

MEMORANDUM

STATE OF ALASKA

Department of Law

To: Glenn Haight
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Alaska Board of Fisheries
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Executive Director
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Subject: **Comments on Specific
Proposals Scheduled for
October 12-16, 2013 Joint
Boards of Fisheries and Game
Meeting**

The Department of Law has the following comments on certain of the proposals to be considered by the Joint Boards of Fisheries and Game at the October 12-16 Meeting on Advisory Committee and Non-subsistence-Area issues:

Proposal 11: This proposal would effectively add another qualification requirement for committee membership (knowledge of and experience with the Alaska Constitution, Alaska Statutes, and administrative code) to 5 AAC 96.040 and give sitting AC members the power to determine those qualifications, rather than those who vote in AC elections, as is now the case. The sitting AC members would interview new candidates to see if they qualify for membership by displaying knowledge and experience with local fish and game resources and uses and with the Alaska Constitution,¹ statutes, and regulations, and having “reputation within the community consistent with the responsibilities of community membership.”

This proposal raises concerns about the lack of specificity regarding what the requirements would be and how meeting them would be determined. If the Joint Board is interested in adopting the concept, it should consider adopting some uniform criteria or testing standards to ensure all committees apply reasonable, objective requirements in a consistent and fair manner. The Joint Board also should consider whether there are alternatives that might be less susceptible to subjectivity or bias, such as a minimum qualifications review by board support staff or an educational booklet that AC candidates would be required to certify they have read. The Joint Board should be careful to avoid

¹ See discussion of constitutional concerns under Proposal 14.

potential claims that standards or their application to exclude candidates are arbitrary and capricious.

Proposal 12: This proposal would provide, among other things, that advisory committee members would be appointed by the commissioner and repeal provisions of 5 AAC 96.060(e) that currently provide for the election of advisory committee members by the residents of the committee area. The Joint Board should consult with the commissioner as to whether this is a function she would undertake. The boards have no administrative, budgeting, or fiscal powers over the department and cannot direct the commissioner or the department to undertake the review of candidates' qualifications and appointment of committee members.

Proposal 13: This proposal would authorize declaration of a vacancy on a committee if a member has failed to respond to committee discipline, effectively authorizing permanent removal of a member by the committee, instead of by the Joint Board, as now authorized in 5 AAC 96.060(n). If the Joint Board were to adopt this regulation, it should consider providing for an appeal process for removed members to afford constitutional due process.

Proposal 14: One part of this proposal would require committees to perform their directed functions in accordance with the Alaska Constitution, statutes, regulations, and other applicable policy required by the Joint Board or individual boards. All state entities are already required to comply with laws applicable to their operations and authorities, so it is doubtful that this would add anything to existing requirements. It is particularly unclear what constitutional provisions would be involved. For example, the committees generally only act in an advisory capacity and have no power to exclude any person from hunting or fishing, so the equal access clauses of the Alaska Constitution would not be implicated by committee actions. Even in the initiation of emergency closures of hunts and fisheries, the committees have no authority to bar admission to any user group, and any closure would already be required to be consistent with sustained yield principles. See 5 AAC 97.010(c). The usefulness of this provision and any constitutional reference is questionable.

Proposal 17: This proposal arose as a consequence of recent litigation involving a committee's request to the Joint Board for removal of a committee member and allegations about the deficiency of, and failure to submit to the Joint Board, committee meeting minutes. The Department of Law supports adoption of this proposal because it clarifies the removal process and affirms committee authority to impose disciplinary measures on members. Individual boards are also given the discretion to supervise committees' submission of minutes. This is intended to avoid similar issues being the subject of litigation.

Proposal 18: One part of this proposal would establish as grounds for removal for cause “disregard for or violation of the Alaska’s Constitutional requirement to manage for Sustained Yield or failure to follow 5 AAC 92.106 or 5 AAC 92.108.” 5 AAC 92.106 is the Board of Game regulation that sets criteria and assigns significance to certain factors the Board will consider in implementing the intensive management statute, AS 16.05.255(e)-(g). 5 AAC 96.108 is the Board of Game regulation that classifies big game prey populations as being subject to requirements of the intensive management statute. This proposed reason for removal appears to be irrational because individual citizens are not in a position to “manage for sustained yield” or implement the intensive management statute. The Department of Law recommends against adoption of this provision because all regulations must be reasonably calculated to achieve a proper state purpose and not be arbitrary or capricious.

Another part of this provision would provide that good cause for removal includes “making dilatory or frivolous motions” or “using parliamentary or non-parliamentary forms with the evident intent of obstructing Advisory Committee business.” The Joint Board should consider whether this is a workable standard, since it would be receiving and deciding requests for removal based on this standard, subject to possible appeal to the courts.

Proposal 19: This proposal would require a committee chair or vice-chair to have served a minimum amount of time on the committee before assuming office. A waiver can be requested from the “chairman of the Joint Boards” if no committee member meets that service time requirement. But there is no standing “chair” of the Joint Board. If the Joint Board wishes to adopt this proposal, it should amend the proposal to provide for a waiver from the chairs of each board.

Proposal 20: See comments on Proposals 18 and 19.

Proposal 21: The proposal would require new members to demonstrate knowledge of legal provisions and board procedures, but does not say how. More specificity is required for a valid, enforceable regulation. See also comments on Proposal 11.

Proposal 23-24: These proposals seek to shift the responsibilities of the former regional councils (RC) to local advisory committees. The Joint Board should be aware that, under the regional council system, there were only six regional councils made up of representatives from each local advisory committee in defined geographic regions of the state. 5 AAC 96.210. The limited number and concentrated nature of the RC’s made it more feasible for the department to devote a certain amount of resources to assist the RC’s. In addition, federal funding was available under ANILCA to subsidize the RC program. No such funding is available today. Proposals that would contemplate that the

same level of resources formerly devoted to six RC's now be given to each of more than 80 AC's may be problematic given department staffing and budgets.

Proposal 23 also assigns many new duties to AC's. In the current RC regulation, 5 AAC 96.250, some these items (such as identifying and evaluated current and anticipated future subsistence and other uses and needs for use of fish and wildlife and recommending management strategies and policies, standards, guidelines and regulations to implement the strategies) presently are to be in annual reports from the RCs to the Joint Board, Department, and U.S. Secretary of the Interior, rather than requirements for interactions with the boards or the department. So the proposal language, as written, would take the AC's functions even beyond the charges to the former RC's.

Proposals 28-29: These proposals would require the boards to allow participation by AC representatives during board deliberations on regulatory proposals. The Department of Law's concern is the integrity of the board deliberation process. To establish a proper administrative record, those with the power to vote need to explain their understanding of the issues and the rationale for their votes during board deliberations. Even the department's role during deliberations is to answer questions and explain the facts, not to deliberate. There is the potential for an unwieldy process and a confusing record if numerous ACs are participating during the deliberations on a statewide or other broadly-applicable proposal. If the Joint Board decides to adopt these proposals, it or the individual boards should frame guidelines to ensure an administrative record that is not confusing and clearly reflects the board members' explanations and rationales, and does not rely on AC representatives' comments as a substitute for adequate record-building. It should also ensure that the AC representative only speak to positions adopted by their AC's as a whole.

Proposals 33-34: These proposals would effectively require harvest reports for all subsistence fishing and hunting and require the boards to base determinations of amounts reasonably necessary (ANS) for subsistence on reported harvest by subsistence users of the stock or population, in the case of Proposal 33, on five years of reported harvest. If adopted, this proposal would require immediate action by both boards to require subsistence harvest reports for all hunts and fisheries, and the review of all, and likely amendment of most, current ANS determinations. This subject may be more proper for each individual board rather than the Joint Board.

Under current statutes and regulations, each board is left to determine how to make determinations on the amount of the harvestable portion of a C&T stock or population that is reasonably necessary for subsistence uses. AS 16.05.258(b). While it might be argued that uniformity between board practices is worthwhile, there is no obvious legal requirement or reason for the Boards to take up this issue jointly. If these proposals are adopted as regulation, both boards would be required to comply with it as written until

amended by the Joint Board at a future meeting. If the proposals are not adopted, either board could impose or amend the same or similar requirements independently.

The boards also should keep in mind that they have no administrative, budgeting, or fiscal powers over the department, and cannot require the department to collect and compile harvest data for all fish stocks and game populations in any particular manner or on any particular time frame. If the Joint Board were to adopt this proposal, it may consider allowing alternative approaches if a board determines there is insufficient reliable harvest data available for a particular stock or population on which to base the ANS determination.

Proposal 35: This proposal would define the term “nonsubsistence harvest” as “fish stocks and game populations taken by nonresidents and aliens.” The application would come in the restriction or elimination of such harvests to as required before restriction of subsistence uses under 5 AAC 99.010(c).

This definition would be inconsistent with the subsistence statutes. The term “nonsubsistence harvest” necessarily includes all harvests of fish or game not taken for subsistence uses, as that term is defined in AS 16.05.940(33),² which are limited to “customary and traditional” uses of fish or game. To be consistent with statute, the term would have to include harvest by Alaska residents in hunts or fisheries opened under other than subsistence regulations, where harvest could not be classified as subsistence uses, such as sport, personal use, or commercial fishing, or general hunting. It would also have to include all harvest of fish or game in “nonsubsistence areas,” as required by AS 16.05.258(c): “The boards may not permit subsistence hunting or fishing in a nonsubsistence area.”

Proposal 36: The Department of Law supports this proposal, which would remove paragraph (c)(2) from 5 AAC 99.010 because the Alaska Supreme Court has ruled that using the factor of “the proximity of the user’s domicile to the stock or population” in Tier II rankings is unconstitutional. *State v. Kenaitze Indian Tribe*, 894 P.2d 632, 639-39 (Alaska 1995).³ This would eliminate the confusion that remains with the current language being left in regulation, even though it cannot be used by the boards.

Proposal 38: This proposal suggests repealing all nonsubsistence areas because they are “no longer necessary.” The Joint Board has no authority to repeal all subsistence areas on that ground. AS 16.05.258(c) affirmatively charges the Joint Board to identify

² See statutory definitions of “subsistence fishing” and “subsistence hunting,” which refer to the taking of fish or game “of subsistence uses.” AS 16.05.940(31), (32).

³ The Court struck down the nearly identical language in AS 16.05.258(b)(4)(b)(ii).

nonsubsistence areas “where dependence upon subsistence is not a principal characteristic of the economy, culture, or way of life of the area or community” and lists thirteen criteria that must be considered. The Joint Board has previously identified the nonsubsistence areas in 5 AAC 99.015, based on application of those criteria. The Joint Board could not, consistent with the statute, repeal those regulatory decisions without reevaluation of the best available information relative to the criteria. The proposal offers no information supporting such a reevaluation. A blanket repeal of all nonsubsistence areas without consideration of the thirteen criteria would be inconsistent with AS 16.05.258(c).

Proposal 39: This proposal would reduce the size of the Fairbanks Nonsubsistence Area (FNA) by excluding those areas within the normal range of the Fortymile caribou herd. The proposal seems to argue that the current FNA boundary is somehow inconsistent with the subsistence statute if a game population with a positive C&T finding comes within the boundary or if current hunting regulations or permits allow subsistence caribou hunting within the FNA. Current hunting regulations provide for a single registration permit that satisfies both subsistence and nonsubsistence harvest, but does not authorize “subsistence hunting” within the FNA, which would be inconsistent with AS 16.05.258(c). The fact that a C&T population may come within the FNA boundaries does not require adjustment of those boundaries; rather, the Joint Board would have to evaluate the areas in question under the thirteen statutory criteria.