

# MEMORANDUM

## State of Alaska Department of Law

TO:	Kristy Tibbles Executive Director Alaska Board of Game	DATE:	January 29, 2014
		FILE NO.:	JU2013200546
		TEL. NO.:	269-5232
FROM:	Lance B. Nelson Senior Assistant Attorney General Natural Resources Section Department of Law	FAX:	278-4607
		SUBJECT:	Comments on March 2014 Statewide Board of Game Meeting Proposals, Anchorage

### GENERAL COMMENTS

**In general, ethics disclosures:** Before staff reports begin on any new agenda item, or, if preferred, at the very beginning of the meeting, Ethics Act disclosures and determinations must be made under AS 39.52.

**In general, record-making:** It is very important that Board members carefully explain and clearly summarize on the record the reasons for their actions and the grounds upon which the actions are based. The Alaska Supreme Court has stressed the importance of a clear record to facilitate the courts in determining that the Board's actions are within its authority and are reasonable. A clear record also assists the public in understanding the Board's rationale. If Board members summarize the reasons for their actions before they vote, it will help establish the necessary record.

In considering each proposal, and the specific requirements that apply in some cases, such as with the subsistence law, it is important that the Board thoroughly discuss and summarize on the record the basis and reasons for its actions. Consistency with past approaches is another important point for discussion. If a particular action does not appear to be consistent, Board members should discuss their reasons for a different approach.

The Alaska Administrative Procedure Act requires that State agencies, including the Board of Game, "[w]hen considering the factual, substantive, and other relevant matter, ... pay special attention to the cost to private persons of the proposed regulatory action." AS 44.62.210(a). This requirement to pay special attention to costs means, at a minimum, that the Board should address any information presented about costs, or explicitly state that no such information was presented, during deliberation of any proposal likely to be adopted. In our view, this requirement does not go so far as to

mandate that the Board conduct an independent investigation of potential costs, nor does it require that cost factor into the Board's decision more than, for example, conservation concerns might. However, it does require the Board to address and "pay special attention to" costs relevant to each regulation adopted.

**In general, written findings:** If any issue is already in court, or is controversial enough that you believe it might result in litigation, or if it is complex enough that findings may be useful to the public, the Department, or the Board in the future, it is important that the Board draft and adopt written findings explaining its decisions. From time to time, the Department of Law will recommend that written findings be adopted, in order to better defend the Board's action. Such recommendations should be carefully considered, as a refusal to adopt findings, in these circumstances, could mean that the Board gets subjected to judicial oversight and second-guessing which might have been avoided. The Alaska Supreme Court has stressed the importance of an adequate decisional document, or written finding, to a determination that the Board has acted within its authority and rationally in adopting regulations, and has deferred to such findings in the past.

**In general, subsistence:** For each proposal the Board should consider whether it involves or affects identified subsistence uses of the game population or sub-population in question. If action on a proposal would affect a subsistence use, the Board must be sure that the regulations provide a reasonable opportunity for the subsistence uses, unless sustained yield would be jeopardized. If the Board has not previously done so, it should first determine whether the game population is subject to customary and traditional uses for subsistence and what amount of the harvestable portion, if any, is reasonably necessary for those uses. *See* 5 AAC 99.025 for current findings on customary and traditional uses and amounts reasonably necessary for subsistence uses. The current law requires that the Board have considered at least four issues in implementing the preference:

- (1) Identify game populations or portions of populations customarily and traditionally taken or used for subsistence; *see* 8 criteria at 5 AAC 99.010(b);
- (2) determine whether a portion of the game population may be harvested consistent with sustained yield;
- (3) determine the amount of the harvestable portion reasonably necessary for subsistence uses; and
- (4) adopt regulations to provide a reasonable opportunity for subsistence uses.

Reasonable opportunity is defined to mean “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.” AS 16.05.258(f). It is not to be construed as a guarantee of success.

The amount of the harvestable portion of the game population that is reasonably necessary for subsistence uses will depend largely on the amount of the game population used for subsistence historically and the number of subsistence users expected to participate. This may require the Board to determine which users have been taking game for subsistence purposes, and which ones have not. Once the Board has determined the amount reasonably necessary for subsistence uses, the Board should by regulation provide an opportunity that allows the predicted number of normally diligent participants a reasonable expectation of success in taking the subject game. In doing so, the Board must distinguish among the various uses, unless the harvestable surplus is so numerous as to be able to provide for all uses. The Board may base its determination of reasonable opportunity on all relevant information including past subsistence harvest levels of the game population in the specific area and the bag limits, seasons, access provisions, and means and methods necessary to achieve those harvests, or on comparable information from similar areas.

If the harvestable portion of the game population is not sufficient to provide for subsistence uses and any other consumptive uses, the Board is required to eliminate non-subsistence uses in order to continue to provide a reasonable opportunity for subsistence uses. If the harvestable portion of the game population is still not sufficient to provide a reasonable opportunity for all subsistence uses, the Board is required to eliminate non-subsistence consumptive uses and distinguish among the subsistence users based on the following Tier II criteria:

- (1) The customary and direct dependence on the game population by the subsistence user for human consumption as a mainstay of livelihood; and
- (2) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated. AS 16.05.258.

**In general, intensive management:** Under AS 16.05.255 (e), (f) and (g), the Board should assure itself that the steps outlined below have been followed when acting on proposals dealing with ungulate populations.

***First*** - Determine whether the **ungulate** population is **important for high levels of human consumptive use**. The Board has already made many of these determinations. *See* 5 AAC 92.108. However, these past findings do not preclude new findings, especially if based on new information.

- If so, then subsequent intensive management analysis may be required.
- If not, then no further intensive management analysis is required.

**Second** - Is the ungulate population **depleted** or will the Board be **significantly reducing the taking** of the population? See 5AAC 92.106(5) for the Board’s current definition of “significant” as it relates to intensive management.

The Board must determine whether depletion or reduction of productivity, or Board action, is likely to cause a significant reduction in harvest.

- If either is true, then subsequent intensive management analysis is required.
- If not, then further intensive management analysis is not required.

**Third** - Is intensive management appropriate?

(a) If the population is depleted, has the Board found that consumptive use of the population is a preferred use? Note that the Legislature has already found that “providing for high levels of harvest for human consumption in accordance with the sustained yield principle is the highest and best use of identified big game prey populations in most areas of the State ...” In the rare cases where consumptive use is not a preferred use, then the Board need not adopt intensive management regulations.

(b) If consumptive uses are preferred, and the population is depleted or reduced in productivity so that the result may be a significant reduction in harvest, the Board must consider whether enhancement of abundance or productivity is feasibly achievable using recognized and prudent active management techniques. At this point, the Board will need information from the Department about available recognized management techniques, including feasibility. If enhancement is feasibly achievable, then the Board must adopt intensive management regulations.

(c) If the Board will be significantly reducing the taking of the population, then it must adopt, or schedule for adoption at its next meeting, regulations that provide for intensive management *unless*:

1. Intensive management would be:
  - A. Ineffective based on scientific information;
  - B. Inappropriate due to land ownership patterns; or
  - C. Against the best interests of subsistence users;

*or*

2. The Board declares that a biological emergency exists and takes immediate action to protect and maintain the population and also schedules for adoption those regulations necessary to restore the population.

### **Comments on Individual Proposals**

**Proposal 136:** Current regulations state “the phrase ‘General hunt only’ means there is a general hunt for residents, but no subsistence hunt, during the relevant open season.” E.g., 5 AAC 85.010(a). As the proposal indicates, there are examples in regulation of hunts that are improperly designated “General hunt only.” The state will continue to correct technical errors in the regulations as they arise. Many game populations around the state with C&T findings are currently in Tier-1 plus or superabundance where both subsistence and other uses are allowed. In these situations, there is often one hunting season and bag limit that provides for all uses. These should not be labeled “General hunt only” or “Subsistence hunt only.”

**Proposal 142:** This proposal would delete the requirements that hunters show their tags, harvested game, or hunting apparatus upon the request of a department employee or peace officer. The Department of Law does not believe that the existing requirements are unconstitutional. We are not aware of any Alaska court ruling to that effect. We do not think these regulations are comparable to operation of a motor vehicle because hunting involves a highly regulated activity dealing with the privilege of harvesting public resources. Contrary to statements in the proposal, these requirement mirror the requirements for sport fishing found in 5 AAC 75.010(c)-(d). These regulations have been approved by the Department of Law and are presumed to be valid under AS 44.62.100.

**Proposal 150:** This proposal would add in 5 AAC 92.030(a) the term “wolf” to wolf hybrid for the purposes of banning the possession, or advertising or offering to sell or purchase such animals. While other statutes and regulations may already ban such activities for wolves, we do not believe addition of the term in 5 AAC 92.030 would cause legal or enforcement problems and may well help to clarify the existing ban to members of the public.

**Proposals 154 & 171:** Proposal 154 attempts to require or clarify the salvage requirement of the edible meat of wildfowls taken for trophies. Proposal 171 would change the requirements for a legal ram until a future, uncertain date when the Department comes up with better horn- measuring method. It is the policy of the state regulations attorney that agencies should avoid placing substantive and operational legal requirements into a definition; such requirement should be included in general hunt or use regulations. .

**Proposal 164:** The commissioner of Fish and Game is already required to submit an annual report on intensive management programs to the board. AS 16.05.050(b).

**Proposals 166 & 167:** If the Board finds it necessary to adopt definitions of “transporter,” “guide,” or “assistant guide,” as suggested in these proposals, it should be careful that such definitions are consistent with statutes and regulations governing such professions in AS 08.54 and 12 AAC.

**Proposal 172:** Adoption this proposal to omit black bears from the definition of “furbearer” will have no immediate effect. Furbearers are animals subject to taking with a trapping license. There are no trapping seasons and bag limits for black bear trapping anywhere in Alaska. All bear snaring is currently conducted under predator control plans, and is not dependent on how black bears are classified.

**Proposal 174:** This proposal, in part, would restrict the capture of raptors on “Native tribal lands” in Alaska. The Board does not have the authority to limit the location of such activities on the basis of ethnicity of land owners.