

MEMORANDUM

RC 112
State of Alaska
Department of Law

TO: Glenn Haight
Executive Director
Alaska Board of Fisheries

DATE: February 23, 2019

FILE NO.: 2018200694

PHONE: (907) 269-5232

FROM: Brad Meyen
Senior Assistant Attorney
General, Natural Resources

SUBJECT: Comments from the Department
of Law relating to the February
21-26, Board of Fisheries
meeting for Alaska Peninsula,
Chignik, Bering Sea-Aleutian
Islands Finfish 2019 Meeting

The Department of Law has the following specific comments should the Board of Fisheries decide to consider the following petition at its Alaska Peninsula, Chignik, Bering Sea-Aleutian Islands Finfish 2019 Meeting or a subsequent meeting.

Emergency Petition Yakutat Bay Subsistence Salmon Fishery (RC36): This petition asks the board to repeal paragraph (e) of 5 AAC 01.670. The board can adopt emergency regulations if it “makes a written finding, including a statement of the facts that constitute the emergency, that the adoption of the regulation or order of repeal is necessary for the immediate preservation of the public peace, health, safety, or general welfare.” AS 44.62.250. The board typically evaluates whether an emergency exists with respect to a petition before considering whether to take action in response to the petition. The board has defined in regulation at 5 AAC 96.625(f) what constitutes an “emergency,” and for petitions dealing with subsistence, the board should also consider the two criteria in 5 AAC 96.615(a):

(1) the proposal must address a fish or game population that has not previously been considered by the board for identification as a population customarily and traditionally used for subsistence under AS 16.05.258; or

(2) the circumstances of the proposal otherwise must require expedited consideration by the board, such as where the proposal is the result of a court decision or is the subject of federal administrative action that might impact state game management authority.

Should the board at this or a subsequent meeting, find an emergency and take action on this petition, and for all proposals affecting subsistence fisheries, the board should consider whether adoption or repeal of a regulation is needed to provide a reasonable opportunity for subsistence uses of the amount of fish reasonably necessary for those uses. "Reasonable opportunity" means 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 fish or game." The board can base its determination of whether the regulations provide a reasonable opportunity for subsistence uses on: the amounts of a fish stock that have been established as reasonably necessary for subsistence uses, information pertaining to subsistence harvest data, bag limits, access, methods and means regulations and gear necessary to achieve the harvest, and other factors.

Finally, if the board decides to make a change, under AS 44.62.260 a regulatory change adopted as an emergency regulation does not remain in effect more than 120 days unless the adopting agency complies with certain regulatory steps prior to submitting the regulation to the lieutenant governor. In other words, if the board decides to make a change, the board may want to consider whether to also direct the department to make the change permanent otherwise the change will expire after 120 days.