

LEGAL SERVICES

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MEMORANDUM

December 4, 2003

SUBJECT: Interaction between the authority of the Commissioner of Fish and Game and the Board of Fisheries (Work Order No. 23-LS1414)

TO: Representative Paul Seaton
Attn: Chris Knight

FROM: George Utermohle 
Legislative Counsel

This memorandum is in response to your questions regarding the interaction of the authority of the commissioner of fish and game and the Board of Fisheries to manage commercial fisheries.

BACKGROUND. Among the duties of the commissioner of fish and game is the duty to "manage, protect, maintain, improve, and extend the fish, game and aquatic plant resources of the state in the interest of the economy and general well-being of the state." AS 16.05.020(2). Among the powers of the commissioner is the power, "when circumstances require, to summarily open or close seasons or areas or to change weekly closed periods on fish or game by means of emergency orders." AS 16.05.060(a). The commissioner may use the emergency order process to implement fishery management plans adopted by the Board of Fisheries. Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 897 (Alaska 1981).

The Board of Fisheries was created for "the purposes of conservation and development of the fishery resources of the state." AS 16.05.221(a). The powers of the board include establishing open and closed seasons and areas for the taking of fish; setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish; establishing the means and methods employed in the pursuit, capture, and transport of fish; establishing seasons, areas, quotas, and methods of harvest for aquatic plants; regulating commercial, sport, guided sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries; establishing nonexclusive, exclusive, and superexclusive registration and use areas for regulating commercial fishing; regulating resident or nonresident sport fishermen as needed for the conservation, development, and utilization of fishery resources; allocating fishery resources among subsistence, personal use, sport, guided sport, and commercial fisheries. AS 16.05.251(a) and (e). The board is also responsible for the development of policies for the management of mixed stock fisheries and of wild and enhanced salmon stocks. AS 16.05.251(h) and 16.05.730.

The Board of Fisheries may delegate its authority to the commissioner of fish and game to act on its behalf. AS 16.05.270.

It is evident that the Board of Fisheries has primary responsibility for the management of the state's fishery resources.¹ The role of the commissioner appears to be supplemental to the board in regard to the management of fisheries.² However, both the board and the commissioner each have their own statutory authorities in regard to fisheries and neither may limit or reduce the statutory authority of the other.

"The Commissioner's emergency powers do not explicitly include any veto over Board decisions. . . . [I]mplication of such a grant of power to the Commissioner would eviscerate powers explicitly granted to the Board under AS 16.05.251. The Legislature's goal would be frustrated. Because the Commissioner could veto any act taken by the Board, the Board would become a mere rubber stamp or advisory body for the Commissioner." Peninsula Marketing Association, 890 P.2d at 573 (footnote omitted). "Inferring a broad veto power would make superfluous the detailed provisions dividing power and authority within the Department. See AS 16.05.050; AS 16.05.241; AS 16.05.251. It would make insignificant the statutory device for resolving disagreements between the Board and the Commissioner. AS 16.05.270. Indeed, it would seem to make inoperative the entire concept of the Board delegating its regulatory powers." Id.

The Alaska Supreme Court has stated that the lack of authority for the commissioner to veto decisions of the Board of Fisheries "does not impact the Commissioner's authority to exercise his emergency powers in a true biological emergency. However, it does circumscribe his ability to override the Board's decisions where he is relying on evidence already presented to and reviewed by the Board." Id.

¹ "The Board's powers are regulatory. 'The boards have regulation-making powers as set out in this chapter, but do not have administrative, budgeting, or fiscal powers.' AS 16.05.241. It may regulate, in accordance with AS 44.62 (Administrative Procedure Act) almost every aspect of fishing: fish reserves, open and closed seasons, quotas or bag limits, means and methods by which fish can be taken, classifying types of fishing, etc. AS 16.05.251(a)." Peninsula Marketing Association v. Rosier, 890 P.2d 567, 572 (Alaska 1995).

² "The Commissioner is directed to 'control the department' and 'manage, protect, maintain, improve, and extend the fish . . . resources of the state' and is vested with all 'necessary power to accomplish the foregoing.' AS 16.05.020. This is a broad grant of authority. However, the statutory list of the specific powers and duties of the Commissioner relates principally to administration and budgeting. AS 16.05.050." Peninsula Marketing Association, 890 P.2d at 572.

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ONE: In light of the recent Kenai superior court case, does the Board of Fisheries have authority to restrict or limit the power of the commissioner of fish and game to issue emergency orders over time and area?

Earlier this year the Kenai superior court had occasion to consider whether the Board of Fisheries had the authority to limit the exercise of the emergency order power of the commissioner of fish and game to specific times and places chosen by the board. Kenai Peninsula Fisherman's Association v. Alaska Department of Fish and Game, Alaska Superior Court, Third Judicial District, Kenai, case no. 3KN-02-524 CI, Order Regarding Motions for Summary Judgment, May 28, 2003. At issue in the case was a regulation adopted by the Board of Fisheries (5 AAC 21.360) which could be construed as limiting the authority of the commissioner to issue emergency orders under AS 16.05.060. The superior court held that the board did not have authority to limit the commissioner's executive order authority and that the regulation should not be construed as limiting the commissioner's authority under AS 16.05.060. Id. at 3-4. The order of the superior court appears consistent with a common sense reading of the applicable statutes and with the Alaska Supreme Court decision in the Peninsula Marketing Association case.

TWO: In oral and written argument before the superior court, the state said that the Board of Fisheries restrictions on the commissioner's emergency order authority were allocative decisions. Can the Board of Fisheries use its allocative authority to limit the emergency order authority of the commissioner?

The emergency order authority is conferred on the commissioner by statute. AS 16.05.060. Except in regard to certain modifications of sport fishing bag limits and gear requirements, the board has no authority to limit the emergency order authority of the commissioner. AS 16.05.060(b). The board has no authority to modify the commissioner's emergency order authority in regard to commercial fisheries. The allocative authority of the board is not a basis for limiting the commissioner's emergency order authority.

The authority to allocate commercial fishery resources among user groups is exclusively a power of the board. The commissioner has no authority to use the emergency order power for the purpose of affecting allocations of fishery resources. The scope of the exercise of the commissioner's emergency order power is circumscribed by the duty of the commissioner to "manage, protect, maintain, improve, and extend the fish, game and aquatic plant resources of the state in the interest of the economy and general well-being of the state." AS 16.05.020(2). It is impossible for the commissioner to avoid allocative consequences arising from the exercise of the emergency order power, but it is not within the power of the commissioner to exercise the emergency order power for allocative purposes.

THREE: Given the wording in AS 16.05.060, can the Board of Fisheries adopt any regulations under AS 16.05.251 that restricts the commissioner's emergency order authority?

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FOUR: Is there a need for legislation to clarify what constitutes new information?

I am not aware of a compelling need to define what would constitute "new information" for purposes of authorizing the commissioner to supercede regulations of the Board of Fisheries based on the receipt of new information not considered by the board at the time that the board adopted a regulation. The commissioner may exercise the emergency order power in a true biological emergency without regard to the existence of new information. Peninsula Marketing Association, 890 P.2d at 573.

FIVE: What are the regulations related to the commissioner's authority to use emergency orders to remain within the new statutorily mandated missions and measures success determination of remaining within the escapement range of a given anadromous stream system?

The legislature failed to pass "missions and measures" legislation for fiscal year 2004. Thus there are no missions and measures statements in effect in regard to the achievement of salmon escapement objectives by the Department of Fish and Game. When missions and measures legislation has been passed by the legislature and enacted into law, the effect of the legislation is to guide state agencies in the expenditure of appropriated funds and to measure the performance of the agencies in achieving their missions. Missions and measures legislation does not provide any new substantive authority to an agency. The agency is intended to achieve its assigned missions utilizing its existing statutory authority. The Department of Fish and Game has not adopted regulations pursuant to "missions and measures" legislation.

If I may be of further assistance, please advise.

GEM:mdr

03-218.mdr