

February 27, 1992

Hon. Georgianna Lincoln
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Re: Petition before the Board of
Fisheries; our file no. 663-
92-0360

Dear Representative Lincoln:

This letter is in response to yours of February 2, 1992, in which you inquire about action by the Alaska Board of Fisheries on a petition from the Yukon River Drainage Fisheries Association (YRDFA) on January 29, 1992. You expressed concern that the board may have ventured too far into the substance of the petition in deciding whether to reject it or set it on for hearing.

As you know, under the Alaska Administrative Procedures Act (APA) at AS 44.62.220 and AS 44.62.230, a person may petition an agency to request regulatory action regardless of any otherwise established agency schedule for considering regulatory changes. When the agency receives a petition it must, within 30 days, either deny the petition in writing or schedule the matter for hearing as set out in the APA for all regulatory actions.

Because the Alaska Boards of Fisheries and Game have developed scheduled regulatory cycles that involve extensive public participation, and because the use of petitions could frustrate that cycle, the joint boards adopted a regulation setting out a standard by which to evaluate petitions and decide whether to reject them or schedule them for hearing. 5 AAC 96.625. In general, that regulation specifies that a petition will not be accepted for hearing outside the normal regulatory cycle unless it presents an emergency. Petitions dealing with subsistence, however, are considered under a somewhat different standard, *viz.*, whether the petition deals with a population not previously identified as one used for subsistence, or whether there is some other good reason for expedited consideration. 5 AAC 96.625(f) and 5 AAC 96.615(a).

At the January 29, 1992, teleconference, the board heard from my staff regarding the correct regulatory procedures to follow when considering a petition dealing with subsistence.

Prior to the January 29 teleconference, the board had considered essentially the same petition from YRDFA and rejected it, apparently relying on the regulatory provisions of 5 AAC 96.625(f), which specify that a petition will be denied unless the petition justifies a finding of emergency. The board evidently did not view the petition as one "dealing with subsistence," which, under the terms of 5 AAC 96.625(f), is to be considered under the criteria set out in 5 AAC 96.615(a). As explained above, that latter regulation does not require a finding of emergency, but directs the board to consider a subsistence proposal (or petition) if it is timely and if it either addresses a fish population that has not previously been identified as being used for subsistence or if "the circumstances of the proposal [petition] otherwise must require expedited consideration by the board, such as where the proposal is the result of a court decision" My staff explained to the board that the YRDFA petition appeared to "deal with subsistence" and hence should have been considered under the more relaxed standard set in 5 AAC 96.615(a).

The board spent a considerable amount of time during the teleconference discussing whether the YRDFA petition did in fact really deal with subsistence, and hence the board did delve somewhat into the substance of the petition. My staff cautioned the board that the petition need only clearly raise, on its face, a subsistence issue to fall into the 5 AAC 96.615(a) category. The board eventually decided that this was the appropriate procedural vehicle.

The board next concluded that because the fish population at issue in the YRDFA petition had already been determined to be subject to subsistence uses, the only remaining issue was whether the circumstances of the proposal otherwise required expedited consideration. It was in this regard that the board posed a number of questions to the Department of Fish and Game regarding recalculations of the 1987 Area M tagging study, many of which questions the Department could not at that time answer, which in turn led to your inquiry as to the appropriate level of scrutiny at this stage.

It is our understanding of the statutory and regulatory provisions applicable to the petition process that the board must make a sufficient inquiry to determine if the substance of the petition warrants expedited consideration, but that it is not appropriate at this preliminary stage to undertake a complete examination of the underlying merits of the requested action. In this regard, one might analogize to the level of scrutiny appropriate for a court in deciding whether to issue a preliminary injunction; the court is directed not to delve deeply into the merits at the preliminary injunction stage. A.J.

Industries v. Alaska Public Service Comm'n, 470 P.2d 537, 540 (Alaska 1970). The reasons for this precaution are two-fold: first, a ruling at the preliminary injunction stage would be premature because it would usually be based on an as yet incomplete record, and second, it would entail ruling twice on the merits -- once at the preliminary injunction stage and once at the final adjudication stage.

It was evident during the Board of Fisheries' teleconference that the caution for a court not to decide the merits at the preliminary injunction stage was appropriate to the board as well, since it was clear that the board did not have a complete record or body of information before it to enable it to look very deeply at the issue. After the board made a number of inquiries as to the significance of changes in the 1987 tagging study, it ultimately concluded that it did not have sufficient information before it to necessitate expedited consideration, and in a split vote, rejected the petition. This is the kind of discretionary decision making that boards are commonly called upon to engage in.

As you know, the board did consider the Area M/AYK chum issue yet again during its meeting in Bethel in February, and at that point determined that it had a sufficient basis to set the matter of the 1987 tagging study on for hearing at its March board meeting in Juneau. The matter is now scheduled to come before the board beginning about March 11.

I hope this answers your questions regarding the proper procedures for consideration of petitions. If I can be of further assistance, please let me know.

Sincerely,

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ATTORNEY GENERAL

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Hon. Georgianna Lincoln
663-92-0360

February 27, 1992
Page 4

2:\liza\lincoln.ltr