

February 28, 1994

The Honorable Georgianna Lincoln
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Re: Fisheries Board agenda changes
Our file no. 661-94-0320

Dear Senator Lincoln:

In your letter of November 15, 1993, you requested an opinion clarifying what constitutes "compelling new information" and "significant new information" as the terms relate to the Board of Fisheries' ("board") regulatory policies for agenda change requests and petitions for regulatory changes.

It is not possible to determine in the abstract what might constitute compelling or significant new information with regard to any particular matter before the board; that determination is within the board's discretion and must be made on a case-by-case basis. We can, however, inform you that in the agenda change policy "new information found by the board to be compelling" was intended to mean new biologic information indicating a biologic resource problem that needs to be addressed before the particular fishery is scheduled for consideration during the board's regulatory cycle.¹ In the January 6, 1992, letter responding to the Yukon River Drainage Fisheries Association's ("YRDFA") petition, "sufficient new information" referred to the board's determination that, since its consideration of the same issue two months earlier, it had received no new information that would justify a finding of emergency under the petition policy.

1. Board of Fisheries' Agenda Change Policy

The agenda change policy provides a means for the board to consider issues outside of its normal cycle with the limitation

¹ The Board of Fisheries currently follows a three-year cycle in which it addresses management and allocation issues for fisheries in different regions of the state on a rotating basis.

that "the board will not accept an agenda change request that is predominantly allocative in nature in the absence of new information found by the board to be compelling." 5 AAC 39.999. (Emphasis added.)²

Review of the board's deliberations on this provision prior to its adoption in 1991 reveals "new information" was intended to mean new biologic information, available from the Alaska Department of Fish and Game staff since the board last considered the issue, showing interception impacts or biologic problems that need to be addressed. The term "compelling" did not acquire any special meaning by virtue of its use in the agenda change policy. It should be construed in accordance with its common usage: "to force, drive, or constrain; to make necessary." Webster's II New River University Dictionary 290 (1988).³ Thus, before the board will accept an agenda change request that is predominately allocative in nature, it must find that there is new biologic information that was not before the board when it last considered the issue, and the new information must be such that the board finds it necessary to consider the matter before the fishery is normally scheduled on the regulatory cycle.

2. Joint Board of Fisheries and Game Petition Policy

In the petition policy the boards recognized that the public has come to rely on the regularly scheduled participatory process for changing fish and game regulations. 5 AAC 96.625(d). The boards also recognized that in rare instances circumstances might require regulatory changes outside the normal process. 5 AAC 96.625(f). To deal with such circumstances, the policy provides:

Except for petitions dealing with subsistence hunting or fishing, which may be evaluated on a case-by-case basis under the criteria in 5 AAC 96.615(a), it is the policy of the boards that a petition will be denied and not scheduled for

² Letter from Laird A. Jones to Virgil Umphenour and Harry Wilde for the Yukon River Drainage Fisheries Association (Jan. 6, 1992) (on file with Alaska Department of Fish and Game).

³ Unless words have acquired a peculiar meaning by virtue of statutory definition or judicial construction, they are to be construed in accordance with their common uses. Wilson v. Municipality of Anchorage, 699 P.2d 569, 571-72 (Alaska 1983).

hearing unless the problem outlined in the petition justifies a finding of emergency. In accordance with the state policy expressed in AS 44.62.270, emergencies will be held to a minimum and are rarely found to exist. In this section, an emergency is an unforeseen, unexpected event that either threatens a fish or game resource, or an unforeseen, unexpected resource situation where a biologically allowable resource harvest would be precluded by delayed regulatory action and such delay would be significantly burdensome to the petitioners because the resource would be unavailable in the future.

5 AAC 96.625(f) (emphasis added).

Under this policy a petition will be scheduled for hearing only if the problem it outlines justifies a finding of emergency as defined in 5 AAC 96.625(f). The January 6 letter in response to YRDFA's petition stated "the board considered whether there was sufficient new information regarding the issue to support the finding." The "issue" was the problem outlined in YRDFA's petition. The "finding" examined for support by sufficient new information was the requirement of the petition policy of a finding of emergency before a matter will be scheduled outside of the board's normal regulatory cycle.

The tapes of the board's consideration of YRDFA's petition show that the board evaluated the petition to determine whether there was sufficient new information regarding the Area M and western Alaska fisheries to justify a finding of emergency. On the question of whether there was information to support a finding of emergency, board chairman Mike Martin directed the board to focus on new information the board did not have when it considered the issue two months earlier. The board members' discussions related to whether there was new information from the department or the petitioners.

Use of the term "sufficient" in the letter to YRDFA should be construed in accordance with its common usage: "that is enough." Webster's II New Riverside University Dictionary 1158 (1988). The synonym "adequate," meaning "able to satisfy a requirement," is also helpful in construing "sufficient." Id. at 78. In the context of the letter, and consistent with its common usage, "sufficient new information" means that in the board's opinion there was not adequate new information relative to the problem outlined in the petition to support a finding that an

emergency situation needed to be addressed outside of the normal regulatory cycle.

III. Joint Boards Subsistence Proposal Policy

Although the board did not discuss the subsistence proposal policy on January 5, when it first considered YRDFA's petition, it is pertinent to your inquiry.⁴ It provides a means for the Boards of Fisheries and Game to consider subsistence proposals and petitions that deal with subsistence outside of the normal regulatory cycle. 5 AAC 96.615(a). Under this policy the boards may schedule for consideration fish and game populations not previously examined for subsistence uses or reexamine decisions on subsistence uses where there is new information that was not available at the time of the prior consideration. The policy contains a more relaxed standard for accepting petitions and proposals that deal with subsistence in that it does not require a finding of emergency as does the petition policy at 5 AAC 96.625.

Under the subsistence proposal policy the board may decline to act on a subsistence proposal or a petition dealing with subsistence "for any reason including . . . the board has previously considered the same issue and there is no substantial new evidence warranting consideration." 5 AAC 96.615(c)(1) (emphasis added). The term "substantial" has no special meaning in the regulation. Its common meaning is "relating to or having substance; being of considerable importance, value, degree, amount, or extent." Webster's II New Riverside University Dictionary 1155 (1988).⁵

During the Joint Board's deliberations prior to adopting the subsistence proposal policy in 1991, board member Bud Hodson explained that it was intended to allow the board to decline to act where its previous action on the matter was adequately supported by information and there was no substantial new information that would require the board to consider the

⁴ As you are aware, the board reconsidered YRDFA's petition on January 29, 1992, under the subsistence proposal policy at 5 AAC 96.615. Letter from Sarah E. Gay to Hon. Georgianna Lincoln, (Feb. 27, 1992).

⁵ The Alaska Supreme Court has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Storrs v. State Medical Board, 664 P.2d 547, 554 (Alaska 1983).

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matter out of the regulatory cycle. "Substantial new evidence" was intended to refer to new information sufficient to require consideration of a subsistence petition or proposal out of the normal regulatory cycle when the issue had previously been considered. It is within the board's discretion to determine what amount of new evidence is sufficient to require a subsistence proposal or petition to be scheduled.

I hope this answers your questions regarding the Board of Fisheries' use of the terms "compelling" and "significant" new information. If I can be of further assistance, please let me know.

Very truly yours,

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