

# MEMORANDUM

STATE OF ALASKA

*Department of Law*

To: Jim Marcotte  
Executive Director  
Alaska Board of Fisheries

Date: November 19, 2008

File No.: 661050436

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From: <sup>S.D. [Signature]</sup> Steven Daugherty & Lance Nelson  
Assistant Attorneys General  
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Subject: **General Comments for  
Regulatory Meetings During  
2008 – 2009 Cycle.**

This memorandum presents updated advice on general legal requirements that Board members should be aware of when adopting regulations. No changes to the Board's authorities were enacted during the 2008 legislative session.

**Ethics disclosures.** To comply with AS 39.52, Board members must disclose personal and financial interests, and the chairman must make determinations about potential or actual conflicts that are substantial and material. This may be done at the beginning of the meeting or any time before deliberations. A board member may not receive any kind of gift under circumstances that could be reasonably be inferred to influence a member's performance of official duties; any gift or gifts of more than \$150 in value must be reported to the chair. (AS 39.52.130(a)-(b). Any gift from a person required to register as a lobbyist under AS 24.45.041 is presumed to be intended to influence the performance of official duties.

**Record-making and "costs."** It is important that Board members carefully explain on the record the reasons for the Board's actions and the factual and policy grounds on which the actions are based. The Alaska Supreme Court has stressed the importance of a clear record to show that Board actions are within the bounds of statutory authority and are reasonable. The Department of Law encourages Board members to summarize their reasons for each action on the record. Special attention should be given to past practices. If a particular action does not appear consistent with the Board's past action, Board members should discuss the reasons for the change.

The Administrative Procedure Act requires the Board to "pay special attention to the cost to private persons of the proposed regulatory action."<sup>1</sup> This requires that costs to private persons be one of the factors explicitly discussed during deliberations. Any

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<sup>1</sup> AS 44.62.210(a).

reasonably significant costs to private persons should be acknowledged and discussed, including indirect costs, such as loss of harvest opportunity.

Consideration of costs is a procedural requirement, not a substantive one. Essentially, the statute requires that costs to private persons be considered and documented as a necessary aspect of informed decision-making; it does not require that regulatory proposals be rejected if they would impose a cost to private persons. In adopting a regulation that does impose a cost to private persons, the Board may find that the cost is insubstantial, that costs are balanced by public or private benefits that will accrue in the future, that it is necessary for conservation or development, or that it is part of a reasonable allocation plan.

**Open Meetings.** Meetings of the Board must be open to the public.<sup>2</sup> By statutory definition, a meeting includes any gathering of four or more Board members when a matter on which the Board may set policy or make a decision is considered.<sup>3</sup> To avoid the appearance of a violation of the Open Meetings Act, we recommend that Board members avoid gathering in groups of four or more. Social gatherings of Board members do not need to be open to the public so long as Board business is not discussed.

Prearranged meetings of committees of the Board are also subject to the Open Meetings Act, even when the committee is composed of only two Board members and the committee has only advisory powers.<sup>4</sup> Accordingly, deliberations of a committee should take place at a meeting that is open to the public, and recommendations of the committee as a whole should be traceable to either deliberations that occurred in the open committee meeting or individual submissions by committee members. Board members may work jointly to prepare a committee report, and that work does not need to be open to the public. Report preparations, however, should not be planned as a time for non-public deliberation among Board members.

**Allocation.** When allocating fishery resources among nonsubsistence uses, the Board must apply the statutory allocation criteria.<sup>5</sup> The Alaska Supreme Court has held that the statutory 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 recently held that the Board may not allocate “within” a particular fishery (same gear and same administrative area). If the Board were to identify commercial setnet fishing and commercial drift net fishing as different fisheries, for example, it

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<sup>2</sup> AS 55.62.310(a).

<sup>3</sup> AS 44.62.310(h)(2)(A).

<sup>4</sup> AS 44.62.310(h)(1), (2)(A).

<sup>5</sup> AS 16.05.251(e).

would be necessary to discuss the allocation criteria when allocating between those two subgroups, similarly the Board would be required to discuss the allocation criteria when allocating between two drift net fisheries in different areas, however the Board may not allocate between drift net fishers fishing in the 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, we recommend that the allocation criteria be reviewed on the record.

If the Board does not believe that a proposal has any support and does not wish to discuss the allocation criteria with regard to a proposal a motion may be made to take no action on the proposal rather than to adopt the proposal. 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 (a Board member may also move to take no action based on action on a prior related proposal).

**Guiding Principles.** For some fisheries and stocks, the Board has adopted guiding principles,<sup>6</sup> it has also adopted regulations excluding some areas from these guiding principles.<sup>7</sup> We recommend that the Board, as a matter of practice, expressly address applicable guiding principles on the record when considering regulatory proposals for these fisheries and stocks. We also recommend that the Board carefully evaluate whether adoption or maintenance of guiding principles in regulation is warranted recognizing that failure to address or comply with a guiding principle may result in a court invalidating a Board regulation unless the Board carefully explains its deviation. A Board cannot bind a future board to a particular course of action, thus the Board may adopt regulations inconsistent with any guiding principles or management plans so long as it fully explains the rationale for its action and its deviation from the principles or plan. Although guiding principles and other provisions that purport to restrict the actions of future Boards are generally ineffective in limiting the Board's discretion they create procedural hoops that may serve as bases for legal challenges to Board actions.

**Sustained yield.** The Alaska Constitution provides that fish and all other replenishable resources belonging to the State "shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial

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<sup>6</sup> See, e.g., 5 AAC 28.089 (groundfish).

<sup>7</sup> See, e.g., 5 AAC 28.089(b)(Eastern Gulf of Alaska).

uses.”<sup>8</sup> The Alaska Supreme Court has held that the provision “requires resource managers to apply sustained yield principles” but “does not mandate the use of a predetermined formula, quantitative or qualitative.”<sup>9</sup>

For salmon, 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.”<sup>10</sup> A checklist to assist Board members in application of the policy should be included in the Board workbooks for each meeting where salmon proposals are scheduled.

The Board has also adopted a “Policy for the management of sustainable wild trout fisheries at 5 AAC 75.222. 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 wild trout management.”<sup>11</sup>

There is no express statutory or regulatory definition of sustained yield for other fisheries.

We recommend that the Board, as a matter of practice, expressly address applicable provisions of the sustainable salmon and wild trout policies on the record when considering applicable fisheries. The Board may adopt regulations inconsistent with those policies, but should expressly note when it is doing so and explain its rationale for doing so. We also recommend that the Board carefully evaluate whether adoption or maintenance of these policies in regulation is warranted, recognizing that failure to address or comply with these policies may result in a court invalidating a Board regulation.

If the Board does not believe that a proposal has any support, and significant new information calling into question the compliance of the existing plan with the sustainable salmon policy or sustainable wild trout policy has not been received, a motion may be

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<sup>8</sup> Alaska Const. art. VIII, § 4.

<sup>9</sup> *Native Village of Elim v. State*, 990 P.2d 1, 6 (Alaska 1999).

<sup>10</sup> 5 AAC 39.222(f).

<sup>11</sup> Similarly the Board should review and consider standards in any area specific management plans such as plans for grayling (i.e. 5 AAC 52.055), wild lake trout (i.e. 5 AAC 52.060) and stocked waters (i.e. 5 AAC 52.065).

made to take no action on the proposal rather than to adopt the proposal. Where more than one proposal will have similar effects, Board members may incorporate by reference their discussion of the applicable policy with regard to a prior proposal (a Board member may also move to take no action based on action on a prior related proposal). The Board may also consider adoption of regulations exempting stocks in certain areas from the policies as it has done with its groundfish guiding principles.

**Subsistence.** If information before the Board indicates that a proposal would affect subsistence uses of fish, the Board should ensure that adoption of the proposed regulation would still allow a reasonable opportunity for subsistence uses of the amount of fish reasonably necessary for those uses. “Reasonable opportunity” means an opportunity “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.”<sup>12</sup> The Board could base its determination of reasonable opportunity on information pertaining to the subsistence harvest levels of the fish stock in the specific area, bag limits, seasons, access, and gear necessary to achieve the harvest.

Unless it has done so previously, the Board, when considering a proposal that would affect subsistence, should: (1) identify whether the fish stock or portion of fish stock at issue is customarily and traditionally taken or used for subsistence, (2) determine whether a portion of the fish stock may be harvested consistent with sustained yield, (3) determine the amount reasonably necessary for subsistence uses, and (4) adopt regulations to provide a reasonable opportunity for subsistence uses.<sup>13</sup> The Board has adopted regulatory criteria that should be followed when making customary and traditional use determinations.<sup>14</sup> In applying the regulatory criteria, the Board is not necessarily required to determine that every single criterion is satisfied, but makes a decision based upon the totality of the evidence. The Supreme Court has held that it is not necessary to find familial relationships among current users and prior generations.<sup>15</sup>

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

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<sup>12</sup> AS 16.05.258(f).

<sup>13</sup> The subsistence statute is AS 16.05.258.

<sup>14</sup> 5 AAC 99.010(b).

<sup>15</sup> *Payton v. State*, 938 P.2d 1036, 1043 (Alaska 1997).

uses, the Board must eliminate nonsubsistence consumptive uses and distinguish among the subsistence users based on the Tier II criteria.<sup>16</sup>

**Fair and reasonable opportunity.** Regulations adopted for the purposes set forth in AS 16.05.251(a), consistent with sustained yield and the subsistence law, must also “provide a fair and reasonable opportunity for the taking of fishery resources by personal use, sport, and commercial fishermen.”<sup>17</sup> That requirement, however, does not prevent the Board from allocating resources among user groups. The Board may make a particular species in a particular area available to one user group without making the same species or area available to another user group.<sup>18</sup> If there is any question as to whether action on a proposal could deprive a user group of a “fair and reasonable opportunity” Board members should discuss this issue and provide their reasoning as to whether the proposal would provide such opportunity.

**Guided and unguided sport fish.** The Board may regulate and allocate to guided sport fisheries separately from other sport fisheries.<sup>19</sup> As with other regulations, guided sport fish regulations must serve the purpose of conservation or development of Alaska’s fishery resources. The Board may require registration, reporting, and operational standards for guides when necessary to make restrictions on guided sport fishers enforceable, or for other conservation and development purposes. The Board may regulate fishing by guides while guiding clients. The Board may also indirectly regulate guides through methods and means and time and area requirements for guided sport fishers. For example, the Board may place restrictions on the number of clients aboard a guide’s vessel or the amount of gear that may be fished from the vessel.

The Board may also adopt regulations requiring the timely submission of reports by sport fishing guides, including the amount of fishing effort, the locations fished, and other regulations necessary to implement the statute governing the collection of information from sport fishing guides.<sup>20</sup> In this area, both the department and the Board have regulatory authority, and coordination of the regulations is advisable.

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<sup>16</sup> AS 16.05.258(b)(4)(B)(i), (iii). The Board may not consider the criteria in clause (ii), proximity of domicile to the fish stock, because it is unconstitutional. *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995).

<sup>17</sup> AS 16.05.251(d).

<sup>18</sup> See *Kenai Peninsula Fisherman’s Coop. Ass’n v. State*, 628 P.2d 897, 904 (Alaska 1981).

<sup>19</sup> AS 16.05.251(a)(6), (12), (e).

<sup>20</sup> AS 16.40.280(b), (f).

**Ecotourism Fisheries:** There are no statutes dealing expressly with ecotourism fisheries, however the Board's general authorities over the conservation and development of fisheries give it authority to create and regulate these evolving fisheries. During the 2007-2008 regulatory cycle the Board considered several ways to deal with ecotourism fisheries based on both commercial fishery and guided sport fishery models. The Board decided in 2008 to use its general authorities under AS 16.05.251 over conservation and development of fisheries, along with its express authority under AS 16.05.940(14) over definition of fisheries, and its authorities over guided sport fishing (AS 16.05.260, AS 16.05.270), to create and regulate a new category of fishery, "guided sport ecotourism fishing." The basic framework regulations adopted by the Board are found at 5 AAC 75.085 and temporary regulations, sunsetting before the 2009 season, specific to a superexclusive George Inlet guided sport ecotourism Dungeness crab fishery are found at 5 AAC 47.090. In 2007, the Board adopted ecotourism fishery regulations, although not expressly designated as such, using a commercial fishing model in Bristol Bay. (5 AAC 06.390).

When considering ecotourism fishery regulations, the Board should be careful to establish a record thoroughly explaining its decisions and the fishery conservation or development purposes of the regulations. The Board does not have fee authority and does not have authority to change or waive commercial or sport fishery license requirements established by statute where the activities involved in ecotourism fishing fall within the definitions of commercial or sport fishing. If the Board determines that existing authorities and license requirements do not fit well with evolving ecotourism fisheries it may wish to seek legislative changes to better accommodate these fisheries.

**Mixed stock policy.** The mixed stock policy adopted by the Board provides generally that the conservation of wild salmon stocks consistent with sustained yield shall be accorded the highest priority, and that allocation of salmon resources will be consistent with the statutory subsistence preference and the regulatory allocation criteria.<sup>21</sup> The policy expresses the Board's preference in assigning conservation burdens in mixed stock fisheries through the application of specific fishery management plans set out in the regulations.<sup>22</sup> In the absence of a regulatory management plan, and when it is necessary to restrict fisheries due to known conservation problems, the policy provides for the burden of conservation to be shared among all fisheries in close proportion to their respective harvest on the stock of concern.<sup>23</sup> The policy also calls for the restriction of new or expanding mixed stock fisheries unless otherwise provided for by management plans or by application of the Board's allocation criteria.<sup>24</sup>

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<sup>21</sup> 5 AAC 39.220(a).

<sup>22</sup> 5 AAC 39.220(c).

<sup>23</sup> 5 AAC 39.220(b).

<sup>24</sup> 5 AAC 39.220(d).

**Gear Stacking.** Under AS 16.05.251(i), during a regularly scheduled meeting for a specific salmon fishery, the Board may adopt regulations allowing a person who holds two entry permits for that fishery additional fishing opportunity. The Board does not have the authority to authorize permit stacking in non-salmon fisheries where holding of multiple permits for the same fishery is statutorily prohibited under AS 16.43.140.

**Salmon Enhancement.** The Board and Department both have authorities relating to salmon enhancement. Generally, the Department has primary authority over hatchery permitting and associated issues relating to salmon production and cost recovery. *See* AS 16.10.400 – 16.10.430. The Board “may not adopt any regulations or take any action regarding the issuance or denial of any permits required in AS 16.10.400 – 16.10.470.” The Board has management authority over both wild and enhanced stocks under AS 16.05.730 which requires management to be consistent with sustained yield of wild stocks but gives the Board discretion regarding whether enhanced fish stocks will be managed for sustained yield. The Board may exercise indirect authority over hatchery production by regulating the harvest of hatchery-released fish, by regulatory amendment of portions of hatchery permits relating to the source and number of salmon eggs, harvest by hatchery operators, and locations for harvest. AS 16.10.440(b). However, the Board is probably not authorized to take action that effectively revokes or prevents issuance of a permit. *See* 1997 Inf. Op. Att’y Gen. (Nov. 6; 661-98-0127). The Board and the Department have entered into a Joint Protocol on Salmon Enhancement (2002-FB-215) which provides an opportunity for the Board and the Public to receive updates from the Department and for the Board and Department to discuss hatchery issues at mutually agreed upon times during regularly scheduled Board meetings. Joint protocol salmon enhancement meetings are non-regulatory, and ACR’s are not considered as action items in these meetings.

**Interaction of Board and CFEC regulations.** The Board has general authority over fishing means and methods, but not to limit access to a fishery to a restricted class of persons.<sup>25</sup> The Commercial Fisheries Entry Commission does have authority to limit access to a fishery to a restricted class.<sup>26</sup> 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.<sup>27</sup> The CFEC cannot authorize the use of a type or quantity of gear (including vessels) prohibited by the Board; however, under restricted capacity limited

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<sup>25</sup> The Board can, however, adopt exclusive or superexclusive registration areas, forcing individuals or vessels to choose between participation in a fishery in one area or in another area or areas. AS 16.05.251(a)0(14); *see, also, State v. Herbert*, 803 P.2d 863 (Alaska 1990).

<sup>26</sup> *See generally* AS 16.43.

<sup>27</sup> AS 16.43.270(d).



entry permits, some permit holders may be subject to a maximum gear limitation that is lower than the limit set by the Board. Under a recent change to the Board's authority at AS 16.05.251(i), the Board may provide additional fishing opportunity to those holding a second permit in a particular salmon fishery. A recent Alaska Supreme Court decision indicates that Board regulations must be consistent with the letter and intent of the provisions of the Limited Entry Act.

**Residency.** The Board should not use state residency as a criterion for participation in a commercial fishery.<sup>28</sup> The Legislature has authorized the Board to regulate resident or nonresident sport fishermen as needed for the conservation, development, and utilization of fishery resources,<sup>29</sup> and noncommercial regulations differentiating between residents and nonresidents have been upheld as constitutional.<sup>30</sup> The Board should carefully consider sport fishing regulations that would differentiate users based on residency. Before adopting such a regulation, the Board should identify a conservation or development concern, and determine that the restriction is designed to address the concern without imposing unreasonable limitations on nonresidents. Discrimination against nonresidents should not be the sole purpose of a regulation. Maintaining or increasing sport fishing opportunity for residents, however, could in some circumstances be a legitimate basis for restricting sport fishing opportunity for nonresidents.

**Petitions.** The Board has adopted a regulation governing petitions.<sup>31</sup> A petition must: (1) state the substance or nature of the regulation or action requested; (2) state the reason for the request; and (3) reference the agency's authority to take the requested action. Any petition not involving subsistence will be denied unless the problem identified justifies emergency rule-making.<sup>32</sup> A petition involving subsistence may be considered if: (1) it addresses a fish population that has not previously been considered by the Board for a customary and traditional use finding; or (2) the circumstances otherwise require expedited consideration. After consideration, the Board may decline to act on a petition. The Board has a separate regulation governing petitions for some Bering Sea / Aleutian Islands King and Tanner crab issues.<sup>33</sup>

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<sup>28</sup> See 1988 Inf. Op. Att'y Gen. (Nov. 15, 662-89-0200) (discussing probability that allocation of commercial fishing opportunity based on residency would violate the commerce clause and the privileges and immunities clause of the federal Constitution).

<sup>29</sup> AS 16.05.251(a)(15).

<sup>30</sup> See, e.g., *Baldwin v. Fish and Game Commission*, 436 U.S. 371 (1978); *Shepard v. State*, 897 P.2d 33, 44 (Alaska 1995).

<sup>31</sup> 5 AAC 96.925.

<sup>32</sup> 5 AAC 96.625(f).

<sup>33</sup> 5 AAC 39.998.

**Agenda Change Requests.** The Board has adopted a regulatory policy for changing the Board agenda.<sup>34</sup> Under this policy, the Board will accept an Agenda Change Request only for its first meeting in the fall, will not accept an agenda change request that is primarily allocative in nature in the absence of compelling new information and will accept a request only: (1) for a fishery conservation purpose or reason, (2) to correct an error in a regulation, or (3) to correct an effect on a fishery that was unforeseen when a regulation was adopted. This policy also provides for the Board's discretionary consideration of proposed regulatory changes to coordinate state and federal fishery programs at any time under the guidelines of the Administrative Procedures Act. The policy does not restrict the Board from considering Board-generated proposals in or out of cycle.

**Written findings.** The Board has adopted a policy on findings that incorporates suggestions from the Department of Law. The Board should consult that policy to determine whether written findings should be prepared.

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<sup>34</sup> 5 AAC 39.999.

# MEMORANDUM

STATE OF ALASKA

*Department of Law*

To: Jim Marcotte  
Executive Director  
Alaska Board of Fisheries

Date: November 28, 2008

File No.: 993-09-00431

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From: <sup>S.O.</sup> Steven A. Daugherty  
Assistant Attorney General  
Natural Resources Section  
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Subject: **Comments on Specific  
Proposals for December 2008  
Board of Fisheries Meeting:  
Prince William Sound**

The Department of Law has reviewed the proposals that will be before the Board of Fisheries at the December 1 - 7 regulatory meeting on Prince William Sound and Upper Copper River/Upper Susitna finfish issues, and we submit the following comments for the Board's consideration on specific proposals. We have previously submitted general comments that should also be referred to as appropriate. We intend to have an Assistant Attorney General present at the meeting to expand on these comments or address other legal issues that may arise.

**Proposal 1:** This proposal would establish a positive customary and tradition use determination for salmon stocks in the Chitina Subdistrict, thereby requiring the Board to provide for a subsistence fishery. Procedures for consideration of subsistence proposals are outlined in the Department of Law General Comments. Although the Board might ultimately be able to simply convert the Personal Use fishery into a subsistence fishery it would first be required to implement the provisions of the subsistence statute and establish a record supporting such a decision, including a determination of the amounts reasonably necessary for subsistence use and a determination that the regulations would provide a reasonable opportunity for subsistence uses.

The Board should be very careful in addressing this issue and should point to an error in the 2003 negative finding or to significant new information to support its decision to review the issue. While, in most situations, the Board has extremely broad discretion to change fishing regulations, its discretion to change C&T findings is more limited because of its affirmative (not just discretionary) statutory duty to identify C&T uses of fish and game through factual findings, and not just quasi-legislative findings, as is the case with most fishing regulations. The Board's 2003 decision is legally presumed to be valid, just as the 1999 decision was, and deemed to be supported by a record that provided a reasonable basis for the factual finding. The adoption process includes a

certification by the Department of Law that the Board committed no legal errors in its process.

We are unaware of any 1978 “legislative intent” to define the Chitina dipnet fishery as a subsistence fishery,<sup>1</sup> further, even if such an intent had been expressed it would not be relevant to the current subsistence law.<sup>2</sup>

We recommend that the Board reconsider and reverse the 2003 negative finding only if it can point to an error in the 2003 finding or can identify significant new information that was not available for the Board’s consideration in the 2003 decision that would have been material to the decision at that time. A decision to review the earlier information and simply disagree with the conclusions reached in the earlier negative finding, without finding any errors or new information, would be difficult to defend in a legal challenge.

**Proposal 3:** This proposal calls for simply opening Crosswind Lake to subsistence fishing for resident fish species; however, the Board can only do so by following the procedures laid out in AS 16.05.258 as outlined in the Department of Law general comments and first making a positive customary and traditional use determination for a stock or stocks found in the lake.

**Proposal 4:** This proposal would reverse a portion of the Board’s prior 1996 positive customary and traditional use determination for all salmon stocks of the Copper River District and establish a negative finding for Chinook salmon.

The Board should be very careful in addressing this issue and should point to an error in the 1996 positive finding or to significant new information to support its decision to review the issue. While, in most situations, the Board has extremely broad discretion to change fishing regulations, its discretion to change C&T findings is more limited because of its affirmative (not just discretionary) statutory duty to identify C&T uses of fish and game through factual findings, and not just quasi-legislative findings, as is the

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<sup>1</sup> The portion of the legislative history cited by the Alaska Supreme Court relating to the Chitina dip net fishery in *Madison v. State*, 696 P.2d 168, 176 (1985), does not support the proponents position, it is prefaced by the statement “[I]f it were defined that dip net fishing were for subsistence uses . . .” The discussion in *Madison* illustrates general support for urban Fairbanks residents qualifying as priority subsistence users, not a legislative intent to define the Chitina dipnet fishery as a subsistence fishery.

<sup>2</sup> AS 16.05.258 was significantly amended in 1986, and then repealed and readopted in 1992; both of these revised statutes clearly placed the responsibility in the Board of Fisheries for determining which fish stocks, or portions of stocks, are customarily and traditionally taken or used for subsistence.

case with most fishing regulations. The Board's 1996 decision is legally presumed to be valid and deemed to be supported by a record that provided a reasonable basis for the factual finding. The adoption process includes a certification by the Department of Law that the Board committed no legal errors in its process.

We recommend that the Board reconsider and reverse the 1996 positive finding only if it can point to an error in the 1996 finding or can identify significant new information that was not available for the Board's consideration in the 1996 decision that would have been material to the decision at that time. A decision to review the earlier information and simply disagree with the conclusions reached in the earlier positive finding, without finding any errors or new information, would be difficult to defend in a legal challenge.

**Proposal 18:** This proposal would impose new monitoring requirements on the department. Under AS 16.05.241, the Board has no administrative, budgetary, or fiscal powers, thus the Board lacks authority to adopt this proposal as worded.

**Proposals 19, 20:** These proposals would impose new daily reporting requirements for subsistence salmon fisheries in the Glennallen Subdistrict. Under AS 16.05.241, the Board has regulatory authority, but no administrative, budgetary, or fiscal powers; thus, while the Board can require users to report, it cannot require the Department to record, process, or use reported information.

**Proposal 21:** This proposal would allow the retention of the daily bag limit of rockfish and/or lingcod taken incidentally in another subsistence finfish fishery with gear that would be prohibited in a directed subsistence fishery. This proposal may raise equal protection and open access concerns because it is likely that federal subsistence users (a group that includes only a subset of state residents) would receive most of the benefit from the regulation because few rockfish or lingcod are likely to be taken in other subsistence finfish fisheries with the exception of the federal subsistence halibut fishery. This proposal also presents enforceability concerns because it will be difficult, if not impossible to prove when an individual engages in directed fishing for rockfish or lingcod under the guise of federal subsistence halibut fishing. Nevertheless, the Board has broad authority over the conservation and development of fisheries, and the regulation does not provide a new fishing method to a limited group of individuals; that has been done by federal regulation. Thus, if the Board determines that the conservation benefits of allowing retention of rockfish and lingcod (preventing discard mortality) outweigh the conservation risks of possible directed fishing under the guise of incidental fishing, then the Board's action should be defensible. Similar regulations adopted for the Kodiak Area (5 AAC 01.520(e)-(f)), and Cook Inlet Area (5 AAC 01.570(m)-(n)), were approved by the Department of Law.

**Proposal 22:** This proposal would increase the personal use annual limit for households of more than two individuals while eliminating supplemental permits and thus decreasing the annual limits available to households of two or fewer individuals. The Board has general authority over quotas, bag limits, and harvest limits where it determines that such limits are reasonably necessary for the conservation and development of fisheries and will provide a fair and reasonable opportunity for the taking of fishery resources; however, under the Alaska Supreme Court's *Grunert* decisions, the Board lacks allocation authority within a fishery; thus, the Board should not apply its allocation criteria where only a single fishery is involved, and the Board should be careful to discuss the conservation and development purposes of such regulations and why the regulations will provide a fair and reasonable opportunity for the taking of fishery resources.

**Proposal 43:** This proposal calls for deletion of portions of the groundfish guiding principles at 5 AAC 28.089. The guiding principles are statewide; if the Board wishes to amend the regulation it should do so only for the areas included within the Board's legal notice (as it has previously done in 28.090(b) for the Eastern Gulf of Alaska Area). However, the Board should be aware that, contrary to the proponent's assertions, the guiding principles are only procedural factors for consideration by the Board. They impose no substantive requirements on the Board or the Department.

**Proposal 40, 47:** These proposals call for an authorization for the commissioner to require onboard observers. The Board should adopt written findings determining that the requirements of AS 16.05.251(13) are met when it imposes or authorizes onboard observer requirements. These findings should be included in the regulations so that they can be easily located; many older findings are not reflected in regulation and may not be easy to locate.

**Proposal 49:** This proposal would establish exclusive registration for the PWS commercial and sport spot shrimp fisheries; a person would not be able to register for both fisheries. Although the Board's explicit statutory authority to establish exclusive and superexclusive fisheries (AS 16.05.251(14)) is tied only to commercial fishing, the Board's general authority over conservation and development of fisheries may provide a basis for such regulations in other fisheries where, the Board determines that exclusive or superexclusive registration is reasonably necessary for conservation and development. The Board first adopted superexclusive restrictions prior to enactment of the explicit statutory provisions – the explicit provisions were adopted in response to a lower court challenge to those early regulations. The initial superexclusive registration requirements, adopted without explicit authority, were upheld by the Alaska Supreme Court in *State v. Hebert*, 803 P.2d 863 (1990). The Board has previously adopted cross-fishery exclusive registration requirements which have survived legal review, *see, e.g.*, 5 AAC 47.090(b) (George Inlet superexclusive guided sport Dungeness crab fishery provisions). However,

the Board should be careful to develop a record explaining the conservation or development purposes for any exclusive registration requirement and should explain why it believes a limited time restriction would be inadequate.

**Proposal 52:** This proposal calls for designating separate areas for commercial and sport fishing for spot shrimp during periods when the commercial fishery is open. The Board has broad authority over the conservation and development of fisheries and authority to allocate between sport and commercial fisheries. The Board may separate sport and commercial fisheries so that they do not occur at the same location at the same time. However, the Board should be careful to avoid raising constitutional issues under the common use and no exclusive right of fisheries clauses of the Alaska Constitution (Article VIII, §§ 3, 15). Permanent or nearly continuous closures of areas to noncommercial fisheries would likely implicate these sections unless the Board establishes that the fishery stocks involved are available in other areas. Constitutional issues are unlikely to be implicated if the Board builds a record to show that it is providing a fair and reasonable opportunity for taking of the stocks by noncommercial fisheries.

**Proposal 57:** This proposal seeks to open subsistence seasons on all crab year-around in Prince William Sound Area. Only Dungeness crab and miscellaneous shellfish issues are noticed for this meeting.

**Proposal 61:** This proposal calls for opening a new area to drift gillnet fishing. This could be considered a new or expanding mixed stock fishery and the Board may need to address its mixed stock policy (5 AAC 29.220), as well as the Board's allocation criteria and sustainable salmon fisheries policy (5 AAC 39.222).

**Proposal 81:** This proposal calls for the Board to reduce hatchery production. The amount of the requested reduction is unclear; it could be either a 24% or 76% reduction depending on how the proposal is interpreted.

As noted in the Department of Law general comments on salmon enhancement, and as further detailed in an Informal Attorney General Opinion, 1997 Inf. Op. Att'y Gen. (Nov. 6, 661-98-0127) previously provided for inclusion in the Board materials, both the Board and Department have authorities relating to salmon enhancement. Generally, the Department has primary authority over hatchery permitting and associated issues relating to salmon production and cost recovery. *See* AS 16.10.400 – 16.10.430. The Board “may not adopt any regulations or take any action regarding the issuance or denial of any permits required in AS 16.10.400 – 16.10.470.” However, the Board has management authority over both wild and enhanced stocks under AS 16.05.730 which requires management to be consistent with sustained yield of wild stocks but gives the Board discretion regarding whether enhanced fish stocks will be managed for sustained yield. The Board may exercise indirect authority over hatchery production by regulating

the harvest of hatchery-released fish by regulatory amendment of portions of hatchery permits relating to the source and number of salmon eggs, harvest by hatchery operators, and locations for harvest. AS 16.10.440(b). However, the Board is probably not authorized to take action that effectively revokes or prevents issuance of a permit. *See* 1997 Inf. Op. Att’y Gen. (Nov. 6; 661-98-0127).

Despite overlapping authorities, the Board has regulatory authority to reduce hatchery production through several means. Examples would include:

(1) Use of its regulatory authority under AS 16.05.251(a)(9) to limit the total number of salmon, by species, that may be released, in specific areas of PWS, leaving it up to the Department to impose hatchery-specific limits through annual hatchery management plans, fish transport permits, or through hatchery permit amendments;

(2) Use of its regulatory authority under AS 16.05.251(a)(9) to limit the total number of eggs, by species, that may be possessed in PWS, leaving it up to the Department to impose hatchery-specific limits through annual hatchery management plans, fish transport permits, or through hatchery permit amendments;

(3) Use of its regulatory authority under AS 16.05.251(a)(9) to limit the total number of salmon by species that may be captured or held in PWS; leaving it up to the Department to impose hatchery-specific limits through annual hatchery management plans, fish transport permits, or through hatchery permit amendments;

(4) Changing harvest regulations in the commercial fisheries, sport, personal use and subsistence fisheries to increase hatchery interception and reduce returns available to hatcheries;

(5) Changing harvest regulations by area to cap hatchery cost recovery harvests or limit time or area available for cost recovery fishing;

(6) Adopting regulations specific to individual hatcheries amending portions of hatchery permits relating to the source and number of eggs.

The Board has given adequate legal and practical notice at this meeting for some methods of reduction such as those in items (1)-(4) above; however, additional notice would likely be needed if the Board decides to use other methods of reducing hatchery production such as those in items (5) and (6) above.

In using any of the above methods, the extent of the Board’s authority is unclear and would depend on numerous economic and operational factors, the Board’s consideration of those factors, and the Board’s establishment of a clear rationale for any limitation. At some point a direct reduction would become so significant that hatchery operation at any level would no longer be feasible, effectively revoking or denying a permit, which is beyond the Board’s authority under AS 16.10.440(b). If the Board decides to directly pursue reductions in hatchery production it should attempt to establish a record showing that operation of currently permitted hatcheries would not be precluded by any reductions implemented. Indirect impacts on hatchery production through



increased interception of hatchery stocks are less likely to be found to be beyond the Board's authority because under AS 16.05.730 the Board is not required to manage enhanced stocks for sustained yield and is not required to provide for adequate cost recovery harvests to cover enhancement operational costs.

**Proposal 94:** This proposal would impose a varying limit on the number of lines that may be fished from a guided sport fishing vessel depending on the number of clients on board, and would impose a maximum of 6 lines unless the vessel is operating under a federal limited entry halibut permit. This proposal would raise equal protection issues and allocation within fishery issues because it would allocate within the guided sport fishery based on whether or not a vessel has a federal permit. The Board may impose limits varying based on number of clients and may impose a uniform maximum limit.

**Proposal 103:** This proposal would close "all known spawning beds to sport fishing." As worded this proposal would be too vague to be enforceable; the Board should specifically identify any areas it wishes to close to sport fishing.

**Proposal 113:** This proposal would prohibit fishing from a power boat or transportation of fishermen in a power boat on two days per week. The Board does not have clear statutory authority over transportation of fishermen and should use methods more directly related to regulation of fishing activities (such as prohibiting fishing on the same day after being aboard a powered vessel) unless it can establish a clear record showing the a more indirect restriction is necessary for the conservation and development of fisheries.

**Proposal 114:** This proposal would apply restrictions to hatchery operations and stocking programs. The Board lacks administrative and budgetary authority and also lacks direct authority over hatchery operations. *See* 1997 Inf. Op. Att'y Gen. (Nov. 6, 661-98-0127) and related comments on proposal 81. The Board does have authority over releases of fish under AS 16.05.251(a)(7) and might be able to achieve some of the objectives of this proposal through regulation of releases such as banning releases of sterile fish, fish raised using hormones, fish reared from non-native broodstock, etc. This proposal seems to have statewide intent, but this is not a statewide meeting, and any Board regulatory action is limited to the area's covered by the Board's legal notice for this meeting.

**Proposal 118:** This proposal would prohibit commercial fishing for a month after participating in a subsistence fishery. While the Board may restrict participation in a commercial fishery based on participation in a subsistence fishery, it should do so only where it can establish that the restriction is reasonably necessary for the conservation and development of the fishery (e.g., preventing sale of subsistence caught fish, aiding enforcement, etc.). It would be difficult to develop a record to support a one month

restriction for most fish species because subsistence caught fish could not generally be kept in a condition suitable for sale for that length of time; the Board may want to consider whether shorter periods might be more appropriate. The Board may also want to consider fishery specific prohibitions if available information does not support a need for restrictions in all commercial fisheries.

**Proposal 124, 125:** These proposals calls for opening a new area to drift gillnet fishing. This could be considered a new or expanding mixed stock fishery and the Board should address its mixed stock policy (5 AAC 29.220), as well as the Board's allocation criteria and sustainable salmon fisheries policy (5 AAC 39.222).

**Proposals 369-375:** Due to a mailing address error by a state contractor, the time for written public comments has been extended and the Board may not take final action on these proposals at this meeting; the Board will teleconference on December 31, 2008 and may take final action at that time. *See* Second Supplemental Notice of November 24, 2008. The Board should accept oral testimony and may conduct preliminary committee meetings and preliminary deliberations at this meeting. If the Board continues rather than adjourning this meeting (or the portion of the meeting relating to these proposals) the Board may reference and incorporate its earlier preliminary deliberations during the December teleconference. Board members and the public should recognize that the Board will review written comments received after this meeting (up until the written comment deadline at 12:00 noon on December 30), and that Board members may change their positions on issues during final deliberations.

**Proposal 370:** This proposal for closures to nonpelagic trawl gear may need some modification because we have learned that the corresponding federal closures to non-pelagic trawl gear are based on protection of potentially important bottom habitat, but are in areas that have not been designated as essential fish habitat. We have also learned that the federal government has proposed additional areas for inclusion. The Board may modify the areas proposed for closures so long as they are within the larger areas noticed for the potential closures (the Bering Sea and Bristol Bay areas). If the Board adopts the restrictions proposed they will likely appear in 5 AAC 39.164, not 39.167.