

Sec. 16.05.251. Regulations of the Board of Fisheries.

(a) The Board of Fisheries may adopt regulations it considers advisable in accordance with AS 44.62 (Administrative Procedure Act) for

(1) 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;

(2) [See delayed amendment note]. =ro establishing open and closed seasons and areas for the taking of fish; if consistent with resource conservation and development goals, the board may adopt regulations establishing restricted seasons and areas necessary for

(A) persons 60 years of age and older to participate in sport, personal use, or subsistence fishing; or

(B) residents under 18 years of age and nonresidents under 16 years of age to participate in sport fishing;

(3) setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish;

(4) establishing the means and methods employed in the pursuit, capture, and transport of fish;

(5) establishing marking and identification requirements for means used in pursuit, capture, and transport of fish;

(6) classifying as commercial fish, sport fish, guided sport fish, personal use fish, subsistence fish, or predators or other categories essential for regulatory purposes;

(7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation, and stocking of fish;

(8) investigating and determining the extent and effect of disease, predation, and competition among fish in the state, exercising control measures considered necessary to the resources of the state;

(9) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;

(10) establishing seasons, areas, quotas, and methods of harvest for aquatic plants;

(11) establishing the times and dates during which the issuance of fishing licenses, permits, and registrations and the transfer of permits and registrations between registration areas is allowed; however, this paragraph does not apply to permits issued or transferred under AS 16.43;

(12) regulating commercial, sport, guided sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries;

(13) [See delayed amendment note]. =ro requiring, in a fishery, observers on board fishing vessels, as defined in AS 16.05.475(d), that are registered under the laws of the state, as defined in AS 16.05.475(c), after making a written determination that an onboard observer program

(A) is the only practical data-gathering or enforcement mechanism for that fishery;

(B) will not unduly disrupt the fishery;

(C) can be conducted at a reasonable cost; and

(D) can be coordinated with observer programs of other agencies, including the National Marine Fisheries Service, North Pacific Fishery Management Council, and the International Pacific Halibut Commission;

(14) establishing nonexclusive, exclusive, and superexclusive registration and use areas for regulating commercial fishing;

(15) regulating resident or nonresident sport fishermen as needed for the conservation, development, and utilization of fishery resources;

(16) requiring unlicensed fishing vessels present in or transiting the waters of the state to report to the department the quantity, species, and origin of fish on board; in this paragraph, "unlicensed fishing vessel" means a fishing vessel that is not licensed under AS 16.05.490 - 16.05.530;

(17) promoting fishing and preserving the heritage of fishing in the state.

(b) [Repealed, Sec. 12 ch 52 SLA 1986].

(c) If the Board of Fisheries denies a petition or proposal to amend, adopt, or repeal a regulation, the board, upon receiving a written request from the sponsor of the petition or proposal, shall in addition to the requirements of AS 44.62.230 provide a written explanation for the denial to the sponsor not later than 30 days after the board has officially met and denied the sponsor's petition or proposal, or 30 days after receiving the request for an explanation, whichever is later.

(d) Regulations adopted under (a) of this section must, consistent with sustained yield and the provisions of AS 16.05.258, provide a fair and reasonable opportunity for the taking of fishery resources by personal use, sport, and commercial fishermen.

(e) The Board of Fisheries may allocate fishery resources among personal use, sport, guided sport, and commercial fisheries. The board shall adopt criteria for the allocation of fishery resources and shall use the criteria as appropriate to particular allocation decisions. The criteria may include factors such as

- (1) the history of each personal use, sport, guided sport, and commercial fishery;
- (2) the number of residents and nonresidents who have participated in each fishery in the past and the number of residents and nonresidents who can reasonably be expected to participate in the future;
- (3) the importance of each fishery for providing residents the opportunity to obtain fish for personal and family consumption;
- (4) the availability of alternative fisheries resources;
- (5) the importance of each fishery to the economy of the state;
- (6) the importance of each fishery to the economy of the region and local area in which the fishery is located;
- (7) the importance of each fishery in providing recreational opportunities for residents and nonresidents.

(f) Except as expressly provided in AS 16.40.120(e) and 16.40.130, the Board of Fisheries may not adopt regulations or take action regarding the issuance, denial, or conditioning of a permit under AS 16.40.100 or 16.40.120, the construction or operation of a farm or hatchery required to have a permit under AS 16.40.100, or a harvest with a permit issued under AS 16.40.120.

(g) The Board of Fisheries shall consider a request of the commissioner for approval of a petition to the Alaska Commercial Fisheries Entry Commission to establish a moratorium on new entrants into a commercial fishery under AS 16.43.225 at the board's next regular or special meeting that follows the receipt by the board of the request for approval of the petition and that allows time for the notice required under this subsection. The board may consider the request of the commissioner for approval of the petition only after 15 days' public notice of the board's intention to consider approval of the petition. The board shall consider whether the commissioner, in support of the request for approval of the petition, has adequately shown that the fishery meets requirements for a moratorium on new entrants under AS 16.05.050. The board by a majority vote of its members at the meeting when the petition must be considered shall approve or disapprove the petition.

(h) The Board of Fisheries shall adopt by regulation a policy for the management of mixed stock fisheries. The policy shall provide for the management of mixed stock fisheries in a manner that is consistent with sustained yield of wild fish stocks.

(i) Notwithstanding AS 16.43.140(c)(5), the board may adopt, at a regularly scheduled meeting at which the board considers regulatory proposals for management of a specific salmon fishery, a regulation to allow a person who holds two entry permits for that salmon fishery an additional fishing opportunity appropriate for that particular fishery.

History -

(Sec. 3 ch 206 SLA 1975; am Sec. 2 ch 218 SLA 1976; am Sec. 4 ch 151 SLA 1978; am Sec. 1, 2 ch 110 SLA 1980; am Sec. 8, 9 ch 132 SLA 1984; am Sec. 1 - 3, 12 ch 52 SLA 1986; am Sec. 4 ch 76 SLA 1986; am Sec.

1 ch 33 SLA 1987; am Sec. 2 ch 93 SLA 1988; am Sec. 7 ch 145 SLA 1988; am Sec. 3 ch 34 SLA 1991; am Sec. 1, 2 ch 90 SLA 1992; am Sec. 1 ch 93 SLA 1992; am Sec. 1 ch 15 SLA 1995; am Sec. 1 ch 13 SLA 2004; am Sec. 3 ch 87 SLA 2005; am Sec. 1 ch 11 SLA 2006; am Sec. 3 ch 18 SLA 2016)

Delayed Amendment -

of paragraphs (a)(2) and (13). - Until January 1, 2017, paragraphs (2) and (13) of subsection (a) will read as follows: ""(2) establishing open and closed seasons and areas for the taking of fish; if consistent with resource conservation and development goals, the board may adopt regulations establishing restricted seasons and areas necessary for

"(A) persons 60 years of age and older to participate in sport, personal use, or subsistence fishing; or

"(B) persons under 16 years of age to participate in sport fishing;

"(13) requiring, in a fishery, observers on board fishing vessels, as defined in AS 16.05.475(d), that are registered under the laws of the state, as defined in AS 16.05.475(c), after making a written determination that an on-board observer program

"(A) is the only practical data-gathering or enforcement mechanism for that fishery;

"(B) will not unduly disrupt the fishery;

"(C) can be conducted at a reasonable cost; and

"(D) can be coordinated with observer programs of other agencies, including the National Marine Fisheries Service, North Pacific Fishery Management Council, and the International Pacific Halibut Commission;

Revisors Notes -

In 1988, a reference to "AS 16.40.120(d)" was deleted from (f) of this section to correct a manifest error in Sec. 7, ch. 145, SLA 1988. Paragraph (a)(13) was enacted as (a)(12). Renumbered in 1986.

Cross References -

For restriction on maximum area of land that may be closed to multiple uses without an act of the state legislature, see AS 38.05.300(a); for legislative findings in connection with the enactment of (a)(13) of this section, see Sec. 1, ch. 76, SLA 1986, in the Temporary and Special Acts; for legislative findings in connection with the 1988 amendment to (a)(2) of this section, see Sec. 1, ch. 93, SLA 1988 in the Temporary and Special Acts.

For statement of legislative intent applicable to the 2005 addition of paragraph (a)(17), see Sec. 1, ch. 87, SLA 2005, in the 2005 Temporary and Special Acts.

Amendment Notes -

The 2016 amendment, effective January 1, 2017, in (a)(2)(B), substituted "residents under 18 years of age and nonresidents under 16 years of age" for "persons under 16 years of age", and made a stylistic change to (a)(13).

AG Opinions -

For discussion of compatibility of state subsistence-use law with federal standards as set forth in Alaska National Interest Lands Conservation Act (16 U.S.C. Sec. 3115 et seq.), see 1981 Op. Att'y Gen. No. 11.

The Board of Fisheries is empowered to adopt regulations that will provide broodstock to the hatcheries; furthermore, because management for sustained yield is required by article VIII, section 4, of the Alaska Constitution, the law directs the board to manage for this result. Aug. 1, 1990 Op. Att'y Gen. Decisions -

The Board of Fisheries has the power to make decisions affecting the utilization of fishery resources. *Kenai Peninsula Fisherman's Coop. Ass'n v. State*, 628 P.2d 897 (Alaska 1981).

The development of a mixed stock policy involves the fisheries board's expertise, and therefore the courts review the regulation for a reasonable basis. *Native Village of Elim v. State*, 990 P.2d 1 (Alaska 1999).

The duty to conserve and develop fishery resources implies a concomitant power to allocate fishery resources among competing users. *Grunert v. State*, 109 P.3d 924 (Alaska 2005).

Proposed initiative held unconstitutional. - Proposed ballot initiative that would ban commercial set net fishing in nonsubsistence areas violates the Alaska Constitution because it effects a prohibited appropriation via initiative; it would have resulted in a give-away program of salmon stock from set netters to other types of fishers, and it would have significantly narrowed the Alaska Legislature's and Alaska Board of Fisheries' range of freedom to make allocation decisions. *Lieutenant Governor of Alaska v. Alaska Fisheries Conservation Alliance, Inc.*, 363 P.3d 105 (Alaska 2015).

Intergroup allocations. - Although the Alaska Board of Fisheries has the statutory authority to allocate fishery resources among personal use, sport, guided sport, and commercial fisheries, the Board is not precluded from making intragroup allocations within those general categories. Therefore, in an initiative dispute, it was error to conclude that the relevant user group was "commercial fishers" as a whole instead of the subset of commercial fishers who used set nets. *Lieutenant Governor of Alaska v. Alaska Fisheries Conservation Alliance, Inc.*, 363 P.3d 105 (Alaska 2015).

Authorization for regulations. - In determining whether a regulation is authorized by statute the Court of Appeals of Alaska looks to four things: First, the scope of authority conferred by the authorizing statute; second, the extent to which the regulation is in accordance with "standards prescribed by other provisions of law"; third, the extent to which the regulation is consistent with the authorizing statute; and fourth, the extent to which the regulation is reasonably necessary to carry out the purpose of the authorizing statute. *Beran v. State*, 705 P.2d 1280 (Alaska Ct. App. 1985).

Legislature authorized the Alaska Board of Fisheries to enact regulations that allow the Department of Fish and Game to establish harvest limits through the permitting process; the Board was given the authority to control or supervise all facets of fishing, and the Legislature has given the Board the authority to enact regulations providing for the issuance of subsistence permits as needed for authorizing, regulating, and monitoring the subsistence harvest of fish. *State v. Estrada*, 315 P.3d 688 (Alaska Ct. App. 2013).

Commissioner has no veto authority. - The Commissioner of the Department of Fish and Game does not have the authority to effectively veto a decision of the Board of Fisheries. *Peninsula Mktg. Ass'n v. Rosier*, 890 P.2d 567 (Alaska 1995).

Different treatment not prohibited. - While Alaska Const., art. VIII, Sec. 15, does prohibit granting monopoly fishing rights, that section was not meant to prohibit different treatment by the Board of Fisheries of such diverse user groups as commercial, sports, and subsistence fishermen. *Kenai Peninsula Fisherman's Coop. Ass'n v. State*, 628 P.2d 897 (Alaska 1981).

Regulation banning fish spotting in Bristol Bay was not constitutionally infirm but constituted a permissible limitation of the type traditionally imposed by the state on the means and methods which citizens may employ as they utilize fishery resources. This regulation restricts means and methods of access in a manner which applies equally to all citizens. *Alaska Fish Spotters Ass'n v. State, Dep't of Fish & Game*, 838 P.2d 798 (Alaska 1992).

Establishment of use priorities. - While the Board of Fisheries did have the authority to establish priorities of use between recreational and commercial fisheries of the salmon stocks in the Upper Cook Inlet, the policy and option establishing these priorities were regulations which should have been adopted pursuant to the provisions of the Administrative Procedure Act, AS 44.62.010 et seq. *Kenai Peninsula Fisherman's Coop. Ass'n v. State*, 628 P.2d 897 (Alaska 1981).

Considerations in adopting subsistence regulations. - The boards of fisheries and game have the discretion to adopt regulations that recognize the needs, customs, and traditions of Alaska residents,

but they are not mandated to do so when formulating their subsistence regulations. *State v. Morry*, 836 P.2d 358 (Alaska 1992).

The Board of Fisheries has authority to ban fish spotting if such a ban is properly based on conservation, development, or allocation goals. *Alaska Fish Spotters Ass'n v. State, Dep't of Fish & Game*, 838 P.2d 798 (Alaska 1992).

Recognition of user groups defined by use of a particular means or method of access would not be in accordance with the views of the framers of Alaska's constitution and would needlessly impair the board of fisheries' power and duty to control utilization, development, and conservation of fisheries resources for maximum public benefit. *Alaska Fish Spotters Ass'n v. State, Dep't of Fish & Game*, 838 P.2d 798 (Alaska 1992).

Applicability of subsection (e). - Subsection (e) applies to allocation of fish resources between two commercial fisheries. *Peninsula Mktg. Ass'n v. State*, 817 P.2d 917 (Alaska 1991).

In adopting a regulation for the allocation of harvestable treaty salmon, the Board of Fisheries had discretion to treat guided and unguided sport fishing as a single category and to make a separate allocation to the commercial trolling fishery. *Rutter v. State, Bd. of Fisheries, Dep't of Fish & Game*, 963 P.2d 1007 (Alaska 1998).

If a cooperative fishery and an open fishery use the same type of gear in the same administrative area to take the same fishery resource, an allocation of resources to the cooperative would be an impermissible allocation within a single fishery under subsection (e) of this section. *Grunert v. State*, 109 P.3d 924 (Alaska 2005).

Allocation criteria addressed in earlier proposal. - Where the Board of Fisheries considered each of the seven allocation criteria for sockeye salmon with an earlier proposal and incorporated its previous deliberations on that proposal into a later proposal, the board properly addressed the allocation criteria for sockeye salmon under subsection (e). *Stepovak-Shumagin Set Net Ass'n v. State, Board of Fisheries*, 886 P.2d 632 (Alaska 1994).

Regulation delaying the commercial salmon fishing season was consistent with and reasonably necessary for purposes of conservation and development, was not arbitrary, and was supported by reasonable objectives. *Stepovak-Shumagin Set Net Ass'n v. State, Board of Fisheries*, 886 P.2d 632 (Alaska 1994).

Regulation upheld. - In promulgating a regulation governing commercial herring fishing in Norton Sound, the board pursued a permissible objective (allocation of a fishery resource between resident and nonresident fishermen) and employed means within its powers, and the regulation itself was reasonable and nonarbitrary. *State v. Hebert*, 743 P.2d 392 (Alaska Ct. App. 1987).

Where a mixed stock regulation was the product of a four-day meeting in which the fisheries board took a hard look at the issues and justified its decisions through written findings, and where the regulation was not so indefinite or uncertain that it could be overturned as facially vague or devoid of substance, it was a valid exercise of discretion. *Native Village of Elim v. State*, 990 P.2d 1 (Alaska 1999).

5 AAC 99.010(b) is constitutional, consistent with its enabling statute, and reasonably necessary to carry out the purposes of the subsistence statute. AS 16.05.251(a)(6) and 16.05.258(a) allow the Board of Fisheries, to create regulations for classifying fish and for identifying the particular fish stocks that align with subsistence use patterns; the subsistence statute provides a general definition of the requirements for subsistence use, but 5 AAC 99.010(b) provides definitions of each specific component and guidelines for how they should be applied. *Alaska Fish & Wildlife Conservation Fund v. State, Dep't of Fish & Game*, 289 P.3d 903 (Alaska 2012).

When the Commissioner of the Alaska Department of Fish and Game limited time for, and then closed, a set net fishery while also increasing drift net fishery time, the sustained yield clause was not violated because the order controlled utilization of the resource to prevent the resource's exploitation,

destruction, or neglect. *Cook Inlet Fisherman's Fund v. State, Dep't of Fish & Game*, 357 P.3d 789 (Alaska 2015).

Regulation held invalid because inconsistent with statutes. - Regulation developed by the Board of Fisheries to identify customary and traditional uses of Cook Inlet salmon qualifying for subsistence priority and codified as 5 AAC 01.597 was held invalid because it was inconsistent with former subsection (b) and AS 16.05.940 and contrary to the legislature's intent in enacting the 1978 subsistence law, ch. 151, SLA 1978. *Madison v. Alaska Dep't of Fish & Game*, 696 P.2d 168 (Alaska 1985).

Applied in *Meier v. State, Bd. of Fisheries*, 739 P.2d 172 (Alaska Ct. App. 1987); *Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314 (Alaska 1994); *Alaska Bd. of Fisheries v. Grunert*, 139 P.3d 1226 (Alaska 2006).

Quoted in *Interior Alaska Airboat Ass'n v. Bd. of Game*, 18 P.3d 686 (Alaska 2001); *Estrada v. State*, 362 P.3d 1021 (Alaska 2015).

Cited in *Reynolds v. State*, 655 P.2d 1313 (Alaska Ct. App. 1982); *Langesater v. State*, 668 P.2d 1359 (Alaska Ct. App. 1983); *State v. Eluska*, 698 P.2d 174 (Alaska Ct. App. 1985).