

Hon. Carl L. Rosier
Commissioner
Alaska Dep't of Fish and Game

July 16, 1993

663-93-0522

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Special harvest areas and
funding of hatchery
evaluation projects

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You have asked two questions about private nonprofit hatcheries.¹ These questions and our answers follow.

Question 1. How may the Department of Fish and Game ("Department") establish special harvest areas ("SHA's") or change the boundaries of SHA's for private nonprofit hatcheries ("PNP's")? In particular, is it necessary for the Board of Fisheries ("Board") or the Department to adopt regulations for this purpose?

Answer: Among other ways, SHA's may be established or changed by an emergency order issued by you or your authorized designee. The issuance of an emergency order does not require an associated regulation.

Discussion: An SHA may be designated by Board regulations, within the hatchery permit, or by emergency orders issued by you or your authorized designee. 5 AAC 40.005(c). Harvesting of salmon in SHA's may be opened and closed by regulation or emergency order. 5 AAC 40.005(d). SHA boundaries that are set out in regulations or in PNP permits may be altered by emergency order if necessary for the proper management of natural or hatchery stocks. 5 AAC 40.005(e). Thus, the "designation, opening, and closure" of SHA's may be achieved through emergency orders. Boundaries established by regulation or in a PNP permit may be altered by emergency order if the Department finds it necessary for proper stock management.

Emergency order authority is described in AS 16.05.060. This law authorizes you or your designee "when circumstances require" to summarily open or close seasons or areas or to change weekly closed periods on fish or game. AS 16.05.060(a). An emergency order has the force and effect of law after it has been announced, and, most important for your question, it is not

¹ You also asked a question about the use of a fish trap by a federal fish hatchery. We will be answering this question in a separate memorandum.

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subject to the Administrative Procedure Act, the law governing the adoption of administrative regulations. AS 16.05.060(c).

Thus, an emergency order may be issued without requiring or referring to a previously adopted regulation that deals with the subject matter of the order. In this particular situation, you may issue an emergency order that designates, opens, or closes an SHA for salmon harvest without need of, or reference to, any regulation. If it is necessary for proper stock management, you may issue an emergency order that amends an SHA boundary established in a PNP permit without there being a regulation that pertains to the SHA. Essentially, an emergency order is a "stand alone" provision that is neither derived from nor dependent on administrative regulations.²

Question 2. You have asked whether you may add a requirement that PNP's fund projects that evaluate fish tagging programs (a) to a new PNP permit, (b) unilaterally to an existing PNP permit, or (c) to an existing PNP permit as a condition for granting the PNP's request for altering its permit.

Answer: You have statutory authority to add such a requirement to a new permit, to an existing permit as a condition of granting a PNP's request for altering the permit, and, if certain findings are made, unilaterally to an existing permit. This authority, however, should not be exercised until you adopt regulations that set out the conditions and procedures for including this requirement in a permit.

Discussion: Concerning a new permit, you or your designee may issue a PNP permit "subject to the restrictions imposed by statute or regulation." AS 16.10.400(a). Although the law sets out conditions that must be included in a PNP permit (see AS 16.10.420), that list is not exclusive. These authorities lead us to conclude that you may include in a new permit a requirement that the PNP pay for fish tagging evaluation projects but only if the conditions and procedures under which it may be included are first established by regulation. The regulations, of course, must be consistent with your duty to manage, protect, maintain, improve, and extend the fish resources

² We have noticed that nearly all emergency orders issued by the Department are expressed as "amendments" of regulations adopted by the Board. This is not only not necessary, but it is also incorrect. Absent a delegation of authority from the Board, the Department may not "amend" a Board regulation.

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of the state. AS 16.05.020(2).

Concerning an existing permit, the law authorizes you to alter a PNP permit "to mitigate the adverse effects of the (hatchery) operation" if you find that the "operation of the hatchery is not in the best interests of the public." AS 16.10.430(b). Thus, before you may unilaterally add a project funding requirement to an existing permit, you must find that (1) the failure of the hatchery to fund such a project causes its operation to not be "in the best interests of the public" (for example, that its operation threatened the viability of wild salmon stocks), and (2) adding the funding requirement would mitigate the adverse effect caused by the hatchery's operation (for example, would serve to protect wild salmon stocks). We also believe, consistent with our advice above, that the conditions and procedures for including this requirement in a permit must first be established by regulation.

Finally, we note that a regulation allows a PNP to propose an alteration of its permit or its management plan. 5 AAC 40.850. You have indicated that most PNP proposals are to allow the hatchery to increase salmon production or to change release sites. We assume that the increased production or changed release sites create the need for a fish tagging evaluation project. In this event, you would have the opportunity to condition your approval on the added requirement that the PNP fund the project. Before doing this, however, we again urge you to adopt regulations that set out the procedures and conditions for adding this requirement.

Please contact us if we can be of further assistance.

SMW:lae