

MEMORANDUM

State of Alaska Department of Law

TO:	Kristy Tibbles Executive Director Alaska Board of Game	DATE:	March 7, 2023
		FILE NO.:	2022200301
		TEL. NO.:	269-5232
FROM:	Cheryl Rawls Brooking Assistant Attorney General Natural Resources Section Department of Law	SUBJECT:	March 2023 Southcentral 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 80 would amend 5 AAC 92.061 to adjust the U8 brown bear permit allocations in DB101 – DB193, to **no more than .35%** of the tags in an individual hunt. This is about one-third of one percent of the permits. If the intent is to be “no more than 35%” the proposal would need to be amended.

Note on proposals related to hunting in State Parks

The following State Park regulations should be considered when addressing Proposals 90, 92 through 95, 97 through 99, and 103:

11 AAC 18.010. Special park use permits. (a) No person may promote, organize, or engage in any of the following activities in a state park without a permit: (1) an organized or promoted assembly of more than 20 persons; (2) any promotional or entertainment event, including an organized athletic event, competitive recreational event, or spectator event, whether or not an admission fee is charged; (3) camping within a developed campground for longer than 15 consecutive days in a calendar year or longer than the period designated by the director for the site or area in which the camp is made; (4) *constructing or placing an improvement, structure, or property within a park, including a sign (with the exception of a state regulatory marker), fixture, shelter or cabin, personal property, road, trail, excavation, fill, or buttress*; (5) discharging explosives; (6) conducting exploration, scientific research, or information collection activities requiring authorization under 11 AAC 12.170 and 11 AAC 12.175; (7) commercial activities described in 11 AAC 12.300 and 11 AAC 12.990; (8) using a state park for recurring or permanent motorized access, including aircraft landings and takeoffs across land or water closed to motorized use, to land not owned or controlled by the state; (9) occupying a campsite with more than the allowed number of vehicles; (10) *uses limited or prohibited by the director under 11 AAC 12 or 11 AAC 20*; and (11) any other incompatible use as defined under regulation or that does not otherwise have lawful recreation as its primary purpose. (b) For a permit required under this section, a fee must be paid if required under 11 AAC 05.170(b)(4). However, nothing in this section limits the department's authority to charge other applicable fees under 11 AAC 05.170. (Italics added.)

11 AAC 18.025. Procedure. (a) An applicant shall complete and file an application form provided by the division for a park use permit at the office of the division nearest the location of the intended activity, and must provide the following information: (1) name of each individual or company responsible for the use intended; (2) permanent address and local address, including residence and mailing addresses, of each person, owner, and company responsible for the use, service, or activity intended; (3) current phone numbers of each company and individual providing services in a state park; (4) in the case of commercial operators, a photostatic copy of a current photo identification card such as a driver's license, that includes the date of birth and a written physical description; (5) in

the case of fishing guides, a photostatic copy of a valid Alaska sport fishing license; and (6) physical descriptions and license numbers of each vehicle used in a state park. (b) The director shall respond within 30 days to a written application made under this section, except that, for permits requiring multi-agency review, the division's response time may be delayed by other review periods beyond its control. (c) The director may, upon proper application, issue a permit for activities described in 11 AAC 18.010(2) - (11) if he or she determines that (1) park facilities and natural and cultural resources will not be adversely affected; (2) the state park is protected from pollution; (3) public use values of the state park will be maintained and protected; and (4) the public safety, health, and welfare will not be adversely affected. (5) Repealed 12/27/2012.

11 AAC 12.190. Firearms and other weapons. (a) A person may not discharge a weapon within a state park except as provided by this section, AS 41.21, 11 AAC 20, or 11 AAC 21. (b) A person may discharge a weapon within a shooting range established by the director, subject to the rules posted for that shooting range. (c) A certified bowhunter may discharge a bow and arrow in a state park in an area otherwise closed to the discharge of weapons for the purpose of lawful hunting except that a person may not discharge a bow and arrow within 300 feet of a developed facility, within the areas specified in (d)(2) - (7) of this section, or as otherwise provided by AS 41.21, 11 AAC 20, or 11 AAC 21. (d) Notwithstanding (c) of this section, a person may discharge a weapon in a state park for the purpose of lawful hunting or trapping, except that *a person may not discharge a weapon in a state park as follows: (1) within one-quarter mile of a developed facility or as otherwise provided by this section, AS 41.21, 11 AAC 20, or 11 AAC 21; (2) in Chilkoot State Trail; (3) in Chugach State Park within one-half mile of the Seward Highway; (4) in Chugach State Park within the following drainages: (A) Eklutna River excluding the east fork of Eklutna River and Thunderbird Creek above Thunderbird Falls; (B) Eagle River and all tributary drainages downstream from the confluence of Icicle Creek and Eagle River located in Section 25, T13N, R1E, Seward Meridian; (C) all forks of Campbell Creek; (D) Rabbit Creek; (E) McHugh Creek; and (F) Rainbow Creek; (5) in Denali State Park within one-quarter mile south or east of the Parks Highway or within one-half mile of the trail around Byers Lake; (6) in the Kenai River Special Management Area below Skilak Lake except that a person may, for the purpose of lawful waterfowl hunting, discharge a shotgun below Skilak Lake from September 1 through April 30; (7) in the Kenai River Special Management Area between Kenai Lake and Skilak Lake. (Italics added.)*

Proposal 90 would amend 5 AAC 85.015 and 92.530 to establish a primitive weapons hunt or any weapons hunt for black bear in the West Fork of the Eagle River drainage in GMU 14C, all drainages in South Fork Eagle River excluding within ½ mile of a developed facility. A permit would be required from State Parks.

Proposal 91 would amend 5 AAC 85.015 and 92.530 to add bow and arrow to means of take for DL455 black bear hunt in GMU 14C JBER. The State and JBER cooperate

regarding methods and means, seasons, and number of permits to be issued. JBER requires base orientation and weapons proficiency, and may restrict hunting and access on the base consistent with its military activities.

Proposal 92 would amend 5 AAC 85.015 and 92.530 to add bow and arrow to means of take for DL457 black bear hunt in GMU 14C McHugh Creek. A permit would be required from State Parks.

Proposal 93 would amend 5 AAC 85.015 and 92.530 to add bow and arrow to means of take for the DL455 black bear hunt in GMU 14C JBER and DL457 McHugh Creek. The State and JBER cooperate regarding methods and means, seasons, and number of permits to be issued. JBER requires base orientation and weapons proficiency, and may restrict hunting and access on the base consistent with its military activities. A permit would be required from State Parks for the McHugh Creek area.

Proposal 94 would amend 5 AAC 85.015 and 92.530 to add a new archery only black bear drawing hunt in GMU 14C McHugh Creek, weekdays Sept. 1 – May 31. A permit would be required from State Parks.

Proposal 95 would amend 5 AAC 85.015 and 92.530 to add a new resident only archery registration black bear hunt in JBER and McHugh Creek, weekdays Sept. 1 – May 31. A permit would be required from State Parks for McHugh Creek. The State and JBER cooperate regarding methods and means, seasons, and number of permits to be issued. JBER requires base orientation and weapons proficiency, and may restrict hunting and access on the base consistent with its military activities.

Proposal 96 would amend 5 AAC 85.015 and 92.530 to add a new archery only black bear registration permit hunt on JBER, only for hunters who draw an archery moose permit, valid while moose draw permit is valid. The State and JBER cooperate regarding methods and means, seasons, and number of permits to be issued. JBER requires base orientation and weapons proficiency, and may restrict hunting and access on the base consistent with its military activities. Further, if availability of the black bear registration permits is restricted to only those hunters who successfully draw a moose permit, there may be a challenge under the equal access provisions of the Alaska Constitution.

Proposal 97 would amend 5 AAC 85.020 and 92.530 to add primitive weapons hunt or any weapons hunt for brown bear hunt in GMU 14C South Fork Eagle River, Oct. 1 - 31. A State Park permit would be required.

Proposal 98 would amend 5 AAC 85.020 and 92.530 to add hunt a brown bear hunt in GMU 14C Rainbow Creek drainage. A State Park permit would be required.

Proposal 99 would amend 5 AAC 85.020 and 92.530 to add a new archery only brown bear drawing hunt in McHugh Creek in GMU 14C, for residents and nonresidents, weekdays Sept. 1 – May 31. A State Park permit would be required.

Proposal 100 would amend 5 AAC 85.020 and 92.530 to add a new archery only brown bear drawing hunt in JBER, one every four years, resident and nonresident, weekdays Sept. 1 – May 31. The State and JBER cooperate regarding methods and means, seasons, and number of permits to be issued. JBER may require base orientation and weapons proficiency, and may restrict hunting and access on the base consistent with its military activities.

Proposal 103 would amend 5 AAC 85.015, 85.020, 92.044, and 92.530 to allow one black and brown bear bait station in the McHugh Creek Drainage, May 1 – June 15, up to six certified users can use the one bait station. A State Park permit would be required authorizing discharge of a weapon and allowing placement of a bait station.

Proposal 107 would amend 5 AAC 92.540(5)(b) to allow an exemption to the motorized vehicles prohibition in the Lower Kenai CUA in GMU 15C for veterans with a service-connected disability of 50% or more.

Proxy hunting is authorized under AS 16.05.405 for residents who are blind, physically or mentally disabled as defined in AS 16.05.940(25) and (26), or over age 65. By statute, a “person with physical disabilities” requires written proof of at least a 70% disability.

A person with a disability may be entitled to a methods and means exemption to provide reasonable accommodation for the individual under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* Federal ADA Title II regulations require the state to provide reasonable modifications to programs to provide access for persons with disabilities, if the modifications do not alter the fundamental nature of the program. (28 CFR 35.130(b)(7), 28 CFR 35.150).

To comply with ADA requirements, the board adopted 5 AAC 92.104 for addressing individual requests for methods and means exemptions for persons with disabilities. Requests are handled on a case by case basis by the department, considering both the individual and the activity, and to ensure modifications do not alter the fundamental nature of the program.

Proposal 161 would direct the department to conduct a feasibility study for transporting Sitka blacktail deer to GMU 15C, south of Kachemak Bay. The Board lacks administrative and budgetary authority but may request that the department consider such a study. This is not a regulatory action.

Proposals 171 and 172 would amend 5 AAC 92.052 to implement local reporting of sea duck harvests. The Board should consider the significant federal involvement under the Migratory Bird Treaty Act, and whether any burden placed on the department would be consistent with the Board's lack of administrative and budgeting authority.

Proposal 200 would amend 5 AAC 85.045 to create a moose hunt for persons over age 65, with no proxy hunting allowed, September 26-30.

Under State law, there is no statutory authority to create a hunt limited to persons over age 65. Statutes provide authority to distinguish between hunters based on age for certain specific purposes: A permanent license for hunting, trapping, and sport fishing may be issued to a resident age 60 or older. AS 16.05.400. There are laws allowing methods and means exemptions for persons with disabilities, and proxy hunting is authorized under AS 16.05.405 for residents who are blind, physically or mentally disabled, or over age 65. Youth hunts are expressly authorized in AS 16.05.255.

Under Federal law, the Age Discrimination Act generally prohibits discrimination based on age unless

(A) such action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any *statutory* objective of such program or activity; or
(B) the differentiation made by such action is based upon reasonable factors other than age. (42 USC 6103)

If a program provides special benefits for the elderly or children, the benefits may be considered necessary to the normal operation of a program. Factors to be considered include the rationale for the special benefits, the effect on other individuals, and other relevant factors.

Proposal 203 would amend 5 AAC 85.045 to create a restricted weapons moose drawing hunt in GMU 14C in Kincaid Park for persons with a physical disability, as defined in AS 16.05.940(26).

The Board has the statutory authority under AS 16.05.255(a)(3) to adopt regulations on methods and means for hunting by persons with at least 70% physical disabilities, and adopted 5 AAC 92.104 to authorize methods and means exemptions. A special hunt season, created solely for physically disabled hunters, may be subject to challenge absent specific statutory authority. For example, special hunt seasons for youth are authorized in AS 16.05.255(i).

In addition, Kincaid Park is owned and managed by the Municipality of Anchorage and is subject to ordinances restricting uses within municipal parks. AMC 25.70.060 provides in part:

AMC 25.70.060 – Activities prohibited in parks.

...

Q. No person shall discharge a firearm or shoot a bow and arrow in a park except in areas designated by the director, where there is no reasonable likelihood of jeopardy to people, domestic animals, or property.

Proposal 209 would reallocate four permits each, from elk drawing permit hunts DE715, DE717, DE721, and DE723 to resident registration hunts, with eight permits available for pick up in Ouzinkie and eight in Port Lions. The Board may wish to adopt findings to provide guidance to the department on how the registration permits are to be allocated.