

SUPPLEMENTAL NOTICE OF PROPOSED CHANGES IN THE
REGULATIONS OF THE ALASKA BOARD OF FISHERIES

This **SUPPLEMENTAL NOTICE** amends the Notice of Proposed Changes that was issued on October 30, 2009 concerning proposed regulation changes in Title 5 of The Alaska Administrative Code dealing with fishery resources by adding the following topics to be considered at the board's **Statewide Finfish and Supplementary Items meeting scheduled to begin** March 16, 2010 and now extended to last through March 21, 2010 at the Hilton Hotel, 500 West 3rd Avenue, Anchorage, Alaska:

5 AAC 01.616. Customary and traditional subsistence uses of fish stocks and amount necessary for subsistence uses, is proposed to be changed to adopt a finding on the customary and traditional use of salmon and adopt a finding on the amount reasonably necessary for subsistence uses in the **Chitina Subdistrict of the Upper Copper River District**.

5 AAC 99.0XX. Board of Fisheries subsistence finding standards, is a proposed new section to adopt subsistence finding standards in regards to fish species to interpret the term "subsistence way of life" found in 5 AAC 99.010(b)(8).

Consideration of these two supplemental topics is scheduled for March 20-21, 2010. It is the intent of the Board to first consider and adopt the finding standard and then apply that standard to the customary and traditional use determination for salmon in the Chitina Subdistrict. So any comments or testimony on the customary and traditional determination should take into account the new finding standard.

You may comment on these two supplemental topics by submitting written comments limited to no more than 100 single sided pages to the Alaska Department of Fish and Game, Boards Support Section, P.O. Box 115526, Juneau, AK 99811-5526, or by fax to (907) 465-6094, so that the comments will be received no later than 5:00 p.m. Friday March 12, 2010. Written comments limited to 10 single sided pages in length from any one individual or group will also be accepted after 5:00 p.m. Friday March 12, 2010, but will not be inserted in board member workbooks until the beginning of the meeting. During the meeting written comments limited to 10 single sided pages in length from any one individual or group may be submitted by hand delivery at any time if 25 copies are provided; but, as a practical matter comments submitted after the board begins deliberations on relevant proposals are likely to receive less consideration than comments submitted earlier. Oral comments may also be presented as explained below.

A public hearing on these topics will be held on Saturday March 20, 2010 beginning immediately after staff reports. To testify, you must sign up at the meeting site between 8:00 a.m. and 10:00 a.m. Saturday March 20, 2010. Due to time restraints, the board may close public testimony before everyone who has signed up and is present has been given the opportunity to be heard, but the Board will accept and consider all written comments submitted in the manner provided above, and encourages anyone concerned about possible time constraints to submit complete written comments.

All other provisions posted in the October 30, 2009 Notice of Proposed Changes remain the same.

For a copy of the proposed regulation changes, or for a copy of the October 30, 2009 Notice of Proposed Changes, contact the Alaska Department of Fish and Game, Boards Support Section, P.O. Box 115526, Juneau, AK 99811-5526, phone 907-465-4110, or access the Internet at: <http://www.boards.adfg.state.ak.us/fishinfo/index.php>.

Statutory Authority: AS 16.05.251; AS 16.05.258

Statutes being implemented, interpreted, or made specific: AS 16.05.251; AS 16.05.258

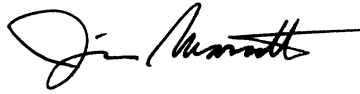
Fiscal Information: The proposed regulatory actions are not expected to require an increased appropriation.

Date: February 10, 2010



Jim Marcotte, Executive Director
Alaska Board of Fisheries

FORM FOR ADDITIONAL REGULATIONS NOTICE INFORMATION
(AS 44.62.190(d))

1. Adopting Agency: Alaska Board of Fisheries.
2. General subject of regulation: Board of Fisheries subsistence finding standards and the Chitina Subdistrict of the Upper Copper River District subsistence uses
3. Citation of regulations: 5 AAC 01.616 and 5 AAC 99.0XX.
4. Reason for proposed action: Supplemental topics for the March 2010 Board of Fisheries meetings. Implement, interpret, or make specific the provisions of AS 16.05 - AS 16.20, AS 16.40 relative to Alaska Fish and Wildlife Conservation Fund v. State of Alaska, Case number 4FA-09-1515 Civil
5. Program category and BRU affected: Natural Resources and all BRUs.
6. Cost of implementation to the state agency and available funding: These actions are not expected to require any additional costs.
7. The name of the contact person for the regulations:
Jim Marcotte, Executive Director
Alaska Board of Fisheries
PO Box 115526
Juneau, AK 99811-5526
(907) 465-4110
Email: jim.marcotte@alaska.gov
8. The origin of the proposed action:
 staff or state agency
 federal government
 general public
 petition for regulation
 other (please list): Ruling from Alaska Superior Court
9. Date: February 10, 2010 Prepared by: 
Jim Marcotte, Executive Director
Alaska Board of Fisheries
(907) 465-4110

SUPPLEMENTAL PROPOSALS
For the Alaska Board of Fisheries
March 2010 Meeting

Proposal 200 Adopt subsistence finding standards

Proposal 201 Find a customary and traditional use of salmon stocks in the Chitina Subdistrict and establish amounts necessary for subsistence

SUPPLEMENTAL PROPOSALS

This proposal was developed as a board generated proposal. It is scheduled for consideration during the March 16-21, 2010 meeting.

PROPOSAL 200 - 5 AAC 99.0XX. Board of Fisheries subsistence finding standards. Adopt subsistence finding standards as follows:

Add a new section in 5 AAC 99 as follows:

5 AAC 99.0XX. Board of Fisheries subsistence finding standards. In the identification by the Board of Fisheries of fish stocks or portions of fish stocks that are customarily and traditionally taken or used by Alaska residents for subsistence uses under 5 AAC 99.010(b), “subsistence way of life” means a way of life that is based on consistent, long-term reliance upon the fish and game resources for the basic necessities of life.

ISSUE: This proposal is generated in response to the Decision and Order from the state superior court in Fairbanks in the case of *Alaska Fish and Wildlife Conservation Fund v. State of Alaska, Board of Fisheries*, Case No. 4FA-09-1515 Civil (Alaska Super. Ct. December 31, 2009). That case challenged the Board’s findings for customary and traditional use of salmon in the Chitina Subdistrict. The court ruled, in part:

because the board failed to properly articulate the standard being applied with regard to criterion eight of 5 AAC 99.010(b), this case is remanded to the board with instructions to 1) define the term “subsistence way of life” as used in 5 AAC 99.010(b)(8) using an objective standard supported by law; 2) provide the plaintiffs with an opportunity to supplement the record in light of that definition; and 3) re-apply 5 AAC 99.010(b) consistent with that definition and in light of the supplemented record.

Decision and Order at 34. In the same decision, the Court, in upholding the validity of 5 AAC 99.010(b)(8), also ruled that the Board could properly apply that criterion as follows:

The statutes and common law of Alaska provide ample guidance in determining what standard should apply when evaluating subsistence activity or a subsistence way of life. The board can turn to this law when determining the meaning of the term “subsistence way of life.”

When determining whether a stock is used as part of a subsistence way of life the board can look for a way of life that includes the noncommercial, long-term, and consistent taking of, use of, and reliance upon fish for direct personal or family consumption as food or for customary trade, barter, or sharing for personal or family consumption. The board can look to see that the taking and use reflects the cultural, social, spiritual and nutritional values embodied in subsistence laws. The board can look to see if the taking and use is relied upon for the basic necessities of life. There is sufficient guidance in the law to give meaning to this criterion.

Decision and Order at 17. This proposal is designed and intended by the Board to comply with the Court's order and guidance in articulating a standard for application of the term "subsistence way of life" in 5 AAC 99.010(b)(8) by capturing the gist of the court's guidance on this subject. With adoption of this proposal, the Board's interpretation of 5 AAC 99.010(b)(8) would flow as follows:

a pattern

- that includes taking, use, and reliance for subsistence purposes upon a wide diversity of fish and game resources and
- that provides substantial economic, cultural, social, and nutritional elements of the subsistence way of life (a way of life that is based on consistent, long-term reliance upon the fish and game resources for the basic necessities of life).

WHAT WILL HAPPEN IF NOTHING IS DONE? The Board will be out of compliance with the superior court's order and directions.

WHO IS LIKELY TO BENEFIT? The Board and the public in general because there will be an articulated standard for application by the Board and for those who wish to submit comments and information for the Board's consideration relative to 5 AAC 99.010(b)(8).

WHO IS LIKELY TO SUFFER? No one.

OTHER SOLUTIONS CONSIDERED? Submission of the proposal to the Joint Boards of Fisheries and Game, which is an option that could be considered for the future, but is not legally required because, although 5 AAC 99.010 is a Joint Board regulation, it is not required to be and this proposal does not amend 5 AAC 99.010(b), which the court found to be legally valid in every respect. Also, there is no provision in the current budget for a joint board meeting this year.

PROPOSED BY: Alaska Board of Fisheries.

This proposal was developed as a board generated proposal. It is scheduled for consideration during the March 16-21, 2010 meeting.

PROPOSAL 201 - 5 AAC 01.616. Customary and traditional subsistence uses of fish stocks and amount necessary for subsistence uses. Find a customary and traditional use of salmon stocks in the Chitina Subdistrict and establish amounts necessary for subsistence as follows:

This proposal would allow the Board to decide whether to amend 5 AAC 01.616 as follows:

- (a) The Alaska Board of Fisheries (board) finds that salmon stocks are customarily and traditionally taken or used for subsistence in the following locations:

...

(7) the Chitina Subdistrict of the Upper Copper River District described in 5 AAC 01.605(1).

(b) The board finds that the following amounts of salmon are reasonably necessary for subsistence uses in the following locations:

...

(6) Chitina Subdistrict of the Upper Copper River District: 100,000 – 150,000 salmon.

If the Board finds in the affirmative on these issues, then other regulations currently in the personal use fishing chapter dealing with the manner of fishing for salmon in the Chitina Subdistrict would also need to be incorporated as subsistence regulations.

ISSUE: In the Decision and Order from the state superior court in Fairbanks in the case of *Alaska Fish and Wildlife Conservation Fund v. State of Alaska, Board of Fisheries*, Case No. 4FA-09-1515 Civil (Alaska Super. Ct. December 31, 2009), which involved a challenge to the Board’s findings for customary and traditional use of salmon in the Chitina Subdistrict, the court ruled, in part:

because the board failed to properly articulate the standard being applied with regard to criterion eight of 5 AAC 99.010(b), this case is remanded to the board with instructions to 1) define the term “subsistence way of life” as used in 5 AAC 99.010(b)(8) using an objective standard supported by law; 2) provide the plaintiffs with an opportunity to supplement the record in light of that definition; and 3) re-apply 5 AAC 99.010(b) consistent with that definition and in light of the supplemented record.

Decision and Order at 34. This proposal is intended to allow the Board to comply with the Court’s order to re-apply 5 AAC 99.010, under the standards proposed in the companion Proposal A, also being generated by the Board at this time.

WHAT WILL HAPPEN IF NOTHING IS DONE? The Board will be out of compliance with the superior court’s order and directions.

WHO IS LIKELY TO BENEFIT? The Board and the public in having a C&T determination on Chitina Subdistrict salmon consistent with the court decision.

WHO IS LIKELY TO SUFFER? No one.

OTHER SOLUTIONS CONSIDERED? None.

PROPOSED BY: Alaska Board of Fisheries.
