

ALASKA DEPARTMENT OF FISH AND GAME
STAFF COMMENTS FOR PROPOSALS 14, 15, 54, 56, 57 & 59
STATEWIDE PROPOSALS
ALASKA BOARD OF GAME MEETING
ANCHORAGE, ALASKA
NOVEMBER 10-17, 2017



The following staff comments were prepared by the Alaska Department of Fish and Game for use at the Alaska Board of Game meeting, November 10-17, 2017 in Anchorage, Alaska, and are prepared to assist the public and board. The stated staff comments should be considered preliminary and subject to change, if or when new information becomes available. Final department positions will be formulated after review of written and oral testimony presented to the board.

Revised 9/15/2017

PROPOSAL 14 – 5 AAC 92.080(7). Unlawful methods of taking game; exceptions; and 5 AAC 92.260(1). Taking cub bears and female bears with cubs prohibited. Prohibit the taking of black bears in dens.

PROPOSED BY: Stephanie McCabe.

WHAT WOULD THE PROPOSAL DO? Prohibit the taking of black bears in dens.

WHAT ARE THE CURRENT REGULATIONS? In Alaska, bears in dens may not be taken except for black bears in a few units under certain circumstances. Regulations at 5 AAC 92.080(7) allow the use of artificial lights by resident hunters who are practicing customary and traditional use activities at a black bear den site from October 15–April 30 in units 19A, 19D upstream from the Selatna River and Black River drainages, 21B, 21C, 21D, 24, and 25D.

Regulations at 5 AAC 92.260 also allow the take of black bear cubs or female black bears accompanied by cub bears by resident hunters who are practicing customary and traditional use activities at a den site from October 15–April 30 in units 19A, 19D upstream from the Selatna River and Black River drainages, 21B, 21C, 21D, 24, and from December 1 through the last day of February in Unit 25D.

In the units referenced above, the board has made the following customary and traditional use findings, and findings of amounts reasonably necessary for subsistence [5 AAC 99.025(2)]:

<u>Black bears, unit</u>	<u>Finding</u>	<u>Amounts reasonably necessary for subsistence uses</u>
19	Positive	30–50
21	Positive	[none to date]
24	Positive	[none to date]
25	Positive	150–250

WHAT WOULD BE THE EFFECT IF THE PROPOSAL WERE ADOPTED? If bears cannot be taken in dens, this customary and traditional practice to provide food in winter would decline because those who continued the practice might be subject to prosecution on non-federal lands. The Federal Subsistence Board adopted the state regulations for this customary and traditional practice so it would continue on the large federal lands in the affected units.

BACKGROUND: The customary and traditional use activities at a black bear den site are described in ADF&G Special Publication No. BOG 2008-07 (units 12, 19, 20, 21, and 24) and Special Publication No. BOG 2008-08 (Unit 25), which are posted to the Board of Game website for the November 2017 Statewide meeting.

Artificial light is used by traditional hunters practicing denning to ascertain if a bear is in a den and for general safety and transportation during Alaska’s dark winter days. Using a flashlight or other artificial light also helps the hunter aim and shoot effectively.

The traditional knowledge of hunters who have established the denning use pattern imparts specific, strong obligations as to how the dens are allocated among hunters, what activities in the immediate area around the den are allowed, and how the den occupants are allowed to be taken and used. Traditional hunters are obligated to take all occupants of the den; to not do so is believed to show disrespect to animals that have revealed themselves to be taken.

A harvest survey conducted in communities in unit 25D (Yukon Flats) for 2007 documented a harvest of 78 black bears by local residents, with most of these taken in the spring and fall and not during the denning season. An ethnographic study of several unit 25D communities in 2008 and 2009 also documented significant subsistence black bear harvests, largely in spring and fall. The study found that winter den hunting might have been the primary means of harvest black bears for food pre-contact, but more recently most are taken between April and October with only occasional forays into dens.

The department has no conservation concerns for black bear populations in these units.

DEPARTMENT COMMENTS: The department is NEUTRAL on the allocation of hunting opportunity. If adopted, the department recommends the board record include discussion of reasonable opportunity for success in harvesting a black bear.

COST ANALYSIS: Approval of this proposal is not expected to result in an additional direct cost for a private person to participate in these hunts or in additional costs to the department.

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PROPOSAL 15– 5 AAC 92.260. Taking cub bears and female bears with cubs prohibited.

Remove the exception for taking cub bears and female bears with cubs.

PROPOSED BY: Alaska Chapter OneProtest.

WHAT WOULD THE PROPOSAL DO? Prohibit taking black bear cubs or female black bears accompanied by cubs.

WHAT ARE THE CURRENT REGULATIONS? In Alaska, cubs or female bears accompanied by cubs may not be taken except for black bears in a few units under certain circumstances. Regulations at 5 AAC 92.260 allow the take of black bear cubs or female black bears accompanied by cub bears by resident hunters who are practicing customary and traditional use activities at a den site from October 15–April 30 in units 19A, 19D upstream from the Selatna River and Black River drainages, 21B, 21C, 21D, 24, and from December 1 through the last day of February in Unit 25D.

In addition, Alaska resident hunters may take black bear cubs or female black bears accompanied by cubs in Unit 25D from July 1–November 30 and March 1–June 30.

In the units referenced above, the board has made the following customary and traditional use findings, and findings of amounts reasonably necessary for subsistence [5 AAC 99.025(2)]:

Black bears, unit	Finding	Amounts reasonably necessary for subsistence uses
19	Positive	30–50
21	Positive	[none to date]
24	Positive	[none to date]
25	Positive	150–250

WHAT WOULD BE THE EFFECT IF THE PROPOSAL WERE ADOPTED? If taking of black bear cubs or female black bears with cubs were prohibited, hunters practicing customary and traditional denning activities could take only male black bears, and given the difficulties of ascertaining sex of a bear in its den, hunter success may decline. Harvests by Alaska residents taking black bears in Unit 25D from July 1–November 30 and March 1–June 30 may also decline.

If sows and cubs cannot be taken in dens, this customary and traditional practice to provide food in winter would decline because those who continued the practice might be subject to prosecution on non-federal lands. When a hunter takes an adult bear from a den, they have no way to tell for sure if the bear is male or female, or if the bear has cubs, even when artificial light is used. The taking of cubs is otherwise prohibited under state hunting regulations, but it is allowed for this customary and traditional practice so that any cubs found can be taken and used for food, clothing, and other purposes.

BACKGROUND: The customary and traditional use activities at a black bear den site are described in ADF&G Special Publication No. BOG 2008-07 (units 12, 19, 20, 21, and 24) and Special Publication No. BOG 2008-08 (Unit 25), which are posted to the Board of Game website for the November 2017 Statewide meeting.

The traditional knowledge of hunters who have established the denning use pattern imparts specific, strong obligations as to how the dens are allocated among hunters, what activities in the immediate area around the den are allowed, and how the den occupants are allowed to be taken and used. Traditional hunters are obligated to take all occupants of the den; to not do so is believed to show disrespect to animals that have revealed themselves to be taken.

The department has no conservation concerns for black bear populations in these units.

DEPARTMENT COMMENTS: The department is NEUTRAL on the allocation of hunting opportunity. If adopted, the department recommends the board record includes discussion of reasonable opportunity for success in harvesting a black bear. Federally-qualified subsistence hunters could continue to take black bear sows and cubs on federal public lands within the affected units.

COST ANALYSIS: Approval of this proposal is not expected to result in an additional direct cost for a private person to participate in these hunts or in additional costs to the department.

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PROPOSAL 54 – 5 AAC 92.070. Tier II subsistence hunting permit point system. Modify the Tier II subsistence hunting permit point system.

PROPOSED BY: Kenneth Manning

WHAT WOULD THE PROPOSAL DO? Delete Tier II indicators and points pertaining to the location where the applicant purchased gasoline and groceries, and indicators about the number of days the applicant spent doing subsistence activities in the local hunt area of the Tier II population.

Replace with questions based on two criteria plus one scoring matrix: 1) the number of living family members the applicant has who will benefit from the applicant’s subsistence harvest, 2) the applicant’s subsistence use activities no matter where the applicant hunts, fishes, or picks berries, and 3) a matrix of one year each for the applicant, spouse, children, grandchildren, parents of applicant, grandparents, great-grandparents, great grandchildren, living nieces and nephews, and great nieces and nephews.

WHAT ARE THE CURRENT REGULATIONS? The board has developed Tier II regulations and application questions to help measure how people meet the two statutory criteria. To measure an applicant’s customary and direct dependence on a Tier II game population for human consumption as a mainstay of livelihood, the board has adopted into regulation three indicators and points [5 AAC 92.070(a)]:

1) the number of years in which the applicant has hunted on or eaten from that game population, plus the number of years in which the applicant would have hunted on or eaten from that game population but did not because state regulations canceled the hunt on that game population during a given year or years, or because the state did not issue the applicant a permit to hunt on that game population for which the applicant applied; one point is given for each year, up to 50 points;

2) the number of years in which a member of the applicant's household has hunted on or eaten from that game population, plus the number of years in which that member of the applicant's

household would have hunted on or eaten from that game population but did not because state regulations canceled the hunt on that game population during a given year or years, or because the state did not issue that member of the applicant's household a permit to hunt on that game population for which that member of the applicant's household applied; 0.2 points are given for each year, up to 10 points; and

3) the amount of time during the year the applicant spends in the noncommercial harvesting of wild fish and game within the Tier II hunt area boundary:

- (A) 0 days = 0 points;
- (B) 1 to 6 days = 5 points;
- (C) 7 to 27 days = 10 points;
- (D) 28 to 48 days = 15 points;
- (E) 49 to 69 days = 20 points; and
- (F) 70 days or more = 25 points.

To measure an applicant's ability to obtain food if subsistence use is restricted or eliminated the board has adopted into regulation two indicators and points [5 AAC 92.070(b)]:

- 1) The availability of food for purchase in the community where most of the applicant's household's store-bought food was purchased during the past year (up to 25 points); and
- 2) the cost of gasoline in the community where most of the applicant's household's gasoline was purchased during the past year (up to 30 points).

WHAT WOULD BE THE EFFECT IF THE PROPOSAL WERE ADOPTED? Removing the focus on the subsistence user may not be in compliance with AS 16.05.258(b)(4)(B), which references the subsistence user individually, not the subsistence user's family. The proposal appears to intend to award points based on the size of an applicant's family. Removing the focus on the Tier II population is likely not in compliance with AS 16.05.258(b)(4)(B)(i), which states the board must distinguish among subsistence users through limitations based on the customary and direct dependence on the Tier II game population, and not every population the subsistence user hunts or fishes from, nor from berries.

BACKGROUND: Under the state subsistence law at AS 16.05.258(b)(4), if there is not enough of a harvestable surplus of a game population to provide a reasonable opportunity for subsistence uses, the Board of Game must limit who can harvest from that population in a way that provides a priority for subsistence uses. The state subsistence law authorizes the board to use two criteria to determine who can harvest the low-population game for subsistence: 1) a subsistence user's customary and direct dependence on that game population 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.

Current Tier II regulations score an application according to two factors. Factor A is up to 85 points, and measures the applicant’s “customary and direct dependence on the game population for human consumption as a mainstay of livelihood” Specific questions are 1) the number of years the applicant has eaten from or hunted the Tier II population (up to 50 points); 2) the number of years a member of the applicant’s household has eaten from or hunted the Tier II population (up to 10 points); and 3) the number of days the applicant has hunted or fished in the Tier II hunt area (up to 25 points).

Factor B is up to 55 points, and measures the “ability of a subsistence user to obtain food if subsistence use [of the Tier II population] is restricted. Specific questions are 1) the availability of food to purchase (up to 25 points); and 2) the availability of gasoline to purchase (up to 30 points).

The board has addressed the Tier II permit point system on multiple occasions since the first regulations were adopted in 1985; most recently at the March 2016 Statewide meeting in Fairbanks (Proposal 105, failed). The Tier II permit point system has also been the focus of court challenges, with the courts upholding the current application, questions, and criteria.

DEPARTMENT COMMENTS: The department is NEUTRAL on the allocative aspects of this proposal. The department recommends the board adopt regulations that are in compliance with current statute.

COST ANALYSIS: Adoption of this proposal is not expected to result in increased costs for private parties to participate in these hunts; however, adoption of the proposal would result in significantly increased costs to the department to re-program the Tier II application process.

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PROPOSAL 56 – 5 AAC 92.072. Community subsistence harvest hunt area and permit conditions. Modify the community subsistence harvest (CSH) permit conditions.

PROPOSED BY: Ahtna Tene Nené

WHAT WOULD THE PROPOSAL DO? This proposal has the following requests:

1. Delete references to “group” throughout the regulation; and
2. Delete references to “resident of community” throughout the regulation; and
3. Modify references to a CSH administrator to specify that the person is a community administrator; and

4. Require the department to determine if an applicant for the community hunt area described in 5 AAC 92.074(d) conforms with the definition of community. The regulation at 5 AAC 92.074(d) describes the area as the Gulkana, Cantwell, Chistochina, Gakona, Mentasta, Tazlina, Chitina, and Kluti Kaah Community Harvest Area for moose and caribou; and
5. Delete a specific reference to meat sharing in that portion of 5 AAC 92.072 that describes how community members must make efforts to ensure that the customary and traditional use pattern is followed; and
6. Allow the department to waive an annual report requirement for a community that has demonstrated, for a five-year period, in their annual reports that it has a high degree of participation in the customary and traditional community use pattern described in the board findings for the area; and
7. If a community fails to demonstrate that it is observing the customary and traditional use pattern the board described for that area, based on criteria and a scoring system developed by the department, allow the department to disprove an application for a CSH for two years for all members of the community; and
8. If a community has been denied a CSH because it failed to submit any report, or a report that demonstrates it observes the customary and traditional use pattern, allow an individual to appeal this decision within 60 days, and allow the department to accept a report that satisfies the department's reporting requirements; and
9. Authorize community administrators to require that members observe the customary and traditional use pattern described by the board; and
10. Amend the definition of community as individuals who participate in a consistent pattern of noncommercial taking, use, and reliance on a wide diversity of subsistence resources in an identified area that provides substantial economic, cultural or social, and nutritional elements of the subsistence way of life of the community and its members.

WHAT ARE THE CURRENT REGULATIONS? Use of the terms “community” and “group” in 5 AAC 92.072 mirrors the language in AS 16.05.330(c) that allows the board to adopt regulations for subsistence permits for communities and groups. A CSH administrator is referred to as a “community or group representative” throughout 5 AAC 92.072. Meat sharing is an example of a customary and traditional use pattern. Annual reporting by a community or group representative is required, and the regulation includes an appeals process for failure to report. A “community” or “group” is defined as “a group of people linked by a common interest in, and participation in uses of, an area and the wildlife populations in that area, that is consistent with the customary and traditional use pattern of that wildlife population and area as defined by the board.”

WHAT WOULD BE THE EFFECT IF THE PROPOSAL WERE ADOPTED? Several changes would be made to the Copper Basin community subsistence hunts for moose and caribou. The department would be required to determine that the applicant meets the definition

of community before issuing the community permit. The department would also be required to deny an applicant a permit if the applicant did not demonstrate in the previous year's report that the community is observing the customary and traditional use pattern described in board findings. The department would be required to establish a scoring system for community reports and a minimum score necessary to determine the applicant's eligibility. The department could waive the annual reporting requirement for any applicant that had demonstrated participation in the customary and traditional pattern in its reports over the previous five years.

BACKGROUND: The board held a special meeting in Glennallen on March 18–21, 2017, to address Copper Basin area moose and caribou hunting. The board retained the community hunts for moose and caribou in the Copper Basin area. The board adopted an amended version of Proposal 20 that distributed the 100 moose that do not meet antler restrictions by Tier II criteria, with up to 350 permits issued. The season was changed to August 20–September 20. For the community caribou hunt, the board increased the bag limit to up to two caribou per household and increased the cap to 400 caribou. These regulatory changes come into effect in the 2018/19 regulatory year.

DEPARTMENT COMMENTS: The department is neutral on eligibility requirements for the Copper Basin community subsistence hunts.

COST ANALYSIS: Approval of this proposal may result in increased costs to private parties, as well as to the department.

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PROPOSAL 57 – 5 AAC 92.072 Community subsistence harvest hunt area and permit conditions. Change the definition of “community” or “group” for community subsistence harvest hunts.

PROPOSED BY: Alaska Board of Game.

WHAT WOULD THE PROPOSAL DO? Change the definition of a community or group for purposes of community subsistence hunts to specify that there is a mutual support network of people who routinely (at least several times per year) provide each other with physical, emotional, and nutritional assistance in a multi-generational and inter/intra familial manner to assure the long-term welfare of individuals, the group, and the natural resources they depend on.

WHAT ARE THE CURRENT REGULATIONS? For purposes of community subsistence harvest hunts, a community or group is a group of people linked by a common interest in, and participation in uses of, an area and the wildlife populations in that area, that is consistent with the customary and traditional use pattern of that wildlife population and area as defined by the board [5 AAC 92.072(i)(2)].

WHAT WOULD BE THE EFFECT IF THE PROPOSAL WERE ADOPTED? The definition would describe in a different way the board’s expectation of community patterns as are expressed in Alaska subsistence activities.

BACKGROUND: The board adopted the current definition from Proposal 70 at the March 2015 Central/Southwest meeting. At their March 2017 meeting, the board received several public comments from Copper Basin community subsistence harvest hunt participants about the effectiveness of the program. Testimony also emphasized the importance for natural resource conservation to ensure long-term sustenance and customary and traditional uses. The board agreed a modification to the definition of community/group should be considered to more accurately reflect the intent of community subsistence harvest hunt regulations, and further clarify how the Tier I Copper Basin community subsistence harvest hunt for caribou is distinguished from the individual Tier I hunt for Nelchina caribou.

Several published definitions provide guidance for understanding the aspects of the meaning of “community”. For each source, the top two definitions are listed here, for convenience. These sources are for example purposes only, and not intended to limit the board’s consideration of other sources.

A. *American Heritage Dictionary* (Fourth edition, 2004). A “community” is:

1. a. A group of people living in the same locality and under the same government.
- b. The locality in which the group lives.
2. a. A group of people having common interests: ...
- b. A group viewed as forming a distinct segment of society: ...

B. *Webster’s New Collegiate Dictionary* (1981 edition). A community is:

1. A unified body of individuals, as:
 - a. State, commonwealth
 - b. The people with common interests living in a particular area; broadly, the area itself
 - c. An interacting population of various kinds of individuals (as species) in a common location
 - d. A group of people with a common characteristic or interest living together within a larger society
 - e. A group linked by a common policy

- f. A body of persons or nations having a common history or common social, economic, and political interests
- g. A body of persons of common and especially professional interests scattered through a larger society

2. Society at large

C. In the popular on-line reference “Wikipedia” (accessed 08/25/17), the article on “Community” notes that “A community is a small or large social unit (a group of people) who have something in common, such as norms, religion, values, or identity.”

Wikipedia also notes that “Durable relations that extend beyond immediate genealogical ties also define a sense of community. People tend to define those social ties as important to their identity, practice, and roles in social institutions like family, home, work, government, society, or humanity at large.” (the cited source is James et al. 2012. Sustainable Communities: Sustainable Development. University of Hawaii Press)

It is not recommended to focus on the aspects of a definition of community as a physical place or as the residents of a particular place (as in definition A.1) because, due to court decisions, the board should not use residency to limit eligibility to participate in a hunt.

Wikipedia and Webster’s introduce two additional possible aspects of “community.” The first is “durability:” the community has a history; it is not short lived or “ad hoc.” The second is “identity:” members identify with the group at a non-superficial level. Both “durability” and “identity” appear to be goals of the board in providing opportunities for groups to form as communities to establish hunting traditions consistent with an identified customary and traditional use pattern. The durability and identity aspects of community have also been recognized by the Joint Boards of Fisheries and Game in the process used to identify customary and traditional (C&T) uses. C&T uses have been established by Alaskans after a “long term, consistent pattern of use” (Criterion 1); are characterized by “handing down of knowledge of fishing or hunting skills, values, and lore from generation to generation” (Criterion 6); and provide “substantial economic, cultural, social, and nutritional elements of the subsistence way of life” (Criterion 8).

However, because they are subsistence hunts and also due to court action, participation in community hunts cannot be limited to individuals with prior histories of harvest or use of the game population (except under Tier II regulations). Also, the board intended to provide CSH opportunities for groups that wanted to establish themselves as communities engaged in C&T uses of moose or caribou in GMU 13: the board did not require prior existence of a “community of interest.” Therefore, it is recommended that, if the concepts of durability and identity are included in a definition of community, that the language be carefully considered and based on substantial evidence in the decision-making record .

DEPARTMENT COMMENTS: The department is NEUTRAL on the definition of community or group for community subsistence hunts.

COST ANALYSIS: Approval of this proposal is not expected to result in an additional direct cost for a private person to participate in these hunts, nor additional costs to the department.

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PROPOSAL 59 – 5 AAC 99.070 Tier II subsistence hunting permit point system; 5 AAC 92.072 Community subsistence harvest hunt area and permit conditions. Consider all customary and traditional uses as eligibility criteria for Tier II and community subsistence harvest hunts.

PROPOSED BY: Kenneth Manning.

WHAT WOULD THE PROPOSAL DO? Require the board to direct the department to consider C&T handicraft uses to establish eligibility for Tier II and community subsistence harvest permit applications.

WHAT ARE THE CURRENT REGULATIONS? Current Tier II regulations measure an application according to two factors. Factor A is up to 85 points, and measures the applicant’s “customary and direct dependence on the game population for human consumption as a mainstay of livelihood” Specific questions are 1) the number of years the applicant has eaten from or hunted the Tier II population (up to 50 points); 2) the number of years a member of the applicant’s household has eaten from or hunted the Tier II population (up to 10 points); and 3) the number of days the applicant has hunted or fished in the Tier II hunt area (up to 25 points).

Factor B is up to 55 points, and measures the “ability of a subsistence user to obtain food if subsistence use [of the Tier II population] is restricted. Specific questions are 1) the availability of food to purchase (up to 25 points); and 2) the availability of gasoline to purchase (up to 30 points).

The state law at AS 16.05.258(b)(4) does not mention handicraft uses as a criterion for Tier II hunts: it specifically states the game population must be used for human consumption as food.

The board has determined that eligibility for community subsistence hunts requires a community or group size of 25 or more Alaskans; that those who subscribe to a community hunt do not hold a harvest ticket or other state hunt permit for the same species where the bag limit is the same or for fewer animals; that Alaskans join only one community subsistence hunt per year; that if the community harvest hunt area is under a Tier II permit requirement, that subscribers have received that Tier II permit; and that Copper Basin community subsistence hunters commit to participation in the program for two years.

WHAT WOULD BE THE EFFECT IF THE PROPOSAL WERE ADOPTED? No changes would occur to the Tier II applications because the board does not have authority to base Tier II eligibility on handicraft uses. Applications for a community subsistence harvest permit would include questions regarding the applicant(s)' hand-made manufacture, uses, and subsistence harvests of non-edible animal parts; however, this information could not be used as eligibility criteria because of Alaska Supreme Court decisions.

BACKGROUND: The board has addressed the Tier II permit point system on multiple occasions since the first regulations were adopted in 1985. The Tier II permit point system has also been the focus of court challenges.

Currently the board has authorized four community subsistence harvest hunts: units 25B and 25D moose, Unit 25D black bears, units 13 and 11 moose, and Unit 13 caribou. Community subsistence harvest hunts are established to accommodate traditional subsistence hunting practices and create group bag limits, rather than individual bag limits.

DEPARTMENT COMMENTS: The department is NEUTRAL on eligibility for hunting opportunities. However, basing eligibility for CSH and Tier II hunts on already-established customary and traditional handicraft uses is not consistent with the subsistence law at AS 16.05.258(b)(4), and basing eligibility for any hunt opportunity on previously-established C&T uses is not consistent with court cases. The department recommends TAKE NO ACTION on this proposal.

COST ANALYSIS: Adoption of this proposal is not expected to result in increased costs for private parties to participate in these hunts; however, adoption of the proposal would result in significantly increased costs to the department to re-program the Tier II application process.

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