

# MEMORANDUM

State of Alaska  
Department of Law

TO: The Honorable Frank Rue  
Commissioner  
Department of Fish and Game

DATE: October 10, 1995

FILE NO.: 223-96-0037

TELEPHONE NO.: 465-6725

SUBJECT: Waste of Salmon: Application  
of Statute to Processors

FROM: Steven A. Daugherty  
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## I. QUESTIONS

You have asked for an interpretation of AS 16.05.831, the salmon waste law. In particular, you have asked whether the statute prohibits processors from removing the roe from a salmon and disposing of the carcass ("roe stripping").

## II. SHORT ANSWER

The purpose of the salmon waste law is to prevent the waste of a valuable resource and to ensure that salmon are used in a manner consistent with the maximum wise use of the resource. When roe stripping occurs, the carcass of a salmon is wasted. Roe stripping may encourage the taking of salmon which would otherwise spawn and contribute to future returns; it may also result in adverse economic impacts to coastal communities. We believe that subsection (a) of the salmon waste statute prohibits anyone, including fishers, catcher-processors, and processors, from roe stripping unless such activity is authorized by the commissioner under subsection (b) of the statute. Roe stripping can be authorized if it is determined to be consistent with the "maximum and wise use of the resource." AS 16.05.831(b).

In March of 1995, we issued a memorandum of advice on waste of salmon. 1995 Inf. Op. Att'y Gen. (March 31; 663-95-0332). This opinion modifies that advice.<sup>1</sup>

## III. DISCUSSION

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<sup>1</sup> In our earlier memorandum, we noted that we had been informed that the legislature did not intend for the salmon waste law to apply to processors. We also noted that we had not confirmed that information, and that processors who wished to roe strip should still seek authorization under AS 16.05.831(b). We now believe we were misinformed. We have examined the legislative history of the salmon waste law and have found no indication that the legislature intended to exempt processors from the prohibition on waste of salmon.

**A. Statutory Provisions Regarding Waste of Salmon**

Alaska statutes prohibit the waste of salmon:

A person may not waste salmon intentionally, knowingly, or with reckless disregard for the consequences. In this section, "waste" means the failure to utilize the majority of the carcass, excluding viscera and sex parts, of a salmon intended for

- (1) sale to a commercial buyer or processor;
- (2) consumption by humans or domesticated animals; or
- (3) scientific, educational, or display purposes.

AS 16.05.831(a).

Substantial civil and criminal penalties are provided for waste of salmon:

A person who violates this section or a regulation adopted under it is punishable by a fine of not more than \$10,000, or by imprisonment for not more than six months, or by both. In addition, a person who violates this section is subject to a civil action by the state for the cost of replacing the salmon wasted.

AS 16.05.831(c).

However, there is an exception to the normal prohibition on waste:

The commissioner, upon request, may authorize other uses of salmon that would be consistent with maximum and wise use of the resource.

AS 16.05.831(b).

**B. Interpreting the Language of the Salmon Waste Statute**

The salmon waste statute is not a model of clarity. The statute prohibits "waste" by any person,<sup>2</sup> but provides an unclear definition of "waste." This permits at least three different interpretations of the statute.

First, the statute could be interpreted literally, but that would undermine the legislative intent of preventing waste. If the statute is read literally, "waste" results from failure to utilize the majority of the salmon carcass, but only if the salmon is intended for (1) sale to a

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<sup>2</sup> "Person" includes "a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person." AS 01.10.060.

commercial buyer or processor, (2) consumption by humans or domesticated animals, or (3) scientific, educational, or display purposes. *See* AS 16.05.831(a). This interpretation would be nearly impossible to apply because it would be necessary to prove "intent" to use the fish for one of the listed purposes.<sup>3</sup> Moreover, this interpretation would defeat the express purpose of the statute, to prevent waste of salmon, because a person could escape prosecution by showing that he intended to waste the salmon.

Second, the statute could be interpreted to require salmon to initially be used for one of the three purposes. Under this interpretation, "waste" could not occur once the salmon had satisfied one of the three listed purposes. This interpretation would also undermine the legislative intent to prevent waste of salmon and render the statute almost completely unenforceable. Salmon caught by commercial fishers would not be "wasted" if it could be sold to a commercial processor, even if the sale was only a sham transaction for a token amount. Similarly, commercial fishers could escape the waste prohibition by obtaining processing licenses, selling the salmon to their processing business, and then stripping roe under the processing license. Commercial buyers and subsequent purchasers would likewise be free to roe strip or otherwise waste the salmon.

Third, the statute could be interpreted in a "common sense" manner to accomplish the stated legislative intent of the original legislation and its 1984 amendment: to "control the waste of salmon resources," sec. 1(b), ch. 99, SLA 1975, and to clarify "that no salmon intended for sale, whether to a private individual or a commercial buyer, may be wasted." *See* 1983 House J. 1212, 1214 (sectional analysis accompanying governor's transmittal letter). Under this interpretation, until the majority of the carcass has been utilized, salmon are "intended for" one of the three listed purposes. "Waste" occurs if, before the majority of the carcass is used, a person intentionally, knowingly, or recklessly, uses a salmon for an unauthorized purpose or discards the carcass. We believe that this is the most logical and defensible interpretation of the statute.

### **C. Legislative History of the Salmon Waste Statute**

The salmon waste statute was originally enacted in 1975 as part of a bill providing for the sale of subsistence-caught salmon eggs. Ch. 89, SLA 1975. Two almost identical

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<sup>3</sup> We note however, that a processor who roe strips could probably be prosecuted successfully under this literal interpretation because the processor "intends" to use the roe, which is part of the fish under purchasing regulations, AS 16.10.296, for sale to a commercial buyer or for human consumption. Application of the law to other persons would be more problematic, because although the general definition of fish includes parts of fish, AS 16.05.940, it does not necessarily include eggs. *See State v. Semaken*, 648 P.2d 114 (Alaska App. 114).

versions of the statute were passed. *Compare* ch. 89, SLA 1975 and ch. 99, SLA 1975.<sup>4</sup> Governor Hammond noted in a letter accompanying the first bill that there was some ambiguity in AS 16.05.831(a) and stated:

We interpret section 831(a) to require that salmon must be used for one of the three purposes listed in paragraphs (1) through (3), and that failure to utilize the majority of a salmon carcass for one of those purposes (unless otherwise authorized by the commissioner) constitutes waste. To interpret this section otherwise would render it meaningless.

1975 Sen. J. 1248-49 (law without signature memorandum).

It appears from its legislative context that a major purpose of the waste statute may have been to prevent subsistence fishers, motivated by the sale of roe, from catching more salmon than they could use. However, the salmon waste statute was enacted as a distinct provision of general applicability. It was located in another section of the statutes than the provisions for sale of subsistence-caught salmon roe. Further, it contained provisions that applied beyond subsistence uses; the authorized uses of salmon included sale to commercial buyers or processors and use for scientific, educational, or display purposes. *See* 1975 SLA 89. In our bill review of the original salmon waste provision, we noted that the bill would "impose a statewide prohibition on the intentional, knowing, or reckless waste of salmon in connection with commercial and sport fishing," and would also apply to "subsistence fishing and waste problems encountered with respect to the sale of salmon roe authorized by this bill." Letter from Avrum M. Gross, Attorney General, to Jay S. Hammond, Governor, May 16, 1975 (review of HCSCSSB 96 Jud. am. H).

In 1984, the salmon waste statute was amended. The stated purpose of the amendment was to clarify language which could be considered ambiguous and could reduce the law's effectiveness. The section-by-section analysis accompanying the Governor's transmittal letter stated, "[t]he clarification expressly provides that no salmon intended for sale, *whether to a private individual or a commercial buyer*, may be wasted." 1983 House. J. 1212, 1214 (emphasis added) (original bill introduction); *see also* 1984 House J. 2296-97 (transmittal letter for sponsor substitute referring to previous analysis).

#### **D. Using Statutory Construction to Interpret the Salmon Waste Statute.**

The most defensible interpretation of the salmon waste statute is that salmon are intended for one of the three purposes of subsection (a), and that a salmon may not be discarded

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<sup>4</sup> Governor Hammond allowed an initial bill to become law without signature and then signed a subsequent bill in order to provide for an earlier effective date. *See* 1975 Senate J. 1351.

or used for another purpose until the majority of the carcass has been utilized. This interpretation is based on the wording of the statute, its legislative history, and application of rules of statutory construction. We realize that the Department of Fish and Game has recently interpreted the statute differently.<sup>5</sup> However, this is a recent interpretation which was not adopted contemporaneously with the enactment of the statute and which conflicts with past departmental interpretation,<sup>6</sup> as such, it is not entitled to deference.

The Alaska Supreme Court has rejected the "plain meaning rule." That rule excludes legislative history as a guide to construing a statute when a statute appears unambiguous on its face. Instead, the court has stated, "[t]he objective of statutory construction is to give effect to the intent of the legislature, with due regard for the meaning that the statutory language conveys to others." *Dillingham v. CH2M Hill Northwest*, 873 P.2d 1271, 1276 (Alaska 1994) (citation omitted). The court uses a "sliding scale" analysis in which "[t]he plainer the meaning of the statute, the more persuasive any legislative history to the contrary must be." *Id.*; see also *Stephan v. State*, 810 P.2d 564 (Alaska App. 1991). In addition, the court has recognized that each part or section of a statute, "should be construed with every other part or section so as to produce a harmonious whole." *City of Anchorage v. Scavenious*, 539 P.2d 1169, 1175 (Alaska 1975).

Criminal statutes are generally strictly construed. "Strict construction, however, does not require that statutes be given the narrowest meaning allowed by the language; rather, the language should be given "a reasonable or common sense construction, consonant with the objectives of the legislature." *State v. Jones*, 750 P.2d 828, 831 (Alaska App. 1988). Where legislative history is sparse, "[c]ommon sense should be used to resolve questions of statutory construction." *Id.* Further, "as a general rule, conservation laws such as fish and game laws should be liberally construed to achieve their intended purpose." *Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State*, 628 P.2d 897, 903 (Alaska 1981) (citation omitted).

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<sup>5</sup> Alaska Department of Fish and Game, Div. of Commercial Fisheries Management and Development, *Requirements for Fishermen, Licensed Buyers and PNP Hatchery Operators to Salvage Salmon Roe*, Memorandum of August 25, 1994.

<sup>6</sup> See Memoranda from Paul Larson, ADF&G, Deputy Director Commercial Fisheries Management and Development, to Regional Supervisors and Management Biologists (August 9, 1993, and July 15, 1994) (Re: Stripping of Salmon Eggs for Commercial Sale and Salmon Waste Statutes) (salmon waste law applies to processors).

Applying these principles to the salmon waste statute, it is unlikely that the legislature intended to create a restriction which has no operative effect or which could be easily evaded by obtaining a processing license or passing the fish through a processor.<sup>7</sup>

Strict literal interpretation of the statute is not supported by applying the rules of construction. The legislative history indicates that the purpose of the statute is to prevent waste of salmon. Interpreting the statute to exempt those who intend to waste salmon rather than put it to use would conflict with that purpose. Statutes should not be interpreted to "yield patently absurd results or to defeat the obvious legislative purpose of the statute." *LeFever v. State*, 877 P.2d 1298, 1300 (Alaska App. 1994). This applies even in interpreting an ambiguous provision in a criminal statute, *id.*, and is further supported by the fact that the salmon waste law is a fish and game law with a conservation purpose and should therefore be liberally construed to achieve that purpose. *See Kenai Peninsula Fishermen's Coop. Assoc., Inc.*, 628 P.2d at 903. Further, the provisions of AS 16.05.831(a) must be construed with AS 16.05.831(b) to produce a harmonious whole, *see City of Anchorage v. Scavenious*, 539 P.2d 1169, 1175 (Alaska 1975), and language allowing the commissioner to authorize other uses of salmon would be rendered superfluous if AS 16.05.831(a) were interpreted to apply only to salmon intended for one of the three purposes.

An interpretation that the salmon waste statute applies only until a salmon has served one of the three purposes is also not supported by the above rules. As noted earlier, the purpose of the salmon waste statute is to prevent the waste of salmon. That purpose is not served if fishers can evade the statute by simply obtaining a processing license and selling the fish to themselves or by engaging in sham transactions with a processing business held by another person.<sup>8</sup> There is nothing in the statute that implies that the prohibition on waste ceases once a salmon has been sold.<sup>9</sup> Further, the legislative history of the 1984 amendments to the statute

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<sup>7</sup> Officers from the Division of Fish and Wildlife Protection have recently alerted our offices that some fishers may be engaging in sham transactions with persons who have processing licenses in order to circumvent AS 16.05.831(a).

<sup>8</sup> We note that the statute would still have some operative effect if interpreted to apply to the initial catcher of salmon, regardless of whether or not they were also processors. However, we note that requirements then could be easily evaded through use of "strawmen" (i.e. two catcher/processors could sell their salmon to each other and then each could roe strip and waste the remaining salmon). *See supra* note 6. We also note that had the legislature intended this result, they could easily have made the statute applicable to "any fisher" rather than "any person."

<sup>9</sup> Legal restrictions on the uses which may be made of fish after the fish have been sold are not a modern invention, and such restrictions have withstood legal challenges. *See e.g.*, 35 Am. Jur. 2d. Fish and Game § 51 (1967); *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 80 L. Ed. 772 (1935) (upholding California provision

indicate that the amendments were intended to clarify that "no salmon intended for sale, whether to *an individual or a commercial buyer*, may be wasted." 1983 House J. 1212, 1214 (emphasis added). While the actual wording of the legislation does not say this, the legislative purpose for the change is helpful for construing it.

The relevant wording of the original statute read:

[W]aste means the failure to utilize the majority of the carcass, excluding viscera and sex parts, of salmon which are to be  
(1)sold to a commercial buyer or processor;  
(2)utilized for consumption by humans or domesticated animals; or  
(3)utilized for scientific, educational, or display purposes.

Section 3, ch. 89, SLA 1975. The amendment replaced the phrase, "of salmon which are to be," with, "of a salmon intended for," and replaced "sold" with sale, and deleted "utilized for" in two places. H.B. 404, 13th Leg., 1st Sess. (1983). These amendments were enacted in the same form as initially proposed in H.B. 404. *See* 1984 SLA 132 section 18.<sup>10</sup> There is no indication in the legislative history that the amendment was intended to substantively change the salmon waste law, so the changes should not be interpreted to alter or weaken the initial purpose of the legislation or remove the requirement that salmon be used for one of the three purposes listed in the original legislation.<sup>11</sup> The purpose of clarifying that "no salmon intended for sale, whether to *an*

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<sup>9</sup> (...continued)

preventing use of sardines in a reduction plant for production of fish flour while allowing canning of sardines for human consumption where the processor argued that the provision was discriminatory, deprived him of property without due process, and was an impermissible restriction on interstate commerce).

<sup>10</sup> The language did change from the form in which it had previously been presented in H.B. 528. § 19, 12th Leg., 1st Sess. (1981) and in section 17 of the 1982 House Resources C.S. for H.B. 528. These earlier bills stated, "of any salmon intended for (1) sale or that has been sold." There is no explanation for the subsequent change, made during the bill drafting process. It may have simply been an attempt to eliminate awkward language. If the earlier language had been included in the bill, it would have been clear that the statute applied to processors. Its removal, however, does not appear to have been intended to cause a substantive change. *Compare* 1981 House J. 1059, 1061 (section 19 analysis) *and* 1983 House J. 1212, 1214 (section 17 analysis).

<sup>11</sup> Where a statute is ambiguous, a change may be regarded as legislative interpretation or clarification of the preexisting law. *City of Anchorage v. Thomas*, 624 P.2d 271, 272 (Alaska 1981). Such interpretation or clarification is entitled to substantial deference. "Subsequent legislation declaring the intent of a previous enactment is entitled to great weight, and even where subsequent amendments do not explicitly purport to clarify earlier enactments, they may still be probative." *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 176

*individual or a commercial buyer, may be wasted,"* 1983 House J. 1212, 1214 (emphasis added), is not achieved unless the prohibition on waste applies until the majority of the salmon carcass is utilized. Although the courts will also give "due regard to the meaning the statutory language conveys to others," *Dillingham v. CH2M Hill Northwest*, 873 P.2d 1271, 1276 (Alaska 1994), we believe that a court would follow this interpretation rather than one which conflicts with the legislative intent of the statute and its amendment.<sup>12</sup>

#### IV. CONCLUSION

We believe that AS 16.05.831(a) applies to anyone, including fishers, catcher-processors, and processors, and that it prohibits roe stripping unless that activity is authorized by the commissioner under AS 16.05.831(b). Even if the statute were interpreted literally, we believe that it would prohibit roe stripping by processors. However, we believe that a literal interpretation of the statutory language conflicts with the legislative intent of the statute. A more sound interpretation requires that, in the absence of authorization from the commissioner of ADF&G for other uses, a salmon must be used for one of the three purposes in AS 16.05.831(a). Further, a salmon must be used for one of these purposes until the majority of the carcass is utilized, even after sale.

The ambiguous wording of the statute may create enforcement problems and contribute to public misunderstanding of the law. Therefore, we recommend that the department seek legislative clarification of the statute.

Under AS 16.05.831(b), the commissioner may authorize uses of salmon other than those authorized by AS 16.05.831(a). These other uses must be consistent with the maximum and wise use of the resource. To afford public notice and to insure that all affected persons are treated equally, the procedures and criteria for obtaining the commissioner's authorization under AS 16.05.831(b) should be promulgated as a regulation.

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<sup>11</sup> (...continued)  
(Alaska 1986) (citation omitted).

<sup>12</sup> The statute's mental state requirements prevent this interpretation from being as far reaching as it might initially appear. Waste is only prohibited where it is intentional or knowing or results from a reckless disregard for consequences. Thus, waste is not prohibited where it occurs despite reasonable efforts to preserve a salmon or put it to use before spoilage occurs.