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SENATE RESOURCES COMMITTEE
LEGISLATION CHECKLIST

IDENTIFICATION:

BILL NUMBER: *SB 357*

BILL NAME: *Management Plans: Ref. adopted by
Board of Fisheries*

SPONSOR(S): *P. Fischer; Gilman*

RELATED BILLS PENDING:

DATE INTRODUCED: *1-18-84*

REFERRALS: *Resources
Finance*

INITIAL RESEARCH:

BILL SUMMARY COMPLETED:

SUMMARY BY LEGAL DIVISION

SPONSOR CONTACTED FOR
BACKUP MATERIALS:

DEPT. OF LAW SUMMARY:

FISCAL NOTE:

AGENCY RESPONSE:

OTHER INTERESTED SENATOR
REPS. NOTIFIED:

BACKGROUND RESEARCH:

SIMILAR BILLS INTRODUCED IN PREVIOUS LEGISLATURES:

RESPONSES FROM INTERESTED PERSONS/GROUPS:

OTHER STATE OR FEDERAL PRECEDENTS, REGULATIONS, LAWS:

HEARING PREPARATION:

CHAIRMAN BRIEFED:

DATE AND PLACE SET:

STAFF MEMO TO COMMITTEE:

TELECONFERENCE:

BACKGROUND MATERIAL DISTRIBUTED:

PSA/PRESS RELEASE:

LIST OF WITNESSES:

SUGGESTED AMENDMENTS/
SUBSTITUTES DRAFTED:

*Henry Smith
Bob Penney*

Alaska State Legislature

BETTYE FAHRENKAMP, Chairman
ROBERT H. ZIEGLER, SR., Vice Chairman
DICK ELIASON
PAUL FISCHER
VIC FISCHER
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Senate

Committee on Resources

MEMORANDUM

TO: Senator Mulcahy, Chairman
Resources Subcommittee of Fisheries

FROM: Senator Fahrenkamp, Chairman
Senate Resources Committee

RE: SB 257

DATE: February 7, 1984

This bill has been prepared for the Senate Resources Committee. I am submitting it to the Subcommittee on Fisheries for consideration by the Subcommittee.

As set forth in administrative plans and regulations adopted by the Board of Fisheries.

cc: Senate Resources Committee

BILL SUMMARY

SB 357 - Standards for adopting regulations/Board of Fisheries
Sponsor: P. Fischer

SB 357 adds a new section to AS 16.05 (Boards of Fish and Game) which establishes standards for the Board of Fisheries to use as a guideline in adopting regulations and management plans.

Of the five subsections, (a) and (b) specify criteria for adopting regulations and management plans. Subsection (c) establishes the Board's responsibility to provide, in writing, findings of fact to user groups affected by new regulations or management plans; and, subsection (d) requires the Commissioner of F&G to review all management plans and provide, in writing, a department position. Subsection (e) exempts this section in cases where emergency regulations need to be adopted under AS 44.62.250.

Probably in response to Kenai situation. At issue is the establishment of use priorities - SB 357 sets up a framework for making such decisions and attempts to ensure a thorough process.

ive sentences. In 30 P.2d 377, (Alaska consecutive sentences cult with a danger- at from an assault However, in *Thes-* 1192 (Alaska 1973), persons were killed rson could not sup- nents because the slaughter indicated ent to kill anyone. n counts, there was d conduct, that in- on of arson.

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state separate offenses.

[19] While the rule is generally used in larceny situations, it has also been held to apply in cases involving multiple charges of receiving and concealing. In *People v. Lyons*, 50 Cal.2d 245, 324 P.2d 556 (1958), the California Supreme Court stated:

Defendant meritoriously contends that the receipt by him of the two items of property which are, respectively, the subjects of counts 5 and 6, constituted only one criminal transaction and that therefore he should not have been sentenced on two counts. The evidence of the accomplices shows that defendant originally received the watch and the fur coat on a single occasion. Therefore, but one offense of receiving stolen property is shown, although the goods were stolen from different sources, and the duality of the sentences, even though they are ordered to run concurrently, cannot be permitted to stand.

324 P.2d at 573 (citations omitted). In the case at bar, there was no evidence presented by the prosecution to prove that Nelson and Herring received the stolen goods for which they were tried on more than one occasion. Thus, under the single larceny rule, Nelson and Herring can stand convicted of only one count. The state has conceded this in its supplemental briefing.

doned that position in favor of the single larceny doctrine, although cases from one jurisdiction have continued to follow the separate larcenies doctrine.

Of the jurisdictions which at one time held that the stealing of property of different persons at the same time and place could be prosecuted at the pleasure of the government as one offense or as several distinct offenses, all but one have subsequently abandoned that position in favor of the single larceny doctrine.

This ruling renders it unnecessary for us to address the appellants' arguments that their sentences were excessive.

These cases are remanded for further proceedings in light of this opinion.



**KENAI PENINSULA FISHERMAN'S
COOPERATIVE ASSOCIATION,
INC., Appellant,**

v.

STATE of Alaska; The Board of Fisheries; Ronald Skoog, Commissioner of the Department of Fish and Game; and Ken Middleton, Regional Supervisor, Commercial Fishing Division of the Department of Fish and Game, Appellees.

No. 5072.

Supreme Court of Alaska.

May 22, 1981.

Appeal was taken from an order of the Superior Court, Third Judicial District,

Even though the applicability of the single larceny doctrine is always limited to cases wherein the taking occurred at one time and from the same place, and is often limited to cases wherein the taking was a single act or transaction, there is some diversity in the construction of these requirements and in the manner in which they have been applied to various fact situations. Hence, no general statement can adequately describe the application of this doctrine, and a reading of individual cases is necessary.

Mark C. Rowland, J., which granted summary judgment in favor of State in suit challenging the validity of action taken by the Board of Fisheries and Commissioner of Fish and Game affecting recreational and commercial fisheries of salmon stock in Cook Inlet. The Supreme Court, Dimond, Senior Justice, held that: (1) Board had authority to establish priorities of use between commercial and recreational fishermen for certain salmon stocks in Cook Inlet, and (2) comprehensive management policy and specific policy option establishing priorities of use between commercial and recreational fishermen for certain salmon stocks in Cook Inlet had effect of regulations or standard of general application for management of those stocks and therefore were required to be adopted according to Administrative Procedure Act.

Reversed.

1. Fish ⇐ 12

Board of Fisheries had authority to establish priorities of use between commercial and recreational fishermen for certain salmon stocks in Cook Inlet. AS 16.05.251(a); Const. Art. 8, § 2.

2. Fish ⇐ 9

Game ⇐ 4

Generally, conservation laws such as fish and game laws should be liberally construed to achieve their intended purpose.

3. Fish ⇐ 12

Board of Fisheries' comprehensive management policy and specific policy option establishing priorities of use between commercial and recreational fishermen for certain salmon stocks in Cook Inlet had effect of regulations or standards of general application for management of those stocks and therefore were required to be adopted according to Administrative Procedure Act. AS 44.62.010 et seq.

4. Administrative Law and Procedure ⇐ 797

If adopted according to procedures specified in Administrative Procedure Act and within discretion vested in administra-

tive agency, appellate review of regulations adopted by an agency in its quasi-legislative capacity is limited to whether regulation is within scope of agency's authority and reasonably necessary to its purposes and whether regulation is reasonable and not arbitrary.

5. Fish ⇐ 12

If regulation establishing fishing seasons were reasonable and not arbitrary, based on total information before Board of Fisheries at time each was adopted and excluding management priorities established in an invalidly adopted policy, the invalidity of the policy, which served as guide for the regulations, would not affect validity of fishing season regulations.

6. Administrative Law and Procedure ⇐ 209

Where a statute delegating authority to an administrative agency does not expressly provide a standard, a standard may be applied from the general policy for purposes underlying the legislative enactment.

7. Fish ⇐ 12

Emergency order issued by Commissioner of Fish and Game in 1978 was invalid because it was premised on compliance with an invalidly adopted policy and adoption, but emergency order amending gear regulations so as to close a season or in area to one gear type but not to others was within Commissioner's powers. AS 16.05.060.

8. Fish ⇐ 12

Board of Fisheries may validly adopt management policy which establishes priorities of use and Commissioner of Fish and Game may use the emergency order process to implement a properly adopted management policy.

Sandra K. Saville and Susan Vaitan-court, Kay, Christie, Fuld, Saville & Coffey, Anchorage, for appellant.

John A. Gissberg, Asst. Atty. Gen., Anchorage and Avrum M. Gross, Atty. Gen., Juneau, for appellees.

Before RABIN BURKE and MA MOND, Senior Ju

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DIMOND, Senior

This case arises judgment granted concerns the valid Board of Fisheries the Commissioner after Commissioner and commercial f stocks in the Upper

Appellant, Kenae Cooperative Association), is a group of men who harvest salmon in the district of the Central. The Association's adoption by the Board of Fisheries management policy option which establishes priorities between commercial fishermen for certain salmon stocks in Cook Inlet. The Association's subsequent actions taken by the Commissioner which violate the illegal policy and option.

We hold that, while the authority to establish the policy and option priorities should have been subject to the provisions of the Administrative Procedure Act.

SUMMARY

In 1977, the Department of Game prepared a documentary Report of Cook Inlet and Their Utilization. The report addressed the issue of competition between recreational fishermen for

1. According to the report, salmon stocks in Cook Inlet are more abundant than in other parts of the state. The statewide commercial salmon runs in the Inlet are the largest of the statewide commercial fishermen hold up about fourteen per

Before RABINOWITZ, C. J., CONNOR, BURKE and MATTHEWS, JJ., and DIMOND, Senior Justice.

OPINION

DIMOND, Senior Justice.

This case arises on appeal from summary judgment granted in favor of the state. It concerns the validity of actions taken by the Board of Fisheries (hereafter Board) and the Commissioner of Fish and Game (hereafter Commissioner) affecting recreational and commercial fisheries of the salmon stocks in the Upper Cook Inlet.

Appellant, Kenai Peninsula Fisherman's Cooperative Association, Inc. (hereafter Association), is a group of commercial fishermen who harvest salmon in the Upper Sub-district of the Central District of Cook Inlet. The Association challenges the adoption by the Board of a comprehensive management policy and a specific policy option which established priorities of use between commercial and recreational fishermen for certain salmon stocks in the Cook Inlet. The Association also claims that subsequent actions taken by the Board and the Commissioner which follow the assertedly illegal policy and option are invalid.

We hold that, while the Board does have the authority to establish priorities of use, the policy and option establishing these priorities should have been adopted pursuant to the provisions of the Administrative Procedure Act.

SUMMARY OF FACTS

In 1977, the Department of Fish and Game prepared a document entitled "Summary Report of Cook Inlet Salmon Stocks and Their Utilization," (hereafter report). The report addressed the growing problem of competition between commercial and recreational fishermen for the salmon stocks in

1. According to the report, competition for stocks in Cook Inlet is probably worse than in other parts of the state. While the natural salmon runs in the Inlet are about five per cent of the statewide production capability, commercial fishermen holding entry permits make up about fourteen per cent of the statewide

Cook Inlet,¹ and requested long term direction from the Board on how to proceed with the management of various stocks in the Inlet.

All five species of salmon enter Cook Inlet, with considerable overlap in timing and migration routes.² While the commercial fishery harvests all five species, the report identified sockeye, chum and pink salmon as the three principal commercial species because of their total number, weight and value to the commercial fishery. The recreational fishery also harvests all five species, but the report indicated that sport demand centers on king and coho salmon.

The report discussed eleven different runs of the various salmon species which could to some degree meet the needs of the growing sports fishery. For certain runs which presented difficult management decisions, the report suggested several specific policy options for management of the stocks. The options generally provided for either maintenance of current management policies, curtailment of recreational fishing in favor of commercial fishing, or curtailment of commercial fishing in favor of recreational fishing.

The report was distributed to the members of the Board and the public at a September/October, 1977, hearing in Anchorage regarding Cook Inlet salmon. At a meeting in December, 1977, which had been called to consider proposed changes in fishing season regulations in the state, the Board also discussed long term management strategy for Upper Cook Inlet, salmon stocks, and adopted a Comprehensive Management Policy for the Upper Cook Inlet (hereafter policy). The policy established certain priorities of use between commercial and recreational fisheries based on the target species indicated for each group in the report. One consideration in adoption

salmon net fishery, and nearly half of all recreational anglers in the state fish the Inlet and adjacent streams.

2. The five species of salmon are sockeye (red), chum, pink, king and coho (silver).

Susan Vaillan-
ville & Coffey,

Atty. Gen., An-
ross, Atty. Gen.,

of the policy was the need to inform user groups of the management plan for the stocks so that they could adjust their future uses consistent with that plan.³

In connection with the policy, the Board also adopted a Specific Policy Option (hereafter option) with respect to the late (after August 15) Kenai coho salmon run.⁴ The option directed closure of the commercial fishery of this run if the commercial catch

3. The policy reads as follows:

COMPREHENSIVE MANAGEMENT POLICY FOR THE UPPER COOK INLET

The dramatically increasing population of the Cook Inlet area has resulted in increasing competition between recreational and commercial fishermen for the Cook Inlet salmon stocks. Concurrently, urbanization and associated road construction has increased recreational angler effort and may adversely affect fisheries habitat. As a result the Board of Fisheries has determined that a policy must now be determined for the long-term management of the Cook Inlet salmon stocks. This policy should rest upon the following considerations:

1. The ultimate management goal for the Cook Inlet stocks must be their protection and, where feasible, rehabilitation and enhancement. To achieve this biological goal, priorities must be set among beneficial uses of the resource.

2. The commercial fishing industry in Cook Inlet is a valuable long-term asset of this state and must be protected, while recognizing the legitimate claims of the noncommercial user.

3. Of the salmon stocks in Cook Inlet, the king and silver salmon are the target species for recreational anglers while the chum, pink, and red salmon are the predominant commercial fishery.

4. User groups should know what the management plan for salmon stocks will be in order that they can plan their use consistent with the plan. Thus, commercial fishermen must know if they are harvesting stocks which in the long-term will be managed primarily for recreational consumption so that they may plan appropriately. Conversely, as recreational demands increase the recreational user must be aware of what stocks will be managed primarily for commercial harvest in order that he not become overly dependent on these fish for recreational purposes.

5. Various agencies should be aware of the long-term management plan so that salmon management needs will be considered when making decisions in areas such as land use planning and highway construction.

6. It is imperative that the Department of Fish and Game receive long-range direction

rates were below average. The purpose of this policy was to provide a satisfactory recreational fishery of the run, which had been identified in the policy as a primarily recreational species.

On September 2, 1978, the Commissioner declared an emergency closure of commercial fishing on the late Kenai coho stocks in order to comply with the Board's policy and management strategy governing these

in management of these stocks rather than being called upon to respond to annually changing Board directives. Within the Department, divisions such as F.R.E.D., must receive such long-term direction.

Therefore, the Board establishes priorities on the following Cook Inlet stocks north of Anchor Point. In so doing it is not the Board's intent to establish exclusive uses of salmon stocks; rather its purpose is to define the primary beneficial use of the stock while permitting secondary uses of the stock to the extent it is consistent with the requirements of the primary user group.

1. Stocks which normally move in the Cook Inlet to spawning areas prior to June 30, shall be managed primarily as a non-commercial resource.

2. Stocks which normally move in Cook Inlet after June 30, shall be managed primarily as a non-recreational resource until August 15; however existing recreational target fish shall only be harvested incidental to the non-recreational use; thereafter stocks moving to spawning areas on the Kenai Peninsula shall be managed primarily as a non-commercial resource. Other stocks shall continue to be managed primarily as a non-recreational resource.

3. The Susitna coho, the Kenai king, and the Kenai coho runs cannot be separated from other stocks which are being managed primarily as non-recreational resources; however, efforts shall be made, consistent with the primary management goal, to minimize the non-recreational catch of these stocks.

4. The Specific Policy Option provided:

Option B—Curtailed commercial fishery catch level to attempt to provide a satisfactory recreational fishery:

1. Adopt a policy that, if the commercial catch rates indicate a below average run, the commercial fishery would close. If the commercial fishery catch rates are at or above average, the maximum commercial fishing time would be two 12-hour periods.

stocks after August 15 that commercial run from August 15 below average. commercial fish

In December regulation 5 A. son. The regulation opening date for Upper Subdistrict the Central District closing date for Subdistrict and five miles of the and Lower Sub regulation was appellant association early king and the late Kenai runs were all men.

The Association state challenge validity of the subsequent order by the Board Association motion based on stipulation the Association proposed that motion for summary judgment the joint stipulation filed a statement in opposition

5. Regulations, by the Board, the closing date recreational fisheries this area of Cook Inlet closure by commissioner.

Authorization from AS 16.05.0

This chapter the commission when circumstances open or close weekly closed means of emergency order has the field announce his authorized order adopted under to the Administrator 62).

budgeting and fiscal powers from the Board's function.⁸ In AS 16.05.251(a), the Board is delegated the power to "make regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62)" for certain enumerated areas of fisheries management.⁹

The Association maintains that these statutes do not delegate to the Board the power to determine "utilization" of fish resources, and therefore the Board cannot establish priorities of use. This claim is based primarily on the fact that, while article VIII, section 2,¹⁰ of the Alaska Constitution gives the legislature authority to provide for *utilization, development and con-*

servation of all natural resources of the state, AS 16.05.221(a) establishes the Board for the purposes of *conservation and development* only. The Association argues that establishment of priorities among beneficial users comes exclusively within the ambit of "utilization," and that the legislature's failure to include "utilization" among the purposes for which the Board was created indicates that the legislature reserved this function to itself exclusively.

In support of this contention, the Association cites the passage by the legislature of the statute establishing subsistence use as the top priority use for all fish and game resources. Ch. 151, SLA 1978.¹¹ In the

8. AS 16.05.241 provides:

The boards have regulation-making powers as set out in this chapter, but do not have administrative, budgeting or fiscal powers. The regulation-making powers set out in the chapter include: (1) AS 16.05.251(a), set out in note 9 *infra*; (2) AS 16.05.251(b), relating to subsistence use as a priority use; and (3) AS 16.0. 260, relating to establishment of advisory committees.

9. AS 16.05.251 provides in part:

(a) The Board of Fisheries may make regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) 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) establishment of open and closed seasons and areas for the taking of fish;

(3) setting quotas and bag limits on the taking of fish;

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

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

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

(7) engaging in biological research, watershed and habitat improvement, fish management, protection, propagation and stocking;

(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) entering into cooperative agreements with educational institutions and state, federal, or other agencies to promote fish re-

search, management, education and information and to train men for fish management;

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

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

(12) establishment of 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 ch. 43 of this title.

10. Article VIII, section 2, of the Alaska Constitution provides:

The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

11. Chapter 151, SLA 1978, provides in part:

Section 1. INTENT. The legislature finds that there is a need to develop a statewide policy on the utilization, development and conservation of fish and game resources, and to recognize that these resources are not inexhaustible and that preferences must be established among beneficial users of the resources. The legislature further determines that it is in the public interest to clearly establish subsistence use as a priority use of Alaska's fish and game resources and to recognize the needs, customs and traditions of Alaska residents. The legislature further finds that beneficial use of those resources by all state residents should be carefully monitored and regulated, with as much input as possible from the affected users, so that the viability of fish and game resources is not threatened and so that resources are conserved in a manner consistent with the sustained-yield principle.

statement of inter legislature recognize a statewide policy development and conserve resources." The this enunciation purposes from ar support action tak dences that the leg intentional omission powers delegated'

[2] We find r tion's suggested powers. As a p laws such as fish liberally construe purpose. 3 C. Sa Construction § 77 Liberal construct establish the Boa tion-making po sion that the Boa decisions affectin resources in this

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12. See Webster (1973), which "planned manage prevent exploit and defines "dev usable."

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statement of intent for that legislation, the legislature recognized the "need to develop a statewide policy on the utilization, development and conservation of fish and game resources." The Association argues that this enunciation of the entire trilogy of purposes from article VIII, section 2, to support action taken by the legislature "evidences that the legislature made a clear and intentional omission of 'utilization' from the powers delegated" to the Board.

[2] We find no merit in the Association's suggested interpretation of Board powers. As a general rule, conservation laws such as fish and game laws should be liberally construed to achieve their intended purpose. 3 C. Sands, Sutherland Statutory Construction § 71.14 at 365 (4th ed. 1974). Liberal construction of the statutes which establish the Board and delegate to it regulation-making powers leads to the conclusion that the Board has the power to make decisions affecting the utilization of fishery resources in this state.

The legislature established the Board for the purposes of conserving and developing fishery resources. The terms "conserving" and "developing" both embody concepts of utilization of resources. "Conserving" implies controlled utilization of a resource to prevent its exploitation, destruction or neglect. "Developing" connotes management of a resource to make it available for use.¹² If the Board is going to accomplish its designated purposes, it is necessarily going to make decisions concerning utilization of the resources it is charged with managing.

12. See Webster's, New Collegiate Dictionary (1973), which defines "conservation" as "planned management of a natural resource to prevent exploitation, destruction, or neglect"; and defines "develop" as "to make available or usable."

13. A grant of broad discretion to an administrative agency may be advisable where the agency functions in an area "where social or economic controls of private activity are deemed desirable, but where the legislature despairs of formulating a general rule which will be capable of precise and equitable application to all the contingencies that are anticipated." I F Cooper, State Administrative Law 35 (1965).

The legislature's statement in ch. 151, SLA 1978, does not indicate that it intended to reserve to itself the *exclusive* power to decide questions of utilization of fishery resources. That legislation created a statewide preference among beneficial users and affected all fish and game resources in the state. Such broad scale action is not evidence of an intent to deprive the Board of the ability to make the various other utilization decisions necessary to effectively conserve and develop the many fishery resources of the state.

Under this construction, the scope of Board action is not wholly without limitation. The Board must act under its specifically delegated regulatory powers, and actions taken must be premised on the need to effectuate conservation and development purposes. For example, in AS 16.05.251(a), the legislature delegated to the Board the power to "make regulations it considers advisable" for the twelve areas set out in the subsection. The quoted language indicates that the legislature intended to give the Board discretion to decide methods of regulation in these areas.¹³ If, as is likely, the method of regulation affects the utilization of fishery resources by various user groups,¹⁴ it will still be within the Board's powers as long as the regulation is based on the need to conserve and develop the affected fishery. An establishment of priorities of use which meets these criteria would be within the Board's delegated powers.

The Association also claims that article VIII, section 15,¹⁵ prohibits an establish-

14. Many of the specific areas of regulation set out in AS 16.05.251(a) inevitably will involve regulation of the use of the fishery resources. For example, the Board cannot make regulations establishing open and closed seasons, set quotas, classify fish, or make fish management decisions without somehow directing the use of the fishery resources.

15. Article VIII, section 15, states:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those depend-

ment of priorities because that section precludes the creation of an exclusive right or special privilege of fishery.¹⁶ Again, the Association's contention is without merit. While section 15 does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sports, and subsistence fishermen. To conclude that, because a certain species is made available for sport fishing in a given area, commercial fishing of the same species in the same area must also be allowed, would be to go far beyond the purpose of the section.¹⁷

II.

[3] The Association next contends that the comprehensive management policy and the specific policy option adopted by the Board in December, 1977, are invalid because they were not adopted in accordance with the provisions for adoption of regulations set out in the Administrative Procedure Act, AS 44.62 (hereafter APA). The Board is required to follow APA procedures when adopting regulations pursuant to its statutorily delegated authority.¹⁸ We have determined that an establishment of priorities of use may be adopted pursuant to a valid exercise of the Board's delegated regulatory powers. The state acknowledges that the policy and the option were not adopted according to APA procedures, but maintains that compliance was not necessary because they are not regulations; instead, they are merely general guidelines,

ent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

16. The Association has raised a number of constitutional arguments concerning the Board's actions. Because we hold that the policy is invalid on the ground that it was not adopted according to proper APA procedures, *infra*, we need not consider the equal protection, due process, and other issues raised regarding the validity of the actual policy adopted. We will, however, consider the constitutional issue raised concerning the general validity of establishment of priorities of use as a means of resource management.

adopted for the convenience of the public and other state agencies, to inform them of the Board's thinking on critical management issues in areas within its delegated authority.

AS 44.62.640(a)(2) defines "regulation" in part as:

every rule, regulation, order, or standard of general application or the amendment, supplement or revision of a rule, regulation, order or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of a state agency; "regulation" includes "manuals," "policies," "instructions," "guides to enforcement," "interpretive bulletins," "interpretations," and the like, which have the effect of rules, orders, regulations or standards of general application, and this and similar phraseology shall not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public. [Emphasis added.]

The Alaska APA is modeled after the California Administrative Procedure Act, Cal.Gov.Code § 11370 *et seq.*, and the Model State Administrative Procedure Act, House Journal 1959 at 397. However, the Alaska APA goes beyond the definition of regulation contained in either of these statutes¹⁹ by stating, "[R]egulation' includes

17. See *Hynes v. Grimes Packing Co.*, 165 F.2d 323, 326 (9th Cir. 1947), *vacated and remanded*, 337 U.S. 86, 69 S.Ct. 968, 93 L.Ed. 1231 (1949); *Methakata Indian Community v. Egan*, 362 P.2d 901 (Alaska 1961), *vacated and remanded*, 369 U.S. 45, 82 S.Ct. 552, 7 L.Ed.2d 562 (1962).

18. See AS 16.05.251(a) and (b); AS 16.05.260.

19. (See Cal.Gov.Code § 11342 (Deering's Supp. 1980) (former Gov.Code § 11371); Model State Administrative Procedure Act § 1 Revised 1961).

The California APA has been commented on as demonstrating "a desire to achieve ... a much greater coverage of rules than Congress sought in the federal APA." *Armistead v.*

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ces "regulation" in

order, or standard
or the amendment,
of a rule, regula-
adopted by a state
interpret, or make
ed or administered
procedure, except
to the internal
ate agency; . . .
"manuals," "poli-
guides to enforce-
bulletins," "interpre-
which have the
s, regulations or
application, and this
shall not be used
nt this chapter;
regardless of name,
or depends in part
the public or is used
with the public.

odeled after the
Procedure Act,
q., and the Model
Procedure Act.
7. However, the
the definition of
her of these stat-
'regulation' includes

eking Co., 165 F.2d
ated and remanded,
L.Ed. 1231 (1949);
nty v. Egan, 362
ated and remanded,
L.Ed.2d 562 (1962).

(b); AS 16.05.260.

42 (Deering's Supp.
1371); Model State
Act § 1 Revised

been commented on
to achieve . . . a
ules than Congress
V. Armistead v

'manuals,' 'policies,' 'instructions,' 'guides to
enforcement,' . . ." One commentator has
found the Alaska definition noteworthy
"[i]n a view of the tendency of many adminis-
trative officers to avoid compliance with
the rulemaking requirements of the applica-
ble statutes by utilizing a name other than
'rule' or 'regulation' to describe agency
statements which have the effect of rules."
1 F. Cooper, State Administrative Law 115
(1965).

Clearly, then, the label placed on a particu-
lar statement by an administrative agency
does not determine the applicability of the
APA. Under the Alaska statute, "regula-
tion" encompasses many statements made
by administrative agencies, including poli-
cies and guides to enforcement. However,
the state maintains that the policy and the
option do not have the effect of rules, or-
ders, regulations or standards of general
application, and therefore are not covered
by the statute. We disagree.

Under AS 44.62.640(u)(2), an indicia of a
regulation is that it implements, interprets
or makes specific the law enforced or ad-
ministered by the state agency. As previ-
ously discussed, the Board is charged with
management of the fishery resources of this
state for conservation and development
purposes. The policy and the option make
specific the management policies of the
Board for the Upper Cook Inlet fishery
resources.

The wording of the policy suggests that it
was intended to regulate future manage-
ment of the salmon stocks in the Upper
Cook Inlet. In the policy, the Board states
that it "establishes priorities" of use for
certain stocks, not that it intends to estab-
lish priorities in future regulations. The

State Personnel Bd., 22 Cal.3d 198, 149 Cal.
Rptr. 1, 533 P.2d 744, 745 (1978) (footnote
omitted). The federal act creates specific ex-
ceptions from notice and hearing requirements
for interpretive rules and general statements of
policy. 5 U.S.C. § 553(b)(A).

20. See *People v. Cull*, 10 N.Y.2d 123, 218 N.Y.
S.2d 38, 176 N.E.2d 495 (N.Y.App.1961), where
in the New York court held that the term
"rule" or "regulation" encompassed "any kind
of legislative or quasi-legislative norm or proced-

priorities established in the policy are based
on the targeting of certain species as pri-
marily commercial or primarily recreation-
al. This classification of fish was under-
taken without notice to commercial or rec-
reational fishermen, who are obviously af-
fected by the action. Furthermore, the pol-
icy directs that, on the basis of these estab-
lished priorities, certain stocks "shall be
managed" primarily as either noncommert-
cial or nonrecreational resources. The man-
datory language here is indicative of an
intent to have the policy establish a course
for future Board and Commissioner conduct
affecting fishery rights in the Upper Cook
Inlet.²⁰

Another indicia of a regulation is that it
"affects the public or is used by the agency
in dealing with the public." Actions taken
by the Board and the Commissioner demon-
strate that the policy and the option served
as a basis for decisions affecting commer-
cial and recreational fishermen and were
used by the Board in dealing with these
groups.

The clearest instance of the policy and
the option directly affecting commercial
and recreational fishermen is the Septem-
ber, 1978, emergency closure of the late
Kenai coho run to commercial fishermen.
On August 11, 1978, the Commissioner an-
nounced that, because of the Board's policy
and specific option concerning the late Ka-
nai coho run, the Department of Fish and
Game would use the catches from three
commercial fishing periods in mid and late
August to determine the strength of the
run. If the catches were below average,
that commercial fishery would be closed
pursuant to the direction of the policy and
the option. The emergency order, issued

ture which establishes a pattern or course of
conduct for the future." *Id.* 10 N.Y.2d 123, 218
N.Y.S.2d 38, 176 N.E.2d at 497 (emphasis add-
ed). In that case, the New York Constitution
required that, in order to be effective, all rules
and regulations had to be filed with the appro-
priate department of the state. The court con-
cluded that an order setting a maximum speed
limit, which was made by the state traffic com-
missioner, was a rule or regulation subject to
the constitutional provision.

September 2, 1978, stated that because commercial catches were below average "commercial fishing on the late run Kenai River coho salmon stocks *must be curtailed* to comply with the Board of Fisheries' policy and management strategy governing these stocks after August 15." (Emphasis added.)

The staff of the Department of Fish and Game also used the policy as a guideline for proposing regulations setting opening and closing dates for the 1979 commercial season in the Upper Cook Inlet. The regulation adopted established opening and closing dates which were consistent with the priorities of use set out in the policy. In connection with the adoption of this regulation, the Board rejected a proposal from an area advisory committee which would have opened commercial fishing before July 1 in the Upper Subdistrict, and cited the policy as a reason for its action. In response to a letter to the governor criticizing the August 15 closure in the 1979 regulation, the governor wrote, "It is my understanding that the allocation to the sport fishery [of the salmon runs after August 15] is in keeping with the Upper Cook Inlet comprehensive management policy adopted by the Board in 1977. The policy has established long term direction for management of Cook Inlet salmon stocks. . . ."

We conclude that the policy and the option make specific management policies for Upper Cook Inlet salmon stocks, and have the effect of regulations or standards of general application for the management of those stocks. As such, they are regulations, and should have been adopted according to APA procedures. The state acknowledges that the policy and the option were not adopted according to APA procedures;²¹ therefore, they are invalid. *Coghill v. Boucher*, 511 P.2d 1297, 1304-05 (Alaska 1973). There can be no future reliance on this particular policy or option either in the

21. The state contends in its brief that all the Board would have to do to comply with the APA would be to complete the appropriate filing procedures under AS 44.62.040-.125. This contention seems to be based on the fact that the notice for the December, 1977, meeting specified that at the meeting fishing season dates would be set. AS 44.62.200 requires that

regulation-making process or as a basis for emergency orders until the procedures required by the APA are observed.

III.

The Association also raises several issues concerning the validity of subsequently adopted regulations and the emergency order.

A.

The Association contends that the invalidity of the policy also renders the 1977, 1979, and future regulations invalid. In response, the state argues that the invalidity of the policy should have no effect on regulations establishing fishing seasons because these regulations are adopted according to APA procedures. The state reasons that the regulations stand independent of the policy and, though a review of the factual bases for the regulation may reveal many of the same concerns expressed in the policy, this duplication should not invalidate the regulations. We do not have sufficient information in the record to determine the validity of the regulations. However, we will briefly review the process for deciding this question.

[4, 5] Our review of regulations adopted by an agency in its quasi-legislative capacity is set out in *Kelly v. Zamarello*, 486 P.2d 906 (Alaska 1971). If adopted according to APA procedures and within the discretion vested in the Board by the legislature, our review is limited to (1) whether the regulation is consistent with the statute (*i. e.*, within the scope of the Board's authority) and reasonably necessary to its purposes, and (2) whether the regulation is reasonable and not arbitrary. *Id.* at 911. The record indicates that the policy served as a guide for the regulation proposed and adopted in

the notice of a proposed adoption of a regulation must include "an informative summary of the proposed subject of agency action. The notice of the December, 1977, meeting made no mention of planned adoption of a long-term management policy for the area. Therefore, it was insufficient notice of the Board's adoption of the comprehensive management policy.

1979. Because the adopted, it was im- however, the regul- sonable and not a total information time each was ad- management prior policy, the invalidit affect the validity regulations.

Although the ex- since expired, the the question of because of "the : may similarly be sioner] in the fut- tion's contention t- misinterpreted the ferred on him by

The Association Commissioner es openings or clousur-plementing a ma- but can only ma- basis of a biologic- current fish stoc- rizes the Commis- es require, to sun- sons or areas . . . orders." AS 16.4 guide as to what- which might need- der. It is the AS "circumstances" emergencies.

[6, 7] We dis- delegating autho- agency does not- dard, the standat- general policy as- legislative enact- Trustees, Calxi- 16 Cal.3d 818, 1

22. See note 5 s

23. The emergen- it was determin- were below aver- an alternative u

1979. Because the policy was invalidly adopted, it was improperly relied upon. If, however, the regulations adopted were reasonable and not arbitrary, based on the total information before the Board at the time each was adopted and excluding the management priorities established in the policy, the invalidity of the policy would not affect the validity of the fishing season regulations.

B.

Although the emergency order has long since expired, the Association asserts that the question of its validity is not moot because of "the prospect that the power may similarly be misused [by the Commissioner] in the future." It is the Association's contention that the Commissioner has misinterpreted the scope of the power conferred on him by AS 16.05.060.²²

The Association first claims that the Commissioner cannot order emergency openings or closures for the purpose of implementing a management plan or policy, but can only make such an order on the basis of a biological emergency endangering current fish stocks. AS 16.05.060 authorizes the Commissioner "when circumstances require, to summarily open or close seasons or areas . . . by means of emergency orders." AS 16.05.060 does not provide a guide as to what the "circumstances" are which might necessitate an emergency order. It is the Association's contention that "circumstances" can only mean biological emergencies.

[6.7] We disagree. Where a statute delegating authority to an administrative agency does not expressly provide a standard, the standard may be implied from the general policy and purposes underlying the legislative enactment. *Turner v. Board of Trustees, Calexico Unified School District*, 16 Cal.3d 818, 129 Cal.kptr. 443, 548 P.2d

22. See note 5 *supra* for text of AS 16.05.060.

23. The emergency order was issued only after it was determined that commercial catch rates were below average. Thus, there was arguably an alternative independent rationale for order-

ing closure separate from the policy and the option. However, both the news release and the order itself indicate that it was issued specifically to comply with the policy and the option.

1115, 1120 (1976). The extent of the Commissioner's power under AS 16.05.060 should therefore be interpreted in light of the overall purpose of the constitutional and legislative scheme of management of state resources prescribed by other provisions of the law. Thus, if the Board properly adopted a plan for the management of state fishery resources, the Commissioner could enforce that policy through the emergency order process. The 1978 emergency order was invalid because it was premised on compliance with the invalidly adopted policy and option.²³ However, future emergency closures which are ordered to implement properly adopted management policies would be valid.

The Association next contends that the method used by the Commissioner to implement the 1978 emergency closure was outside the scope of his authority. In the emergency order, the Commissioner sought to close commercial fishing of the late Kenai coho run in the Upper Cook Inlet. He did this by amending the 1978 gear regulations for set gill nets and drift gill nets in the central district because these were the gear types commercially harvesting this run in the Upper Cook Inlet. The Association claims that the Commissioner's power under AS 16.05.060 is limited to ordering closure of a season or an area, but does not extend to amending gear regulations so as to close a season or an area to one gear type but not to others.

[8] We have already concluded that the Board may validly adopt a management policy which establishes priorities of use, and that the Commissioner may use the emergency order process to implement a properly adopted management policy. The Commissioner may therefore use the emergency order process to close down one type of fishery and not another in order to implement a policy establishing priorities of use.

ing closure separate from the policy and the option. However, both the news release and the order itself indicate that it was issued specifically to comply with the policy and the option.

The effect of the gear regulation amendment was to close the commercial fishing season for the Kenai coho run in the area of the Upper Cook Inlet where this species was commercially fished. Because closure by season or by area was within the Commissioner's powers, and the amendment of the gear regulation had that effect, we conclude that the method of implementing the emergency closure was not outside the Commissioner's delegated authority.

IV.

The trial court found that the policy adopted by the Board did not violate the Association's constitutional rights of equal protection and due process, nor did it violate the provisions of article VIII of the Alaska Constitution. Because we find that the policy was not adopted according to proper APA procedures, we do not feel it is proper to reach the constitutional validity of the actual policy adopted. The purpose of the notice and hearing provisions of the APA is two-fold. First, it gives notice to interested parties of proposed agency actions which may affect their interests. Next, it gives the administrative agency the opportunity to receive information and comments from those interested parties on its proposed action.²⁴ Both the Board and interested fishermen should have full benefit of these opportunities before a review is made of the validity of the policy adopted.

The decision of the superior court that the Comprehensive Management Policy need not be adopted according to APA procedures is REVERSED.

COMPTON, J., not participating.



24. See *Cheshire Convalescent Ctr. v. Comm'n on Hospitals*, 34 Conn.Sup. 225, 386 A.2d 264, 271 (1977); *Essett v. State Fish & Wildlife*

Lester J. FICKES and Dorothy M. Fickes, Appellants,

v.

PETROLANE-ALASKA GAS SERVICE, INC., Appellee.

PETROLANE-ALASKA GAS SERVICE, INC., Cross-Appellant,

v.

Lester J. FICKES and Dorothy M. Fickes, Cross-Appellees.

Nos. 4035, 4077.

Supreme Court of Alaska.

May 29, 1981.

Trailer court owners filed an action against gas company claiming that an explosion in a water treatment plant was caused by propane gas escaping from underground lines installed and maintained by the gas company. The Superior Court, Fourth Judicial District, Fairbanks, James R. Blair, J., denied the trailer court owners' motion for a new trial and entered judgment for the gas company on the jury verdict. Appeal was taken. The Supreme Court, Connor, J., held that: (1) the failure of a juror to acknowledge on voir dire that he knew one of the witnesses for the gas company and subsequent argument by juror during deliberations that he knew the witness, that the witness was competent and that if the witness did the job, then it must have been done well, amounted to an obstruction of justice; (2) the conduct of the juror deprived the trailer court owners of a fair trial, since it was highly likely that the trailer court owners would have challenged the juror had they been aware that the juror knew the employee who did the repair work and the comment of the juror went to the heart of the defense of nonnegligence; and (3) instruction on the duty of care should have pointed out that handling propane gas creates a dangerous circumstance

Comm'n, 27 Or.App. 639, 556 P.2d 1382, 1384 (1976).

and requires a deliberate with that danger.
Reversed and

1. New Trial ⇐

In action by against gas company claimed that explosion plant was caused from underground maintained by gas company either intentionally to disclose that he ny's employees were performed by gas company arguing to fellow witness, that witness that if witness did been done well at of justice.

2. New Trial ⇐

Failure by juror acquaintance with probability of fact that acquaintance of justice.

3. New Trial ⇐

In determining violation party of fair trial whether, if party known true facts ty would have caused improper comment lateral matter, defense, and whether probable effect of

4. New Trial ⇐

In action against gas company claimed that explosion plant was caused from underground maintained by gas company disclose that he subsequent argument knew witness, and that if witness had been done