

MEMORANDUM

State of Alaska

Department of Law

TO: Art Nelson
Executive Director
Alaska Board of Fisheries

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FILE NO.: 2022200304

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SUBJECT: Department of Law comments
on proposals for the January 14,
2023 - January 18, 2023 Board
of Fisheries meeting.

The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at its January 14, 2023 - January 18, 2023 Board of Fisheries meeting for Arctic/Yukon/Kuskokwim finfish:

Proposals 69, 70, 72, and 75: These proposals relate to fishing for Arctic grayling. Board members should thoroughly review the Wild Arctic Grayling Management Plan, codified at 5 AAC 52.055, and ensure that the standards outlined in the plan have been considered on the record in any proposal dealing with Arctic grayling management.¹

Proposal 77: This proposal seeks to implement an optimal escapement goal. There are three types of escapement goals: sustainable escapement goal (SEG), biological escapement goal (BEG), and optimal escapement goal (OEG). The policy for the management of sustainable salmon fisheries and the policy for statewide salmon escapement goals (5 AAC 39.223) state that BEGs and SEGs, along with sustainable escapement thresholds (SETs), will be determined by the department.

The escapement goal policy and the sustainable salmon fisheries policy give the Board authority to establish OEGs. "Optimal escapement goal" is defined in the sustainable salmon fisheries policy as a specific management objective for salmon

¹ Similarly, the Board should review and consider standards in any area specific management plans such as plans for wild lake trout (5 AAC 52.060) and stocked waters (5 AAC 52.065).

escapement that (a) considers biological and allocative factors and may differ from the SEG or BEG, (b) may be expressed as a range with the lower bound above the level of sustainable escapement threshold, (c) will be sustainable, and (d) will be adopted as a regulation by the board. 5 AAC 39.222(f)(25).

In 5 AAC 39.223(c) the escapement goal policy states that in recognition of its joint responsibilities, and in consultation with the department, the board will:

- (1) take regulatory actions as may be necessary to address allocation issues arising from implementation of a new or modified BEG, SEG, and SET;
- (2) during its regulatory process, review a BEG, SEG, or SET determined by the department and, with the assistance of the department, determine the appropriateness of establishing an optimal escapement goal (OEG); the board will provide an explanation of the reasons for establishing an OEG and provide, to the extent practicable, and with the assistance of the department, an estimate of expected differences in yield of any salmon stock, relative to maximum sustained yield, resulting from implementation of an OEG.

Law has regularly recommended that the Board act consistently with its policy regulations when it considers escapement goal proposals. If the Board chooses to specify a BEG or SEG in regulation, it should explain its reasoning for doing so. Also, while the Board and Department are not confined to using the types of escapement goals defined in the policies, it is best to use defined goals to avoid confusion unless the new goal and the reasons for using it are explained.

Proposal 79: This proposal would allow “hook and line attached to a rod or pole” to the gear that may be used for subsistence fishing in some parts of the Nulato and Koyukuk Rivers. The subsistence statute requires that subsistence fishing regulations provide a reasonable opportunity to harvest fish. The board has the discretion, but is not mandated, to consider the traditional methods of taking subsistence fish resources.

“Customary and traditional” is defined as “the noncommercial, long-term, and consistent taking of, use of, and reliance upon fish or game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time taking into consideration the availability of the fish or game.” AS 16.05.940(7) Conspicuously absent from that definition is any reference to methods of take.

Proposal 80: This proposal would reduce the subsistence king salmon harvest on the middle and upper Yukon River. For proposals affecting subsistence fisheries the Board should consider whether adoption of the proposed regulation would provide a reasonable opportunity for subsistence 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.

This proposal seeks to reduce subsistence harvest. 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).²

Proposal 94: This proposal seeks to prohibit harvest of chum salmon by nonresident anglers in the Kanektok River from June 1 to July 15. While the board is authorized to allocate between resident and nonresident sport fishing in favor of residents, that is usually done on a fishery-by-fishery basis with a record that explains the need for a resident preference. The board should articulate for the record a rationale justifying the prohibition of nonresident fishing, such as the possibility that the available harvestable surplus is not sufficient to meet expected resident demand.

² 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.”)