

MEMORANDUM

State of Alaska Department of Law

TO: Kristy Tibbles
Executive Director
Alaska Board of Game
Glenn Haight
Executive Director
Alaska Board of Fisheries

DATE: March 14, 2019

FILE NO.: 2018200696

TEL. NO.: 269-5232

SUBJECT: Comments on Certain Proposals
for March 2019 Joint Board of
Fisheries and Game meeting

FROM: Cheryl Rawls Brooking
Brad Meyen
Assistant Attorneys General
Natural Resources Section
Department of Law

GENERAL COMMENTS

In general, ethics disclosures: Before staff reports begin on any new agenda item, or, if preferred, at the very beginning of the meeting, Ethics Act disclosures and determinations must be made under AS 39.52.

In general, record-making: It is very important that Board members carefully explain and clearly summarize on the record the reasons for their actions and the grounds upon which the actions are based. The Alaska Supreme Court has stressed the importance of a clear record to facilitate the courts in determining that the Board's actions are within its authority and are reasonable. A clear record also assists the public in understanding the Board's rationale. If Board members summarize the reasons for their actions before they vote, it will help establish the necessary record.

The Alaska Administrative Procedure Act requires that State agencies, including the Joint Board, "[w]hen considering the factual, substantive, and other relevant matter, ... pay special attention to the cost to private persons of the proposed regulatory action." AS 44.62.210(a). This requirement to pay special attention to costs means, at a minimum, that the Board should address any information presented about costs, or explicitly state that no such information was presented, during deliberation of any proposal likely to be adopted. In our view, this requirement does not go so far as to mandate that the Board conduct an independent investigation of potential costs, nor does it require that cost factor into the Board's decision more than, for example, conservation concerns might. However, it does require the Board to address and "pay special attention to" costs relevant to each regulation adopted.

Comments on Individual Proposals

Proposal 19: This proposal would remove advisory committee members automatically if a member is absent from meetings without justification and does not respond to a written request from the Boards Support. The current language in 5 AAC 96.060 allows either the AC chair to declare a vacancy (5 AAC 96.060(g)(2)) or the Joint Board at the request of a majority of the AC members to remove a member (5 AAC 96.060(n)(1)). If the Joint Board were to adopt this regulation, it should consider providing an appeal process for removed members, to afford constitutional due process.

Proposal 22: This proposal would allow AC members to discuss and vote by email. This is prohibited by the Alaska Open Meetings Act, AS 44.62.310-312. Meetings and deliberations of more than three members must be noticed in advance and open to the public.

Proposal 23: This proposal would allow abstentions to be disregarded in AC votes. The abstaining member would still be counted for quorum purposes. The Department of Law issues this reminder that members of boards and ACs are expected to fully participate, including voting on matters that come before them. If a member abstains from voting, the reason for the abstention should be stated.

Proposal 26: This proposal would allow each board to act separately during regularly scheduled meetings, which combined action would be the action of the Joint Board. This would apply to AC matters described in 5 AAC 96.410-450 that require Joint Board action. AS 16.05.315 authorizes the commissioner or either board (by a vote of at least 4 members of a board) to call a joint meeting; the authority in the statute to call a joint meeting would be unaffected.

Proposals 28 and 29: These proposals would allow AC members to be at the board table during deliberations on proposals submitted by that AC. Currently each board determines who may be at the board table, and on rare occasions may suspend the rules to seek clarification from an individual during deliberations. In considering this proposal, the Joint Board should also consider that the representative of the AC at a board meeting is unable to speak for the AC membership beyond what was previously discussed at an AC meeting that was publicly noticed and had a quorum of members present. AC representatives are encouraged to include in written and oral reports any information that would be helpful to the board in its deliberations.

Proposals 34 - 37: These proposals seek clarification or changes to 5 AAC 96.625(f) regarding emergency petitions (for temporary regulations) submitted outside of the regular agenda cycle, and the different criteria for emergency subsistence petitions. We recommend a brief public discussion of changes that can be made outside of the regular agenda process, to include:

- emergency petitions and the delegations of authority to the commissioner by each board to make an emergency finding;
- timely submitted subsistence proposals submitted under 5 AAC 96.615;
- agenda change requests; and
- commissioner's emergency order authority to open or close when circumstances require under AS 16.05.060.