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February 20, 2023

Doug Vincent-Lang, Commissioner
Alaska Department of Fish and Game
P.O. Box 115526
Juneau, AK 99811-5526

RE: Proposal #140, ADF&G Staff comments
Board of Fisheries, Alaska Peninsula / Chignik meeting, February 20-25, 2023

Dear Commissioner Vincent-Lang:

I have serious concerns regarding the Alaska Department of Fish and Game comments on Proposal #140 currently before the Alaska Board of Fisheries for the Alaska Peninsula/Chignik meeting. That proposal was written by the Fairbanks Fish and Game Advisory Committee (FAC) and is widely supported throughout the AYK region.

I ask that you reconsider your preliminary position that Proposal #140 is allocative and therefore the Department remains neutral. The Department should know the Board cannot allocate between a commercial fishery and a subsistence fishery unless the subsistence fishery provides a reasonable opportunity.

The law is clear. The board may only "allocate" a stock or population among sport, guided sport, personal use, and commercial uses. Subsistence use is the priority use and if a stock cannot provide reasonable opportunity for subsistence use, all other uses must be eliminated.

5 AAC 39.220(a) provides:

In applying this statewide mixed stock salmon policy for all users, conservation of wild salmon stocks consistent with sustained yield shall be accorded the highest priority. Allocation of salmon resources under this policy will be consistent with the subsistence preference in AS 16.05.258

Alaska Stat. § 16.05.258(b)(4)(A) provides:

[I]f the harvestable portion of the stock or population is not sufficient to provide a reasonable opportunity for subsistence uses, the appropriate board shall

(A) adopt regulations eliminating consumptive uses, other than subsistence uses.

The Area M mixed stock fishery has been subject to prior litigation. In a case where the Commercial side sued the State, the court held:

The legislature specifically omitted subsistence use from the list because of the statutory priority given that use; the allocation criteria of section 251(e) would not apply to decisions involving subsistence uses.¹

In 1999 The Native Village of Elim sued the State over failing chum runs in Norton Sound. At that time, unlike now, there was no scientific evidence that any Area M chum were heeded to Norton sound and the subsistence ANS for Norton sound included all salmon.

In that case, the supreme court rejected the state's argument that the Norton Sound chum stock could not be managed hundreds of miles away in the Area M fishery.²

Proposal 140 addresses the lack of any subsistence opportunity for AYK Chum. It does not mention, nor can it be interpreted as seeking to allocate chum for any commercial, personal use, or sport fishing uses. It proposes a restriction, not the elimination, of the June commercial use of this same stock in Area M.

There is no dispute that this mixed stock fishery harvests AYK Chum in significant numbers, especially during June.

The board findings related to the Mixed Stock Policy include:

The Board determined in section (a) of the policy that mixed stock salmon fisheries management should be fully consistent with the statutory preference for wild stock conservation, and accorded it the highest priority consistent with sustained yield. The Board also determined that nothing in this policy development was intended to diminish in any way the subsistence preference.³

In 2022 alone, despite voluntary measures, the commercial fleet harvested 96,116 chum bound for CWAK, according to the ADFG comments. While CWAK includes other rivers, no one can doubt that a significant percentage of these fish were bound for the Yukon and Kuskokwim rivers. The report that was just (quite unfairly) dropped on 2/17 shows in figure 21 that Area M harvested more Yukon Fall chum in June than did subsistence users on the Yukon, who only caught them incidentally.

If the Board agrees, as it must, that the AYK stock of chum has not, and is not expected to soon provide a reasonable opportunity for subsistence use, then Proposal #140 cannot be considered allocative. The Board cannot legally allocate

¹ Peninsula Mktg. Ass'n v. State, 817 P.2d 917, 921 (Alaska 1991).

² Native Vill. of Elim v. State, 990 P.2d 1, 8 (Alaska 1999).

³ Finding # : 93-07-FA.

any portion of a subsistence stock not providing a reasonable opportunity for subsistence to a commercial fishery. It must first provide a reasonable opportunity for subsistence, before any other use can even be considered.

Proposal #140 seeks to restrict the commercial harvest of a stock not meeting ANS. You cannot say it is allocating fish from the commercial fishery to the subsistence fishery. The subsistence priority law requires that, and ADF&G is bound by that law. It cannot be neutral when the allocation is from a commercial fishery to a subsistence fishery not meeting ANS. It should be clear that Proposal #140 is a conservation issue, as stated in the proposal.

We learned from the study released today on the 2022 chum harvest that the Area M harvest of Yukon fall chum was 1,693 and the subsistence harvest of this stock was 1,577 which included fish caught in the ADFG test fishery. That stock did not come anywhere close to meeting escapement goals or ANS.

"The Board has set the ANS for Yukon Area summer chum salmon at 83,500–142,192 fish; for Yukon Area fall chum salmon at 89,500–167,900 fish; and for Kuskokwim River drainage chum salmon at 41,200–116,400 fish. Subsistence harvest data for 2022 are not yet available. Preliminary subsistence harvest data for 2021 indicate that these ANSs have not been met."

The statement about not being sure if ANS was met in 2021 and 2022 is misleading at best. You know the 2021 subsistence numbers are final and ANS was not met. Not even close. The 2022 numbers are almost final and include the ADFG test fishery harvest. Incidental catch of summer chum in subsistence fisheries for other types of fish was less than 6,000 chum. That is a small fraction of the minimum ANS of 89,500. ADFG knows there was no targeted Salmon fishery and that the fish caught were caught incidentally while subsistence fishing for other species.

If you continue to maintain a neutral position, please be prepared to explain how a proposal that would undoubtedly boost Yukon escapement and provide more opportunity to meet ANS is allocative.

The law requires you to allocate all Yukon and Kuskokwim Chum to the subsistence fishery and eliminate all other uses until a reasonable opportunity to meet ANS has been achieved. Proposal 140 is a compromise that merely restricts commercial harvest opportunity in June when most AYK chum stocks pass through. Until a reasonable opportunity for subsistence use can be provided, no restriction on commercial harvest can be considered allocative.

I look forward to your response and the finalized ADFG position.

Thank you for your consideration.

Sincerely,

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CC: Members, Alaska Board of Fisheries