

Finding of the Alaska Board of Fisheries  
Deferred Subsistence Proposals - Ketchikan January 11, 1994  
(Previously Finding #: 94-01-FB)

Background:

At its regularly scheduled meeting in Ketchikan, Alaska on January 11, 1994 the Board of Fisheries considered the options available for action on subsistence proposals that had been deferred from the board's meeting in Sitka in November 1993. See Finding #: 93-08-FB. The board found it necessary to defer most of the subsistence proposals to its January meeting because of the invalidation of the nonsubsistence area provisions of the 1992 subsistence law on October 16, 1993, by the superior court in Kenaitze v. State, Case No. 3AN-91-4569 civil, and the resulting uncertainty in how the subsistence law could be applied.

In December 1993, the superior court ruled that the invalidated nonsubsistence area portion of the law could be severed, leaving the rest of the law in effect. The State has appealed the superior court's decision to the Alaska Supreme Court, and requested a stay of the order until the appeal is resolved. The court has not yet ruled on the stay. If a stay is granted the nonsubsistence areas will remain in regulation and the board will be precluded by law from adopting subsistence regulations within those areas. If a stay is not granted the Joint Boards will have to repeal the nonsubsistence area regulations and the board will have to adopt subsistence fishing regulations in the former nonsubsistence areas as appropriate. The Department of Law has advised the board of options for addressing the deferred subsistence proposals. See Memorandum to Tom Elias, Deferred Subsistence Proposals, December 30, 1993.

Findings:

The deferred subsistence proposals are generally of two types: (1) those submitted prior to 1992, and deferred since then due to changes in the law, and (2) those submitted for consideration during the Board's 1993-94 meeting cycle.

1) **Proposals submitted prior to 1992:** These proposals were submitted between 1989 and 1992. Because of the substantial changes in the subsistence law in 1990 as a result of the McDowell v. State decision (which invalidated the rural limitation on participation in subsistence uses) and the 1992 subsistence law, the effect of board action on these subsistence proposals might be very different than what the proposers intended at the time the proposals were submitted. The proposals have already been deferred several times due to changes in the law. The board finds that the best way to assure that the pre-1992 proposals reflect the intent of the proposers is to return them for resubmission under the present law. Proposals in this category will all be returned to their proposers for resubmission, regardless of whether they are

affected by nonsubsistence areas, because they all have been subject to the changes in the subsistence law.

The board did not set a date for resubmission of these proposals. The board's intent is that resubmitted proposals will be considered as soon as practicable, the under the agenda change policy, subsistence proposal policy, or other means determined by the board.

2) **Proposals submitted for the current board cycle:** Subsistence proposals for the current cycle were submitted under the 1992 subsistence law, but before the decision in Kenaitze invalidated the nonsubsistence areas. Because of the Kenaitze decision, and its affect on the subsistence law, the board will consider separately (a) those current subsistence proposals that affect or are affected by existing nonsubsistence areas, and (b) those that are not affected.

(a) Deferred subsistence proposals that affect or are affected by nonsubsistence areas will be deferred until there is a legal decision, or some other change in the law that provides the board with clear direction in how to regulate within existing nonsubsistence areas. If there is no clarification in the subsistence law before 1997, when southeast Alaska subsistence uses are again on the board's regular cycle, the board will then consider whether action on them is possible. This category includes subsistence proposals requesting action on fish stocks that are harvested within or migrate through nonsubsistence areas.

(b) Deferred subsistence proposals that do not affect or are not affected by existing nonsubsistence areas will be considered by the board as appropriate during its regular meeting cycle.

Tom M. Elias  
Tom Elias, Chair  
Alaska Board of Fisheries

January 19, 1994 @ 11:19 a.m.  
Date

Approved: Ketchikan, AK  
Vote: (6/0) (Yes/No) (Absent: Angasan)

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# Subsistence and Subsistence Related Proposals

BOARD OF FISHERIES

## *Proposals to Be Taken Up by the Board of Fisheries at the Jan 11-22, 1994 Meeting in Ketchikan:*

9. 5 AAC 01.020 Prohibit retention of king salmon for subsistence use by commercial permit holders.

14. 5 AAC 01.710. Prohibit the subsistence harvest of herring 72 hours before and 72 hours after any open commercial herring fishing period by any vessel, permit holder, or crew member involved in the commercial herring fishery. (also listed as prop. #28 and #377; action on prop. #28 was to defer to the Jan. meeting).

23/200. 5 AAC 02.010, 77.010. Close a portion of Section 3-B to harvest of abalone using dive gear.

311. 5 AAC 33.5XX. Close the Unuk River to the commercial harvest of hooligan (eulachon or smelt).

## *Old Proposals Deferred from 1992-93 to Be Returned to Submitters:*

1. 5 AAC 01.730. Allow directed subsistence fishing of king and coho salmon in southeast Alaska.

2. 5 AAC 01.720. Allow subsistence fishing with a "rod and reel."

3. 5 AAC 01.680. Allow directed harvest of steelhead.

4. 5 AAC 01.715. Designate Sitka as a rural (customary and traditional use area) for all finfish.

5. 5 AAC 01.710. Create a subsistence fishery near Point Baker for the residents of Port Protection and Point Baker from July 1 through September 20.

6. 5 AAC 01.715. Establish subsistence use areas for the Tongass Tribe (Saxman).

7. 5 AAC 02.107. Expand the Yakutat customary and traditional use area to include commercial setnet areas in the Yakutat District, including the waters of Icy Bay.

10. 5 AAC 01.710. Allow subsistence fishing in Chilkoot Lake for "spawned out" salmon.
11. 5 AAC 01.725. Allow subsistence fishing in and at the mouth of the Chilkoot River.
12. 5 AAC 01.725. Provide a subsistence fishery in Upper Lynn Canal from Thursday noon through Saturday noon.
13. 5 AAC 01.720. Allow subsistence harvest of salmon with drift net and seine gear at Redoubt Lake near Sitka. *(Proposal has been withdrawn by the proposers.)*
15. 5 AAC 01.71X. Establish a lingcod fishing season in the Sitka Sound Area (same proposal as #31 in the Personal Use roadmaps).
16. 5 AAC 02.115. Direct ADF&G to take immediate action in Southern Southeast Alaska to increase Dungeness crab abundance through area and seasonal closures (same proposal as #37 in Shellfish, and #32 and 204 in Personal Use roadmaps).
- 17, 18. 5 AAC 02.115. Reduce the subsistence possession limit to 10 dungeness crab per person in the waters of Section 13-B, north of the latitude of Dorothy Narrows.
20. 5 AAC 02.107. Designate sea urchins, abalone, sea cucumbers, king crab, brown crab, and Tanner crab as customary and traditionally harvested species (same as proposal #76 and #79 in the shellfish roadmap).
- 78, 81. 5 AAC 38.1XX. Close the waters of Tebenkoff, Chatham, and Frederick Sound to commercial abalone, sea urchin fishing.
22. 5 AAC 02.107. Designate Sitka area as a customary and traditional subsistence use area for abalone.
529. 5 AAC 02.110 and 5 AAC 77.660 Modify shrimp pot gear specifications (proposal includes personal use gear specifications) in Southeast Alaska.
376. 5 AAC 27.150. Close Port Camden to the commercial harvest of herring and shrimp (same proposal as #71).

DEPARTMENT OF FISH AND GAME

BOARD OF FISHERIES

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February 13, 1994

Carl Rosier  
Commissioner  
Alaska Department of Fish and Game

Dear Commissioner Rosier,

At our meeting on Prince William Sound (PWS) fisheries issues in Cordova, the Board of Fisheries (BOF) was asked in proposal 382 to direct the Prince William Sound Aquaculture Association (PWSAC) to examine compliance with enhanced salmon allocations between gear groups. At this meeting, we heard a number of seine fishermen testify that the allocation policy was not working. Specifically, their portion of the ex-vessel value of the recent years salmon harvests, fell far short of the mark, as set forth in the enhanced salmon allocation plan adopted by this board in 1991. It was apparent that the BOF had no authority to direct any activities of PWSAC, however, the BOF felt it was appropriate to review the existing regulation. In doing so a number of problems with the existing enhanced salmon allocation plan (5 AAC 24.370.) were uncovered:

1. The codified regulation differed from the version printed in the "handy dandy" regulation booklet in that it lacked the preamble section that captures the intent of the time and area portions of the plan.
2. The PWSAC enhanced salmon allocation policy, adopted by reference in the "handy dandy" booklet version was to be captured by a BOF finding referred to in paragraph 6 of the codified. This board finding cannot be found, and probably does not exist.
3. Neither the PWSAC enhanced salmon allocation policy nor the codified allocation plan provided any gear group allocation percentages, and excluded any method or means of determining compliance to those percentages.

The BOF is sympathetic to the seiner's situation. However, lacking a clear method for determining compliance with the allocation plan and a clear description of the allocation policy, the BOF could not determine how to address the seiner's concerns with regulatory actions. The BOF feels very strongly that these issues need to be addressed through a public process involving the fishermen who compose the users of the PWS salmon resources, similar to the process used to develop the enhanced salmon allocation plan adopted in 1991. We therefore request that you direct the Prince William Sound/Copper River Regional Planning Team (PWS/CR RPT) to undertake the task of facilitating the public process to develop and complete the missing portions of the PWS enhanced salmon allocation and management plan.

It should be made very clear that the BOF in no way intends this to be a comprehensive review of the existing plan. Specifically the board does not desire a review of the portions of the plan that set out fishing areas, seasons and the allocation percentages for the respective user groups. The plan as it currently exists, is a good body of work and to a large degree should remain unaltered. The specific charge the BOF is requesting of the PWS/CR RPT is as follows:

1. Replace that portion of the plan (5 AAC 24.370) contained in section (6) that identifies by reference the finding of the 1991 BOF meeting.
2. Capture intent language from the preamble in the 1991-1992 regulation booklet that was lost in the filed codified version.
3. Incorporate the enhanced salmon allocation percentages for gear groups from the PWSAC allocation policy into the regulatory plan. Specifically these percentages are: 47.5% for seiners; 51.5% for gillnetters; and 1.0% for setnetters. These percentages are based upon the 1960 - 1979 ex-vessel values from harvests of wild stocks of salmon as determined by CFEC data.
4. Develop a method of measuring compliance, consistent with the intent of the enhanced salmon allocation plan and policy, including action points, and available tools to correct for deviations outside of compliance tolerance ranges.
5. Ensure that inseason management actions are not to be included in addressing deviations outside of compliance tolerance ranges for enhanced salmon allocations between gear groups.

The BOF views items 1 - 3 as technical corrections in the plan which are consistent with the original intent language and the PWSAC policy adopted by reference. Items 4 and 5, dealing with compliance, are new sections that require the most input through

public review. The BOF expects the PWS/CR RPT to facilitate a consensus process involving all gear groups concerned in developing these measures in the plan revision.

The BOF fully expects the PWS/CR RPT to complete its development of the needed aspects to the plan by next winter. In anticipation of this, the BOF intends to schedule this topic for review out of cycle during the 1994/95 meeting schedule.

Sincerely,



Kay Andrew  
Chair  
Alaska Board of Fisheries

March 29, 1991

Pete Esquiro  
General Manager  
Northern Southeast Regional Aquaculture Association  
1308 Sawmill Creek Road  
Sitka, Alaska 99835

Donald F. Amend  
Southern Southeast Regional Aquaculture Association  
1621 Tongass Avenue, #103  
Ketchikan, Alaska 99901

Dear Mr. \_\_\_\_\_:

The Alaska Board of Fisheries recognizes the necessity of developing a southeast wide allocative plan for all enhanced fish. The board directs Northern Southeast Regional Aquaculture Association (NSRAA) and Southern Southeast Regional Aquaculture Association (SSRAA), Fisheries, Rehabilitation, Enhancement, and Development Division (FRED) and the private non-profits (PNP's) to cooperate towards this goal.

NSRAA & SSRAA is to coordinate these activities and will be assisted by the joint regional planning team (RPT). The board requests the association's to develop an overall production and allocation plan for the full region.

The board will be reviewing all southeast Alaska finfish regional regulations during the October 1993 - March 1994 meeting cycle. This is the time period when your product(s) will be before the board. As questions arise or you need for clarification, please send these to Laird A. Jones so he can forward them to the full board. We would like to be kept updated on your progress periodically through mailings. As you feel appropriate, a board member can be invited to observe your meetings or activities.

Sincerely,

Mike Martin  
Chair

cc: Carl L. Rosier  
Commissioner

Brian J. Allee, PhD  
Director of FRED Division

Laird A. Jones  
Director of the Division of Boards