

# MEMORANDUM

# State of Alaska

## Department of Law

TO: Glenn Haight  
Executive Director  
Alaska Board of Fisheries

DATE: December 6, 2019

FROM: Aaron Peterson  
Assistant Attorney General

FILE NO.:

TEL. NO.: 269-5232

SUBJECT: Department of Law  
comments on proposals  
for the December 10-  
December 13, 2019 Board  
of Fisheries meeting for  
Lower Cook Inlet finfish

The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at its December 10-December 13, 2019 meeting for Lower Cook Inlet finfish:

**Proposal 15:** This proposal would prohibit reselling of guide services by anyone other than licensed guides. The Board probably lacks authority to prohibit reselling of guide services by anyone other than licensed guides. The board may regulate guided fishing and the methods and means utilized by fishing guides and guided anglers while engaged in fishing, but regulating the tangential commerce related to the industry is probably not within the authority of the board.

**Proposal 21:** This proposal would allow commercial harvest of aquatic plants in Cook Inlet. As written, this proposed regulation would require the department to set harvest limits on the permit, in violation of *Estrada*. In *Estrada v. State*, 362 P.3d 1021 (Alaska 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.

**Proposal 22:** This proposal would limit the number of each salmon species harvested in cost recovery fisheries. The Dept. of Law has opined in the past that the legislature split management authority over aquaculture projects between the Board and the Department, with the Department having primary authority over hatchery operations. 1997 AG Op. File No. 661-98-0127 (November 3, 1997). The Board may amend hatchery permits 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. AS 16.10.440(b). The Board may not adopt any regulations or take any action regarding the issuance or denial of any hatchery permit. *Id.* When exercising that authority, the Board must consider hatchery brood stock needs in determining appropriate harvest levels.

**Proposal 23:** This proposal seeks to suspend, revoke, or alter the Tutka Bay hatchery permit to reduce capacity. 16.10.430 vests the authority to suspend or revoke a permit solely to the commissioner. The Board has substantial, indirect control over hatchery production by virtue of its authority to amend hatchery permits with respect to special harvest areas, the harvest of brood stock and cost-recovery fish. However, Board action that effectively revokes a hatchery permit is probably not authorized.