

MEMORANDUM

State of Alaska

Department of Law

TO: Glenn Haight
Executive Director
Alaska Board of Fisheries

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FROM: Aaron Peterson
Assistant Attorney General

TEL. NO.: 907-269-5232

SUBJECT: Department of Law
comments on proposals for
the March 8 - March 11,
2020 Board of Fisheries
meeting for Statewide King
& Tanner Crab

The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at its March 8 - March 11 meeting for Statewide King & Tanner Crab:

Background on NPFMC's Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs:

The Fishery Management Plan (FMP) for the Commercial King and Tanner Crab Fisheries in the Bering Sea/Aleutian Islands establishes a State/Federal cooperative management regime that defers crab management to the State of Alaska with Federal oversight. State regulations are subject to the provisions of the FMP, including its goals and objectives, the Magnuson-Stevens Act national standards, and other applicable federal laws. The FMP has been amended several times since its implementation.

The King and Tanner crab FMP is a “framework” plan, allowing for long-term management of the fishery without needing frequent amendments. The plan is more general than other FMPs, and establishes objectives and alternative solutions instead of selecting specific management measures.

The FMP defers much of the management of the BSAI crab fisheries to the State of Alaska using the following three categories of management measures. Category 1 measures are those that are fixed in the FMP and require a FMP amendment to change. Category 2 measures are framework-type measures that the state can change following criteria set out in the FMP. Category 3 measures are those that are neither rigidly

specified nor frameworked in the FMP. Management measures in category 1 may be addressed through submission of a proposal to the North Pacific Fishery Management Council (NPFMC). Management measures in categories 2 and 3 may be adopted under state laws subject to the appeals process provided for in the FMP.

Table 8-1 Management measures used to manage king and Tanner crabs in the BS/AI management unit by category

Category 1 (Fixed in FMP)	Category 2 (Frameworked in FMP)	Category 3 (Discretion of State)
Legal Gear	Minimum Size Limits	Reporting Requirements
Permit Requirements	Guideline Harvest Levels	Gear Placement and Removal
Federal Observer Requirements	In-season Adjustments	Gear Storage
Limited Access	Districts, Subdistricts and Sections	Vessel Tank Inspections
Norton Sound Superexclusive Registration	Fishing Seasons	Gear Modifications
Essential Fish Habitat	Sex Restrictions	Bycatch Limits (in crab fisheries)
Habitat Areas of Particular Concern	Pot Limits	State Observer Requirements
	Registration Areas	Other
	Closed Waters	

The FMP's description of management measures is not intended to limit the state to only these measures. However, implementation of other management measures not described in the FMP must be consistent with the FMP, the Magnuson-Stevens Act, and other applicable Federal law, and may occur only after consultation with the Council.

The Magnuson-Stevens Act national standards are:

1. Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.
2. Conservation and management measures shall be based upon the best scientific information available.
3. To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.
4. Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen, (B) reasonably calculated to promote conservation, and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.
5. Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

6. Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.
7. Conservation and management shall, where practicable, minimize costs and avoid unnecessary duplication.
8. Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.
9. Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.
10. Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

Subsistence: Several proposals relate to subsistence crab fisheries. 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 crab 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 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

¹ AS 16.05.258(f)

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 criteria in AS 16.05.258(b)(4)(B)(i)&(iii) and 5 AAC 99.010(c)(1)&(3).²

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).