleted or reduced in productivity so that the result may be a significant reduction in harvest, the Board must consider whether enhancement of abundance or productivity is feasibly achievable using recognized and prudent active management techniques. At this point, the Board will need information from the Department about available recognized management techniques, including feasibility. If enhancement is feasibly achievable, then the Board must adopt intensive management regulations.

(c) If the Board will be significantly reducing the taking of the population, then it must adopt, or schedule for adoption at its next meeting, regulations that provide for intensive management *unless*:

1. Intensive management would be:
 - A. Ineffective based on scientific information;
 - B. Inappropriate due to land ownership patterns; or
 - C. Against the best interests of subsistence users;

Or

2. The Board declares that a biological emergency exists and takes immediate action to protect and maintain the population and also schedules for adoption those regulations necessary to restore the population.

Comments on Individual Proposals

Proposal 1: Some regulations currently allow motorized land vehicles for stated purposes, and this change could limit access in those situations. Other regulations restrict access in certain areas by means of motorized land vehicles, so the effect could be to allow these efficient modes of travel within those controlled use areas where hovercraft and airboats are currently prohibited. The board's intent should be explained on the record.

The following regulations may be impacted:

5 AAC 92.080(4)
5 AAC 92.080(5)
5 AAC 92.080(10)
5 AAC 92.100(2)
5 AAC 92.100(3)
5 AAC 92.111(b)(5)(A)
5 AAC 92.111(c)(5)(A)
5 AAC 92.112(b)(5)(A)
5 AAC 92.112(c)(5)(A)
5 AAC 92.113(b)(4)(A)
5 AAC 92.118(b)(5)
5 AAC 92.118(c)(4)
5 AAC 92.121(b)(4)(A)
5 AAC 92.122(b)(4)
5 AAC 92.123(b)(5)(A)
5 AAC 92.123(c)(5)(A)
5 AAC 92.124(b)(4)(A)
5 AAC 92.124(c)(5)(A)
5 AAC 92.126(b)(4)(A)
5 AAC 92.127(b)(5)(A)
5 AAC 92.127(b)(5)(B)
5 AAC 92.127(c)(5)(A)
5 AAC 92.127(c)(5)(B)
5 AAC 92.520(a)
5 AAC 92.520(b)(1)(B)
5 AAC 92.530(7)(C)
5 AAC 92.540(1)(A)(ii)
5 AAC 92.540(2)(A)(ii)
5 AAC 92.540(3)(A)(ii)
5 AAC 92.540(3)(B)(ii)
5 AAC 92.540(3)(C)(ii)
5 AAC 92.540(3)(D)(ii)

5 AAC 92.540(3)(E)(ii)
5 AAC 92.540(3)(F)(ii)
5 AAC 92.540(3)(G)(ii)
5 AAC 92.540(3)(H)(ii)
5 AAC 92.540(3)(I)(ii)
5 AAC 92.540(3)(K)
5 AAC 92.540(4)(B)(ii)
5 AAC 92.540(5)(A)(ii)
5 AAC 92.540(7)(B)(ii)
5 AAC 92.540(11)(B)

Proposal 19: Currently, all board-generated proposals are part of the public rule-making process, which must be in accordance with the Administrative Procedure Act.¹ Except in an emergency, the APA requires 30 days’ notice to the public for proposed regulatory action, and an opportunity for the public to submit written comments. In practice, for most proposals the board provides notice of regulatory action for much longer than the required 30 days, and also invites oral comments at its public meetings.

The proposed mandate to “meet all the elements as outlined in this chapter” needs clarification and explanation because this chapter, 5 AAC 92, contains statewide regulations governing hunting and trapping. In general, regulations pertaining to adoption of fish and game regulations are found in a different chapter, 5 AAC 96.600 through 96.660, and are adopted by the Joint Boards of Fisheries and Game.

Joint Board Policy 2013-34-JB states that the board will consider the following criteria when deliberating the proposed development and scheduling of a board-generated proposal:

1. Is it in the public’s best interest (e.g., access to resource, consistent intent, public process)?
2. Is there urgency in considering the issue (e.g., potential for fish and wildlife objectives not being met or sustainability in question)?
3. Are current processes insufficient to bring the subject to the board’s attention (e.g. reconsideration policy, normal cycle proposal submittal, ACRs, petitions)?
4. Will there be reasonable and adequate opportunity for public comment (e.g., how far do affected users have to travel to participate, amount of time for affected users to respond)?

¹ AS 16.05.255(a) provides “[t]he Board of Game may adopt regulations it considers advisable in accordance with AS 44.62 (Administrative Procedure Act)”

Proposal 40: The second suggestion included in the proposal, to allow only Alaska residents to be sheep hunting guides, would violate the Privileges and Immunities Clause of the U.S. Constitution. In addition, guides are subject to regulation by the Big Game Commercial Services Board under AS 08.54, rather than by the Board of Game.

Proposal 43: One of the suggestions in this proposal would require hunting guides and assistant guides to be full time Alaska residents, which would violate the Privileges and Immunities Clause of the U.S. Constitution. In addition, guides are subject to regulation by the Big Game Commercial Services Board under AS 08.54, rather than by the Board of Game.

Proposal 67: The following additional information may be helpful:

In its annual publication of hunting regulations, the Department encourages hunters to obtain permission from private landowners and identifies the GMUs where each regional corporation owns land. A phone number contact for each regional corporation is included so hunters can obtain information on land status maps.

According to the Alaska Department of Transportation and Public Facilities, certain highway rights-of-way, or easements, cross private property and other highway rights-of-way are owned in fee by the state that do not overlay private land. There is no consolidated list, and it is not a simple task for a hunter to find out which is which, or who owns the fee title. Each roadway or portion of a roadway would need to be researched.

The scope of use of private land within a highway right-of-way is currently being litigated. *Ahtna, Inc. v. State*, Case No. 3AN-08-6337 CI. The State's position is that a variety of primarily travel-related uses are allowed in rights-of-way, including for day use, picnicking, rest stops, picture taking, accessing navigable waterways for fishing, boat launching, short term personal (non-commercial) camping and equipment storage, overnight parking, and other travel-related uses.

Under Alaska law, entering or remaining unlawfully on private land is criminal trespass.² A criminal trespass is a class A misdemeanor (first degree criminal trespass) if done with intent to commit a crime or in a dwelling such as a cabin,³ and a class B misdemeanor otherwise (second degree criminal trespass).⁴ For example, a person who trespassed on private land with the intent to commit a criminal hunting violation could be charged with first degree criminal trespass in addition to the hunting violation.

² AS 11.46.320; AS 11.46. 330.

³ AS 11.46.320.

⁴ AS 11.46.330.

To “enter or remain unlawfully” means to enter an area that is not open to the public when the defendant is not otherwise privileged to do so.⁵ A person is privileged to enter unimproved private land if she does so without intent to commit a crime and the land is “neither fenced nor otherwise enclosed,” unless notice against trespass is “personally communicated to that person by the owner of the land or some other authorized person” or notice is given “by posting in a reasonably conspicuous manner under the circumstances.”⁶ Another defense is that the entry or use of the land was for an emergency.⁷

Proposal 84: The current language and authority of enforcement officers does not violate constitutional rights under either the Fourth Amendment of the United States Constitution or Art I, § 14 of the Alaska Constitution. Hunting and trapping are highly regulated activities and all states recognize the authority of law enforcement officers to ensure compliance with fish and game laws and regulations by the use of warrantless searches.⁸

The proposers compare hunting and trapping to operating a motor vehicle as both are regulated activities, but the U.S. Supreme Court and state courts throughout the country distinguish motor vehicle stops from investigations into hunting, fishing, and trapping compliance. Motor vehicle stops, other than checkpoint stops, require a warrant or reasonable suspicion. Hunting, fishing and trapping investigations – as highly regulated activities - do not.⁹

⁵ AS 11.46.350(a)(1).

⁶ AS 11.46.350(b)(1)-(2).

⁷ AS 11.46.340.

⁸ See, e.g., *State v. Beauchemin*, 161 N.H. 654, (New Hampshire, 2011); *People v. Maikhio*, 51 Cal.4th 1074 (Cal. 2011), cert. denied 132 S. Ct 1712 (2012); *State v. McKeen*, 977 A.2d 382 (Maine 2009). In one recent case in Arkansas, *Pickle v. State*, 2015 Ark. 286 (Ark. 2015), rehearing denied, game wardens investigated a group of hunters for compliance with hunting laws. One hunter did not have his hunting license with him. The game warden conducted a background check where it was discovered that the hunter was a convicted felon. The hunter was arrested for being a convicted felon in possession of a firearm. The Arkansas Supreme Court held that the subsequent background check must be suppressed because there was neither a warrant nor a reasonable suspicion of a violation. However, the court assumed the game wardens had the authority to conduct a search to investigate compliance with hunting laws, without a warrant and without reasonable suspicion that any violation had occurred.⁸ It is not clear whether the Alaska Supreme would agree to suppress the subsequent background search, and this Arkansas case may be an anomaly in that respect.

⁹ *Delaware v. Prouse*, 440 U.S. 648 (1979), finding that discretionary random highway vehicle stops other than checkpoints are unreasonable under the Fourth Amendment. Justice Blackburn, concurring, noted that this case does not serve “as a precedent that throws any constitutional shadow upon the necessarily somewhat

Proposal 90: The list of animals in 5 AAC 92.029(b) includes animals that do not require permits from the Department to possess, import, export, buy, sell, or trade. The animals on this list are generally considered to be privately-owned animals in Alaska, and may not be released into the wild. Currently the permitting regulations for privately-owned animals not on the “clean” list are limited. The Board of Game has the authority to remove the animals from the list. Feral animals are within the definition of game and subject to regulation by the Board of Game.¹⁰ However, the board’s authority to regulate domestic sheep and goats is narrow.

Domestic sheep and goats are regulated by the State Veterinarian within the Department of Environmental Conservation, which has jurisdiction to “issue orders or permits relating to or authorizing examination, inspection, testing, quarantine or embargo of animals or animal products . . . to prevent the spread of pests or contagious or infectious disease.”¹¹ “Animal” is defined as “an animal other than a human being and includes a mammal, insect, bird, fish, and reptile, whether wild or domestic, and whether living or dead.”¹²

To avoid potentially conflicting regulations, please consider the following message sent on behalf of the Office of the State Veterinarian, within the Department of Environmental Conservation:

Since “game” specifically excludes domesticated mammals, it appears that Proposal 90 might overstep into the authorities of the Office of the State Veterinarian. DEC currently regulates the health and importation of sheep and goats. Domestic sheep entering Alaska must test negative for bluetongue if the animal is over 3 months of age and the animal’s health certificate must declare that the animal comes from a scabies free area or that the animal has been dipped within 14 days of importation. The health certificate must also provide a statement that the animal originates from a flock not under state or federal restriction. Domestic goats entering Alaska must test negative for bluetongue, brucellosis, and tuberculosis within 30 days of import. Animals must also have a health certificate that declares that the animals listed are free from infectious and contagious diseases, are free of ectoparasites (or the animals have been dipped or sprayed within 10 days of importation), that the animals do not originate from a herd or area currently under state or federal restriction and that the animals did not

individualized and perhaps largely random examinations by game wardens in the performance of their duties.”

¹⁰ AS 16.05.940(19).

¹¹ AS 03.05.011.

¹² AS 03.05.100.

originate from a premises or area currently under quarantine. The Office of the State Veterinarian also has the ability to re-test any imported animal if there is a concern about the animal's health.

Proposal 91: "Cattle" are currently included in the "clean" list in 5 AAC 92.029(d)(2) and may not be released into the wild. Feral animals are within the definition of game and subject to regulation by the Board of Game.¹³

To aid in distinguishing feral cattle from cattle permitted under a state grazing lease, the Department of Natural Resources adopted the following regulation in 1970:

11 AAC 60.070. Identification of livestock

All livestock permitted on a state grazing lease shall be properly identified and such identification registered in accordance with AS 03.40.010 - 03.40.270. In addition, the director may require that the livestock be tagged, dyed or otherwise marked as a control on numbers permitted on a lease in accordance with the annual operating plan.

Proposal 92: The proposer suggests this change is needed to be consistent with the constitutional Privileges & Immunities Clause. The P&I Clause¹⁴ prevents a state from unreasonably discriminating against individual residents of other states regarding commercial activities, i.e., the ability to earn a livelihood.

AS 16.05.935(d) requires each application for a permit for export or propagation to be accompanied by a statement prepared by the department examining the probable environmental impact of the action. Permits are authorized under 5 AAC 92.033.

Proposal 93: AS 16.05.935(d) requires each application for a permit for export or propagation to be accompanied by a statement prepared by the Department examining the probable environmental impact of the action. Permits are issued under 5 AAC 92.033.

Proposal 99: Currently, 5 AAC 92.050(a)(4)(B)(ii) requires a successful nonresident or nonresident alien permit applicant who is required to be accompanied by a guide to provide verification in the application that a guide-outfitter has been hired.

At its meeting on December 10, 2015, the Big Game Commercial Services Board adopted the following regulation:

¹³ AS 16.05.940(19).

¹⁴ "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." U.S. Constitution, Art. IV, § 2.

12 AAC 75.260 is amended by adding a new subsection to read:¹⁵

(d) A contracting registered or master guide that is signing the hunt contract, and who intends to apply a client for a drawing hunt permit for a hunt conducted under regulations required by AS 16.05, is required to obtain a Unique Verification Code from the department prior to entering an application for the client. Unique Verification Codes will only be issued to registered or master guides that are registered in a guide use area located in the hunt area the year the application is made and the years the permit is valid.

Proposal 105: Subsistence harvest of wild fish in Alaska is under the jurisdiction of the Board of Fisheries. Regulations for Tier II subsistence use of game are established by the Board of Game. It may be difficult to defend a legal challenge if Tier II subsistence harvest of *game* is based, in whole or in part, on the number of days harvesting and preserving *fish*.

If “consecutive years” of “over 180 days” is to be required, there must be support in the record supporting a reasonable justification for these requirements. There should also be an explanation on the record explaining why non-consecutive years, or less than 180 days, will result in zero points.

As written, the proposed regulation appears to be inconsistent with AS 16.05.258 that requires distinguishing among subsistence users based on “the customary and direct dependence on the . . . game population by the subsistence user for human consumption as a mainstay of livelihood.” The number of days spent in the noncommercial harvesting and preserving of wild fish and game anywhere in Alaska does not equate to a dependence on the game population that is subject to Tier II subsistence regulation.

¹⁵ The final wording of the published regulation may differ. It is expected to become effective at the beginning of May 2016.