

# What is the Board's authority to regulate hatcheries?

Board of Fisheries, Hatchery Committee

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# Statutory Sources of Authority

- ▶ AS 16.10.440(a)
- ▶ AS 16.10.440(b)
- ▶ AS 16.05.730

# Alaska Statute 16.10.440(a)

- ▶ Fish released by hatchery are available to Alaskans “for common use” and are subject to Board regulation the “same way as fish occurring in their natural state until [the fish] return to the specific location designated by the department for harvest by hatchery operator.” AS 16.10.440(a).
- ▶ This means that the Board’s authority to regulate fish and the taking of fish in AS 16.05.251 applies the same to hatchery fish until they return to the harvest area specified in the operator’s permit. *But see the next slide for Board authority over harvest areas...*
- ▶ Some non-exhaustive examples of regulations that apply to hatchery fish:
  - ▶ The power to allocate between competing user groups **APPLIES**. AS 16.05.251(e).
  - ▶ The power to set time, area, and methods of means on taking of fish **APPLIES**. AS 16.05.251(a)(2),(4).
  - ▶ The power to set quotas, bag limits, and harvest levels **APPLIES**. AS 16.05.251(a)(3).
  - ▶ The power to adopt regulations as needed for the conservation, development, and utilization of fisheries **APPLIES**. AS 16.05.251(a)(12).

# Alaska Statute 16.10.440(b)

- ▶ The Board *may* regulate the terms of a hatchery permit after the permit is issued by the Commissioner.
  - ▶ **The Board can regulate those terms “relating to the source and number of salmon eggs, the harvest of fish by hatchery operators, and the specific locations designated by the department for harvest.”**
  - ▶ **...*The other end of last slide’s ellipses***: Though the Board cannot regulate the harvest of fish once it returns to hatchery harvest area under .440(a), the Board *can* take action to regulate the locations of hatchery harvest under .440(b).
- ▶ *But* the Board cannot enact regulations to effectively issue or deny a permit.

# Digging deeper the limit set in .440(b)

- ▶ The only time the Alaska Supreme Court has addressed this issue, it identified this bright line:

“**The** statutes place the responsibility for issuing, suspending, and revoking permits with the Commissioner, not the Board. The power to modify permit terms is shared. It lies with the Commissioner in the first instance, but is subject to ultimate control by the Board.” See *O’Callaghan v. Rue*, 996 P.2d 88, 95-96 (Alaska 2000).

- ▶ What counts as a constructive issuance or denial is fact-dependent and currently without on point precedent for additional guidance.
- ▶ But the extreme ends are instructive. Potential examples that might constitute constructive denial include regulation that allows for zero egg take or eliminates all harvest areas for brood stock.

# Alaska Statute 16.05.730

- ▶ The Board and the Department **MUST manage “[f]ish stocks** in the state . . . consistent with sustained yield of wild **fish stocks.”**
  - ▶ However, for enhanced stocks, the statutory language is only permissive. But the Board and the Department **MAY** manage fish stocks consistent with sustained yield of enhanced stocks. AS 16.05.730(a).
- ▶ The Board **MUST consider the need of “fish enhancement projects” to obtain brood stock.** .730(b)
  - ▶ **As part of this requirement, the Board MAY direct the Department to “manage fisheries . . . to achieve an adequate return of fish from enhanced socks to enhancement projects for brood stock.” This direction MUST be “consistent with sustained yield of wild fish stocks.”** .730(b).
- ▶ The Board **MAY** also
  - ▶ Consider need for hatcheries to harvest and sell fish produced by hatchery but not needed for brood stock for cost recovery purposes. See .730(c)(1).
  - ▶ Exercise its authority to direct Department to provide reasonable harvest of fish, in addition to the fish needed for brood stock, for cost recovery. But the harvest must be **“consistent with the sustained yield of wild fish stocks.** See .730(c)(2).
  - ▶ Adopt a fishery management plan to provide fish to an enhancement project for cost-recovery purposes. See .730(c)(3).