

MEMORANDUM

State of Alaska Department of Law

TO: Kristy Tibbles
Executive Director
Alaska Board of Game

DATE: January 31, 2017

FILE NO.: JU2016200590

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SUBJECT: February 2017
Interior/Northeast Arctic Region
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 47: This proposal would amend the 5 AAC 92.990(26) definition of “edible meat” for game birds within the region. Currently the definition applies to game statewide. If the Board adopts a definition that will apply only within this region, we recommend information be included in the record to support a regional, rather than statewide, definition of “edible meat” for game birds.

Proposals 53 through 56: These proposals would amend 5 AAC 85.015 (black bear seasons and bag limits), .025 (caribou), .045 (moose) and .055 (Dall sheep) to change “general season”¹ to “subsistence” for resident hunts. The Department plans to address the identification of hunts by region, as a housekeeping measure, to correctly identify general and subsistence hunts throughout chapter 85. (The Department submitted comments on these proposals.)

Proposal 70: This proposal would establish a resident disabled veteran hunt in any unit or subunit in the Interior/Northeast Arctic region with a healthy moose population. Qualified veterans must be disabled, with the disability solely caused by military service. A Purple Heart and monthly SMC would be required. No proxy hunting would be allowed. As the Board considers this, please keep in mind the following statutes and regulations currently in place:

AS 16.05.255(a)(3) authorizes the Board of Game to adopt regulations establishing methods and means for persons with physical disabilities, but does not authorize the Board to establish a hunt limited to disabled veterans.

AS 16.05.340(d) provides reduced fees and a special nonresident military hunting license (at the resident license rate) for active duty military permanently stationed in the state.

AS 16.05.341 provides free licenses for veterans with 50% or greater disability incurred while serving in the military or Alaska Territorial Guard.

AS 16.05.940(25) defines a “person with physical disabilities” to mean a person who receives at least 70% disability compensation for a physical disability or can provide an affidavit from a physician stating the person is at least 70% physically disabled.

In 5 AAC 92.530, the Board authorized permits to be issued to disabled veterans and disabled active duty military personnel in certain management areas. 5 AAC 92.052(18) allows a person with physical disabilities to hunt with a motorized vehicle and requires the hunter to be accompanied by another licensed hunter capable of assisting with retrieving game.

¹ Probably means “General hunt only.”

Proposal 72: This proposal would amend 5 AAC 92.095 to allow same-day airborne harvest of wolf and coyote by firearm with a trapping license in the region, for both residents and nonresidents.

Currently, 5 AAC 92.095(8) prohibits a person from using a firearm to take a wolf until after 3:00 a.m. following the day in which the flying occurred (except for a trapper using a firearm for an animal caught in a trap). This regulation also applies to coyotes unless the hunter is over 300 feet from the airplane at the time of taking.

Same-day airborne restrictions in AS 16.05.783 are applicable: “A person may not shoot or assist in shooting a free-ranging wolf or wolverine the same day that a person has been airborne.” An exception applies for authorized predator control programs. The restriction in this statute prohibits the harvest of wolves as proposed, but does not apply to coyotes.

Galena area:

Proposal 98: This proposal would amend 5 AAC 92.124(b) to eliminate the requirement for a nonresident wolf tag in Unit 21. Per AS 16.05.340(a)(15), a tag is not required if there is an IM plan for all or any portion of the unit. An IM plan is found in 5 AAC 92.124 for wolf predation control in 21E Moose Management Area. Therefore, under current law there is no requirement for a nonresident wolf tag in Unit 21.

Proposal 101: This proposal would create a regulation allowing the harvest of moose, outside of seasons and bag limits established by the Board, by the Gwichyaa Zhee Gwich'in Tribal Government under a permit for celebratory events unrelated to deaths.

In addition to the common use, equal access, and sustained yield requirements of the Alaska Constitution, the following information may provide guidance to the Board:

5 AAC 92.017 allows for the taking, under conditions described in regulation, of big game for the Koyukon Potlatch Funerary or Mortuary Ceremony outside the seasons or bag limits established by the Board of Game if the harvest is consistent with sustained yield principles.

5 AAC 92.019 allows for the taking, under conditions described in regulation, of big game species with a positive customary and traditional use finding outside the seasons or bag limits established by the Board of Game, for use in Alaska as food in customary and traditional Alaska Native funerary or mortuary religious ceremonies, and if the harvest is consistent with sustained yield principles.

In *Frank v. State*, 604 P.2d 1068 (Alaska 1979), the Alaska Supreme Court found that a moose could be taken out of season for a funeral potlatch by someone exercising a

practice deeply rooted in his religion, where he was sincere in his religious beliefs. The constitutional right to free exercise of religion requires the state to accommodate religious practices by making exemptions from general laws except to the extent that doing so would harm a compelling state interest. The court noted that deaths may take place at any time of year and it is not part of the Athabascan culture to plan for them. The court distinguished a memorial potlatch, which can occur much later and is controllable and does not give rise to the same exigency.

In *Phillip v. State*, 347 P.3d 128 (Alaska 2015), in defense to criminal charges, a group of fishermen asserted a religious right to harvest king salmon in the Kuskokwim River. The court found that the state had a compelling interest in preserving the viability of the king salmon run that outweighed the defendants' assertion of "a religious right to 'unfettered' subsistence fishing" "without regard to emergency closures or gear restrictions." The court refused to grant a religious exemption in that case.

Proposal 112: This proposal would amend 5 AAC 92.085 and 92.095 to allow same-day-airborne hunting for wolf in Unit 25D. The Board should consider AS 16.05.783(a), which prohibits same day airborne hunting for a wolf or wolverine except as part of an authorized predator control program. A regulation cannot be inconsistent with a statute.

Delta Area:

Proposal 124: This proposal would amend 5 AAC 92.530(19) that allocates up to 25% of the moose drawing permits in the Delta Junction Management Area to disabled veterans or disabled active duty military personnel. The Department would require proof of qualification before awarding these drawing permits in Unit 20D. Current relevant laws are described under Proposal 70 (above).

In addition, the proposal suggests at least three tags should be issued as governor's tags. AS 16.05.335 authorizes the commissioner, at the request of the governor, to provide up to 50 complimentary fishing and hunting licenses and appropriate big game tags "which the governor may distribute to distinguished visitors to the state for their use in any one season during their visits to the state."