

MEMORANDUM

State of Alaska

Department of Law

TO: Glenn Haight
Executive Director
Alaska Board of Fisheries

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FILE NO.: 2020200464

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SUBJECT: Department of Law comments on proposals for the January 4 - 15 Board of Fisheries meeting for Southeast Alaska and Yakutat

The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at its January 4 - 15 Board of Fisheries meeting for Southeast Alaska and Yakutat finfish and shellfish:

Subsistence: For proposals affecting subsistence fisheries the Board should consider whether adoption of the proposed 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 of fish or game.” The Board can base its determination of whether the regulations provide a reasonable opportunity for subsistence uses on amounts of a fish stock that have been established as reasonably necessary for subsistence uses, information pertaining to subsistence harvest data, bag limits, seasons, access, gear necessary to achieve the harvest, and other factors.

Unless it has done so previously, the Board, when considering a proposal that would affect subsistence, should: (1) determine whether the fish stock is in a nonsubsistence area; (2) determine whether the fish stock or portion of the fish stock is customarily and traditionally taken or used for subsistence; (3) determine whether a portion of the fish stock may be harvested consistent with sustained yield; (4) determine the amount reasonably necessary for subsistence uses; (5) adopt regulations to provide a

reasonable opportunity for subsistence uses; and (6) if the harvestable amount is not sufficient to allow for subsistence uses and other consumptive uses, adopt regulations to reduce or eliminate other uses in order to provide a preference and reasonable opportunity for subsistence uses.

If the harvestable amount is insufficient to allow subsistence uses and other consumptive uses, the Board must adopt regulations to reduce or eliminate other uses in order to provide a reasonable opportunity for subsistence uses. If the harvestable portion of the fish stock is not sufficient to provide a reasonable opportunity for all subsistence uses, the Board must eliminate nonsubsistence consumptive uses and distinguish among the subsistence users based on the Tier II criteria. AS 16.05.258(b)(4)(B)(i), (iii). However, the Board may not consider the criteria in clause (ii), proximity of domicile to the fish stock, because it was ruled unconstitutional in *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995) (“The Tier II proximity of the domicile factor violates sections 3, 15, and 17 of article VIII of the Alaska Constitution, because it bars Alaska residents from participating in certain subsistence activities based on where they live.”)

Allocation: When allocating fishery resources among nonsubsistence uses, the Board should reference the allocation criteria in AS 16.05.251(e) in accordance with 5 AAC 39.205 and 91-129-FB. The Alaska Supreme Court has held that the allocation criteria apply to allocations among use categories (i.e., personal use, sport, guided sport, and commercial) as well as among subgroups of those categories (e.g., drift and setnet commercial fisheries). However, the Alaska Supreme Court has also held that the Board may not allocate “within” a particular fishery (same gear and same administrative area).

Some regulatory proposals will have significant allocative impacts even though allocation is not their intended purpose. When considering such proposals, the Board should address the allocation criteria or explain why the criteria are not applicable. The Board may determine that a proposal does not have a significant allocative impact, even if the record contains comments to contrary from the public or the Department, as long as the record reflects a reasonable basis for the Board's determination. If there is doubt about whether a proposal has significant allocation impacts, Law recommends that the allocation criteria be reviewed on the record.

Where more than one proposal will have similar effects, Board members may incorporate by reference their discussion of the allocation criteria with regard to a prior proposal.

Policy for the management of sustainable salmon fisheries: The Board has adopted a “Policy for the management of sustainable salmon fisheries” at 5 AAC 39.222. Board members should review the policy thoroughly and ensure that the standards outlined in the policy have been considered on the record in any proposal dealing with salmon management. For purposes of the sustainable salmon fisheries policy, the Board has defined sustained yield as: “an average annual yield that results from a level of salmon escapement that can be maintained on a continuing basis; a wide range of average annual yield levels is sustainable; a wide range of annual escapement levels can produce sustained yields.” 5 AAC 39.222(f).

Proposal 87: This proposal would require the department to “[c]reate a cell phone app for the collection of catch date in real time” that would report weekly. Several other proposals seek to create similar data collection and reporting programs. The department usually indicates that it would be required to develop a new program (including a new app) and that it would require increased staffing to compile effort and harvest data that would be collected. Because the Board has no administrative, budgeting, or fiscal powers over the Department, any Department concerns about funding for a particular reporting system should be considered before adopting this kind of proposal.

This proposal would also require a tax on “individual fish box[es] leaving the area.” The Board has no authority to create a tax on boxes of fish “leaving the area.”

Proposal 116: This proposal would require commercial troll fishermen to sell king salmon caught during periods outside king salmon retention periods for one dollar. The board may regulate commercial fishing as needed for the conservation, development, and utilization of fisheries, but regulating the price for which fish must be sold is probably not within the authority of the Board.

Proposals 137: This proposal would prohibit taking fish by proxy in the personal use fishery at Sweetheart Creek. AS 16.05.405(a) states that fish may be harvested primarily for food on behalf of another person “subject to regulations adopted by the Board of Fisheries.” The beneficiary receiving the fish must be “a person with physical or developmental disabilities, or a person who is 65 years of age or older.”

Proposals 165 and 166: Proposal 165 would create a new food and bait fishery which would harvest herring remaining from the commercial sac roe GHL. Proposal 166 would create an open pound herring spawn on kelp fishery in Sitka Sound.

The Board has general authority over fishing means and methods, but the Board does not have the authority to limit access to a fishery. The Commercial Fisheries Entry

Commission does have authority to limit access to a fishery to a restricted class. The CFEC also has authority to issue restricted capacity limited entry permits for new limited entry fisheries in order to limit the amount of effort in a fishery.

Law has consistently advised that in cases where action by the Board within its authority may also affect matters within the CFEC's authority, such as action on proposals to allow additional fishing opportunities for permit holders in overlapping administrative areas, a separate CFEC regulatory proceeding may be advisable to determine whether CFEC regulatory changes are needed.