

MEMORANDUM

STATE OF ALASKA

Department of Law


To: Monica Wellard
Executive Director
Alaska Board of Fisheries

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File No.:

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Subject: **Comments on Specific
Proposals for 2012 Board of
Fisheries Meeting on Southeast
and Yakutat Finfish Fisheries**

The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at its February 24 – March 4, 2012 meeting on regulations for finfish fisheries in Southeast Alaska and Yakutat areas.

Proposal 141: This proposal would establish a “Marine Conservation Zone” around Cache Island and prohibit fishing for bottom fish and shellfish within 1500 feet from shore. While the Board has authority to close areas to fishing for particular species of fish when there is a need to do so, an action to adopt a blanket closure to multiple species without particular regard to the conservation or development of each species would appear to be the creation of a fish reserve area, which would require legislative approval under AS 16.05.251(a)(1). This statute authorizes the Board to adopt regulations “setting apart fish reserve areas, refuges, and sanctuaries in the waters of the state over which it has jurisdiction, subject to the approval of the legislature.” If the Board wishes to proceed with this proposal, we recommend that the board adopt a resolution to be forwarded to the legislature with the recommendation for statutory enactment of the reserve.

Proposals 142, 143, and 144: These proposals are similar to Proposal 141, but would prohibit only nonresidents from fishing for bottom fish and shellfish, in Behm Canal (Proposal 142), Naha Bay (143), and Cedar Island (144). Like Proposal 141, these propose blanket prohibitions of fishing for multiple, rather than individual, species. To adopt these proposals, the Board would need to articulate a rationale justifying the prohibition of nonresident fishing, such as the fact that the available harvestable surplus of each species is not sufficient to meet expected resident demand.

Proposals 233 and 234: These proposals would amend 5 AAC 27.195 to establish an equal share fishery for herring sac roe in Sitka Sound, in which the Guideline Harvest Level would be divided among permit holders or registered participants. A similar equal share quota plan already exists in the West Behm Canal sac roe herring fishery, where 5 AAC 27.197(a)(2) (Sections 1-E and 1-F commercial sac roe herring fishery) provides that the department shall “determine the equal share quota by dividing the annual harvest objective by the maximum number of CFEC permits eligible to be fished in the fishery; a CFEC permit holder may not retain more herring than the annual amount of the equal share quota specified by the department.” If the board passes an equal share regulation, then more than one permit holder could be on board a vessel and the vessel could fish until the multiple harvest shares are filled. Each permit holder would have to be present on board the harvesting vessel under AS 16.43.140(b), and the fish ticket would have to be signed by the permit holder and not by a group representative, vessel operator, or buyer under AS 16.10.265. The Board and Department cannot establish cooperative-style fisheries by regulation or emergency order under *State v. Grunert*, 139 P.3d 1226 (Alaska 2006).

Proposals 238 and 239. Proposal 238 would amend 5AAC 27.150 (Waters closed to herring fishing in Southeastern Alaska area) to establish closed waters for the Sitka Sound commercial herring fishery in order to provide an area open for subsistence in these waters. The proposal states that the closed waters are to be of the size and location necessary to provide a reasonable opportunity to harvest the amount of high quality herring roe necessary for subsistence. Proposal 239 would amend 5 AAC 01.716(b) to exclude commercial herring fishing within a defined core spawning area within Sitka Sound to allow for a harvest of herring spawn to meet the amount necessary for subsistence (ANS). The ANS is 136,00 – 227,000 pounds of herring spawn under 5 AAC 01.716(b). The Board should consider whether these regulations are necessary to provide a reasonable opportunity for subsistence 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.” AS 16.05.258(f).

Proposal 245. This would amend 5 AAC 27.197 (Sections 1-E and 1-F Commercial Sac Roe Herring Fishery) to allow a purse seine fisherman in the West Behm Canal sac roe herring fishery to designate another permit holder to catch his or her portion of the equal-share harvest. The Board does not have the authority to change the “permit holder on board” requirement in AS 16.43.140(b).

Proposal 247. This would require the department to develop and implement a management plan to protect and enhance a roadside sport fishery in Juneau. Most of what is proposed is beyond the scope of the Board's authority, since the Board has no administrative, budgeting, or fiscal powers over the Department.

Proposals 275 and 276. Proposal 275 would amend 5 AAC 01.750 (subsistence vessel specifications and operations) to remove the 35 horsepower limit in the Klawock subsistence area. Proposal 276 would amend 5 AAC 01.710 (subsistence fishing seasons) to change the subsistence sockeye fishery season in the Klawock River from five to seven days per week July 7 to August 7. The Board should consider whether these actions are necessary to provide a reasonable opportunity for subsistence uses.

Proposal 281. This would change allowable gear in the Yakutat Bay subsistence fishery from one net, not to exceed 50 fathoms, to one net, not to exceed 75 fathoms. The Board should consider whether this is necessary to provide a reasonable opportunity for subsistence uses.

Proposal 285. This would amend or repeal 5 AAC 39.117 (Vessel Length; Bulbous Bow), the 58-foot seine vessel length limit on salmon seine vessels in Southeast Alaska, and couple it with an additional permit requirement or some other form of permit reduction to reduce excess harvest capacity and enhance the value of the fishery. It appears that the intent is to allow a permit holder acquiring an additional Southeast Alaska purse seine permit to use a vessel larger than the current seine vessel length limitation of 58 feet to participate in the Southeast Alaska purse seine fishery. The Board has the authority to repeal or modify the seine vessel length limit in a fishery by regulation, under AS 16.05.835(a), which states: "Unless the Board of Fisheries has provided by regulation for the use of a longer vessel in a salmon seine fishery, a salmon seine vessel may not be longer than 58 feet overall length [with limited exceptions]" Such a repeal or modification would apply to all participants in the fishery. The Board does not have authority to adopt regulations for a permit reduction program. It does have authority under AS 16.05.251(i) to adopt a "regulation to allow a person who holds two entry permits for [a] salmon fishery an additional fishing opportunity appropriate for that particular fishery." If the Board should desire to consider increasing the vessel size limit for a person who holds two entry permits under authority of this statute, it would need to explain how a larger vessel provides an "additional fishing opportunity appropriate for [this] particular fishery."

Proposal 294. This would amend 5 AAC 39.010 (retention of fish taken in a commercial fishery) to require that commercial fishers who retain commercially caught salmon and steelhead report them to creel census personnel at the point of offloading rather than on fish tickets. This proposal would amend a statewide regulation, which is beyond the scope of the Board's notice for this meeting. If the Board wanted to adopt such a proposal for the Southeast Alaska and Yakutat Areas only, it should be careful to

consider the current requirements in several other regulations including 5 AAC 39.130 (a commissioner regulation) and 5 AAC 30.395.

Proposal 303. This would amend 5 AAC 30.310 (Yakutat area fishing seasons) to establish a minimum level of coho salmon escapement (5,000 to 10,000) needed to be seen in the Tsiu River before a commercial set gillnet fishery could be opened. It proposes that the number of fish would have to be “recorded with department aerial surveys.” The Board has no administrative, budgeting, or fiscal powers over the Department, and cannot direct the department to conduct aerial surveys. The Board could use alternative language, to the effect that the threshold for opening the fishery is “when the department, to the extent practicable, determines or projects that 5,000 (or 10,000) salmon have passed the departmental marker.”

Proposal 328. This would amend 5AAC 33.374 (District 12: Hidden Falls Hatchery Terminal Harvest Area Salmon Management Plan) to allow a floating weir-like structure to be used within special harvest areas (SHAs) at Hidden Falls and Deep Inlet for the purpose of broodstock capture. This proposal would appear to authorize a hatchery operator to erect and operate a fish trap in terminal harvest areas. Operation and erection of fish traps is prohibited by AS 16.10.070 and AS 16.10.100, enacted in 1959 by the first session of the Alaska Legislature, which state:

AS 16.05.070. Operation of fish traps. Fish traps, including, but not limited to floating, pile-driven, or hand-driven fish traps, may not be operated in the state on or over state land, tideland, submerged land, or water. This section does not prevent the operation of small, hand-driven fish traps of the type ordinarily used on rivers of the state that are otherwise legally operated in or above the mouth of a stream or river.

AS 16.05.100. Erection of fish traps prohibited on land or water owned by the state. Fish traps, including, but not limited to floating, pile-driven, or hand-driven fish traps, may not be erected, moored, or maintained on or over land, tideland, submerged land, or water owned or otherwise acquired by the state. This section does not prevent the maintenance, use, or operation of small, hand-driven fish traps of the type ordinarily used on rivers of the state that are otherwise legally maintained or operated in or above the mouth of a stream or river.

These statutes implemented Ordinance No. 3, which was adopted by the same vote as the ratification of the state constitution and became effective as state law upon the effective date of the constitution. The prohibition in the statutory language is broader than that in the ordinance in that it does not contain language limiting the ban to taking salmon for

commercial purposes. While an argument could be made that the fish trap ban may not apply in circumstances like those addressed Proposal 328, in the face of the clear language of the statutes, we would recommend some alternative approach to regulations for fish harvest by hatchery operators to avoid the statutory conflict. There is a significant likelihood that Department of Law would not approve the regulation proposed by Proposal 328.

Proposal 331. This would amend 5AAC 33.370 (District 1: Neets Bay Hatchery Salmon Management Plan) to remove the description of fishing rotation schedules for purse seine, gillnet, and troll gear in the Neets Bay Hatchery salmon management plan, and, in place of the current schedules in regulation, allow the SSRAA board to annually set fishing schedules in response to needs for broodstock, cost recovery, and status of the *Southeastern Alaska Enhanced Salmon Allocation Management Plan*. The Board may not delegate to a hatchery association the Board's statutory authority and responsibility to allocate fish in a common property fishery. *See* AS 16.10.440(a); 1997 Inf. Op. Att'y Gen. (Nov. 6; 661-98-0127). Where the hatchery contracts with fishers in a cost recovery fishery, it can contract with any gear type it wants, unless the Board has some specific concern with the way the harvest is being taken. But SSRA could not decide the allocation scheme and instruct the Department to use issue emergency orders accordingly.