

MEMORANDUM

State of Alaska

Department of Law

TO: Glenn Haight
Executive Director
Alaska Board of Fisheries

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FILE NO.: JU2015200515

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SUBJECT: Department of Law
comments on proposals
for the January 12-16,
2016 Arctic/Yukon/
Kuskokwim meeting

The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at its January 12-16, 2016 meeting on proposals for the Arctic/Yukon/Kuskokwim finfish fisheries:

Subsistence. For proposals affecting subsistence fisheries, the board should consider whether adoption of the proposed regulation is needed to provide a reasonable opportunity for subsistence uses of the amount of fish reasonably necessary for those uses. "Reasonable opportunity" means an "opportunity, as determined by the appropriate board, 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."¹ The board could base its determination of whether the regulations provide a reasonable opportunity for subsistence uses on board determinations of the amounts reasonably necessary for subsistence uses, information pertaining to subsistence harvest levels of the fish stock, bag limits, seasons, access, gear necessary to achieve the harvest, and other factors.

Unless it has done so previously, the board, when considering a proposal that would affect subsistence, should: (1) determine whether the fish stock is in a nonsubsistence area; (2) determine whether the fish stock or portion of the fish stock is customarily and traditionally taken or used for subsistence; (3) determine whether a

¹ AS 16.05.258(f).

portion of the fish stock may be harvested consistent with sustained yield; (4) determine the amount reasonably necessary for subsistence uses; (5) adopt regulations to provide a reasonable opportunity for subsistence uses; and (6) if the harvestable amount is not sufficient to allow for subsistence uses and other consumptive uses, adopt regulations to reduce or eliminate other uses in order to provide a preference and reasonable opportunity for subsistence uses. In 5 AAC 99.010(b) the board has adopted regulatory criteria that should be followed when making customary and traditional use determinations. In applying these criteria, the board is not necessarily required to determine that every single criterion is satisfied, but should make a decision based upon the totality of the evidence.

If the harvestable portion of the fish stock is not sufficient to provide a reasonable opportunity for all subsistence uses, the board must eliminate nonsubsistence consumptive uses and distinguish among subsistence users based on the Tier II criteria in AS 16.05.258(b)(4)(B)(i) & (iii) and 5 AAC 99.010(c)(1) & (3).²

Proposal 92: Because 5 AAC 07.365(b) already requires that Kuskokwim River salmon stocks be managed in a conservative manner, the language in the proposal requiring the department to manage the king salmon fishery conservatively may be redundant.

Proposals 93 & 94: Consistent with the board's policy for the management of sustainable salmon fisheries at 5 AAC 39.222, in-river goals should be established in a manner consistent with sustained yield. The board should consider whether an in-river goal would cause the department to manage a salmon stock in a manner that would lead to escapement goals being exceeded.

Proposal 95: This proposal seeks to establish a Tier II subsistence king salmon fishery in the Kuskokwim River, but also contemplates "an alternate system which will effectively ensure an equitable distribution of any harvestable surpluses throughout the drainage in periods when amount necessary for subsistence (ANS) cannot be met (i.e. community permits or quotas)." If the board determines that the harvestable portion of the fish stock is not sufficient to provide a reasonable opportunity for all subsistence uses, the board must eliminate nonsubsistence consumptive uses and distinguish among subsistence users based on the Tier II criteria; in such a situation, the board may not adopt "an alternate system" to Tier II.

² The criterion in AS 16.05.258(b)(4)(B)(ii), the proximity of the domicile of the subsistence user to the stock or population, was ruled unconstitutional in *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995).

Proposal 96: The board should apply the criteria in 5 AAC 99.010(b) when identifying fish stocks or portions of fish stocks, such as portions of the Kuskokwim River king salmon stock, that are customarily and traditionally taken or used for subsistence uses.

Proposal 97: In *Estrada v. State*, --- P.3d ----, 2015 WL 7353892 (Alaska Nov. 20, 2015), the Alaska Supreme Court held that subsistence salmon harvest limits established by the department under 5 AAC 01.015 & 01.730, were “regulations” that had to be promulgated in compliance with the Administrative Procedure Act. The court’s decision was based in part on a determination that the regulations provided only general requirements to the department for setting the harvest limits. This proposal could be read to provide only general requirements to the department for establishing subsistence harvest limits for king salmon outside of the APA process, which would violate the *Estrada* decision. The board could address this issue by delegating to the department the authority to establish these harvest limits in regulation, or amending the proposal to either include specific harvest limits or provide specific requirements to the department for establishing the harvest limits.

Proposals 106, 127, 128, & 134: Under AS 16.43.200(b), only CFEC can modify or change the boundaries of limited entry administrative areas. In the past we have advised that if the board wants to change the fishing districts or registration areas that CFEC uses to define administrative areas, as all of these proposals seek to do, the board might consider delaying the effective date of the changes to the board’s regulations to give CFEC time to ratify or reject those changes for purpose of defining CFEC’s administrative areas.

Proposal 114: Similar to proposal 97, this proposal could be read to provide only general requirements to the department for establishing subsistence harvest limits for king salmon outside of the APA process, which would violate the *Estrada* decision. The board could address this issue by delegating to the department the authority to establish these harvest limits in regulation, or amending the proposal to either include specific harvest limits or provide specific requirements to the department for establishing the harvest limits.

Proposal 143: The board should consider whether adoption of this proposal would provide a priority for subsistence uses of northern pike in the Yukon Area.

Proposal 222: Similar to proposal 97, this proposal could be read to provide only general requirements to the department for establishing subsistence harvest limits for

king salmon outside of the APA process, which would violate the *Estrada* decision. The board could address this issue by delegating to the department the authority to establish these harvest limits in regulation, or amending the proposal to either include specific harvest limits or provide specific requirements to the department for establishing the harvest limits.

This proposal anticipates that the board will find a communal subsistence pattern of use of king salmon in the Kuskokwim River drainage, for which a community permit may be issued, and a subsistence use of king salmon in the Kuskokwim River drainage, for which a household permit may be issued. In *Alaska Fish & Wildlife Conservation Fund v. State*, 347 P.3d 97 (Alaska 2015), the Alaska Supreme Court upheld Board of Game regulations establishing community and individual subsistence hunts of moose and caribou populations. The regulations in that case authorized different hunting seasons and other permit conditions for the community and individual subsistence hunts, and the court upheld these regulations in part because the different permit conditions were supported by board findings concerning the two subsistence uses. Consistent with the *AFWCF* decision, the board could apply the criteria in 5 AAC 99.010(b) and identify different subsistence uses of king salmon in the Kuskokwim River drainage. The board is required to adopt regulations to provide a reasonable opportunity for any subsistence uses it identifies. The board could authorize different permit conditions if supported by board findings concerning subsistence uses. The board should ensure that the regulations provide the preference for subsistence uses required by AS 16.05.258.

We are concerned about the proposal providing an expiration date, given the board's obligation to provide a reasonable opportunity for any subsistence uses it identifies. As for the permitting system only applying "in times of king salmon conservation," the board can adopt a permitting system designed to increase subsistence harvest opportunities during times of low king salmon abundance in order to provide a reasonable opportunity for subsistence uses, but should avoid adopting a permitting system, with harvest limits, designed to provide an equitable distribution of king salmon when the harvestable surplus of king salmon is not sufficient to provide for subsistence uses. If the board determines that the harvestable portion of a fish stock is not sufficient to provide a reasonable opportunity for all subsistence uses, the board must eliminate nonsubsistence consumptive uses and distinguish among subsistence users based on the Tier II criteria.