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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT SITKA

SITKA TRIBE OF ALASKA, Plaintiff, v. STATE OF ALASKA, DEPARTMENT OF FISH AND GAME, and the ALASKA BOARD OF FISHERIES, Defendants, and SOUTHEAST HERRING CONSERVATION ALLIANCE, Defendant-Intervenor.	)	Case No. 1SI-18-00212CI

CORRECTED SITKA TRIBE OF ALASKA'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

STA is not asking this Court to order ADF&G to take any specific management action. Instead, STA is seeking a ruling of law from this Court invalidating ADF&G's unsupported interpretation of 5 AAC 27.195 and confirming that the regulation: 1) requires ADF&G to make a determination before opening the commercial fishery regarding whether it is necessary to distribute the commercial harvest by fishing time

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and area to ensure that subsistence users have a reasonable opportunity to harvest the amount of herring necessary for subsistence uses; 2) requires ADF&G to consider the quality and quantity of herring spawn on branches in the subsistence fishery when making management decisions regarding either the subsistence or the commercial fisheries; and 3) requires ADF&G to provide a record of its decision-making that is sufficient for judicial review. In addition, STA requests that the Court confirm that the requirements set out in the regulation cannot be disregarded simply because implementing the regulation could interfere with achieving the full guideline harvest level ("GHL") for the commercial fishery.

II. ARGUMENT

A. Standard of Review: This Court Should Not Defer to ADF&G's Interpretation of 5 AAC 27.195.

This Court should conclude that deference to ADF&G's unwritten, inconsistent, and *post hoc* interpretation of 5 AAC 27.195 is entirely inappropriate. ADF&G fundamentally misunderstands the proper standards of review for interpreting regulations. According to ADF&G, the Court should defer to ADF&G's interpretation of 5 AAC 27.195 because understanding the regulation "requires" highly specialized expertise.[1] But the regulatory interpretation issue currently before the Court is purely a question of law that is within the Court's purview, and not ADF&G's. STA is not asking

[1] State's Opposition to STA's Motion for Partial Summary Judgment at 3.

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this Court to review individual management decisions that may, if they were before the Court, require understanding scientific assessments or technical determinations. The question presented is whether ADF&G's interpretation of its mandate under 5 AAC 27.195 is erroneous, *i.e.*, whether ADF&G is making the determinations and considering the factors that 5 AAC 27.195 requires in the first instance. Thus, there is no reason to defer to ADF&G's interpretation of the Board's unambiguous regulation.

Recently in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019),[2] the U.S. Supreme Court analyzed the common law basis for deference to agency regulatory interpretations. The Alaska Supreme Court has followed a nearly-identical approach.[3] Deference to agencies is rooted in the presumption that the legislature "would generally want the agency to play the primary role in resolving regulatory ambiguities" because the agency is in the better position to determine its own regulation's original meaning.[4] But "deference is not the answer to every question of interpreting an agency's rules."[5] Deference is only warranted where four elements are met: (1) the regulation is

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[2] 588 U.S. ____ (2019).

[3] *See Kelly v. Zamarello*, 486 P.2d 906, 917 (Alaska 1971) (citing favorably the U.S. Supreme Court's approach to agency deference).

[4] *Wilkie*, 139 S. Ct. at 2412; *accord Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982) ("[W]here an agency interprets its own regulation . . . a deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue.").

[5] *Wilkie*, 139 S. Ct. at 2414; *State, Comm. Fisheries Entry Comm'n v. Templeton*, 598 P.2d 77, 81 (Alaska 1979).

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ambiguous; (2) the agency's proffered interpretation is the official position of the agency that promulgated the regulation; (3) the interpretation represents the agency's fair and considered judgment; and (4) the agency's interpretation is reasonable.[6] Here, ADF&G's interpretation of 5 AAC 27.195 fails on all fronts, and thus, should not be accorded any deference.

1. The plain language of 5 AAC 27.195 is unambiguous.

ADF&G argues that the Court has no role in interpreting 5 AAC 27.195 because the regulation involves "highly specialized expertise."[7] But an agency's expertise is only relevant if the regulation is genuinely ambiguous and the question before the court "involves agency expertise or the determination of fundamental policy questions *on subjects committed to the agency's discretion*."[8] Here, the question presented requires this Court to interpret 5 AAC 27.195 as a matter of law. The Court is "in just as good a position" to interpret the legal meaning of the regulation as ADF&G.[9]

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6 *See Wilkie*, 139 S. Ct. at 2412-18.

7 State's Opposition to STA's Motion for Partial Summary Judgment at 5.

8 *City of Valdez v. State*, 372 P.3d 240, 246 (Alaska 2016) (emphasis added) (concluding Department of Revenue's interpretation of its regulation establishing appeal procedures did not "implicate Revenue's expertise or fundamental policies").

9 *Templeton*, 598 P.2d at 81 (declining to defer to Commission's interpretation of its own regulation that conflicted with statute's purpose).

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Importantly, deference to an agency's interpretation of a regulation is inappropriate unless the regulation is genuinely ambiguous.[10] "If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law."[11] The court's first step in analyzing a regulation is to apply "traditional tools" of construction to determine the regulation's meaning, beginning with the regulation's plain language.[12] The court may consider deferring to the agency's interpretation only if the court determines that the regulation is genuinely ambiguous after attempting to ascertain the regulation's meaning through traditional canons of interpretation.[13] "A regulation is ambiguous when it is capable of two or more equally logical interpretations."[14]

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[10] *Wilkie*, 139 S. Ct. at 2415 ("First and foremost, a court should not afford [ ] deference unless the regulation is genuinely ambiguous."). Justice Kavanaugh's concurrence in *Wilkie* highlights the fact that there is no mainstream judicial philosophy that believes deference to agency regulatory interpretations is appropriate if the regulation is unambiguous. *See id*. at 2448 ("Umpires in games at Wrigley Field do not defer to the Cubs manager's in-game interpretation of Wrigley's ground rules."). STA is unaware of any Alaska case where the court deferred to an agency's interpretation of an unambiguous regulation.

[11] *Id*.

[12] *Tea ex rel. A.T.*, 278 P.3d 1262, 1265 (Alaska 2012); *see Trustees for Alaska v. Gorsuch*, 835 P.2d 1239, 1246 (Alaska 1992) (analyzing the plain meaning of a regulation before turning to an agency's interpretation).

[13] *See Wilkie*, 139 S. Ct. at 2415 ("And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction.") (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984)).

[14] *RBG Bush Planes, LLC v. Alaska Pub. Offices Comm'n*, 361 P.3d 886, 892 (Alaska 2015) (internal quotation marks omitted).

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STA has demonstrated that 5 AAC 27.195(a)(2) unambiguously requires ADF&G to make a determination before opening the commercial fishery regarding whether it is necessary to distribute the commercial harvest by time and area to ensure that subsistence harvesters have a reasonable opportunity. And 5 AAC 27.195(b) unambiguously requires ADF&G to consider the quality and quantity of herring spawn on branches when making management decisions regarding the commercial fishery.[15] Both of those relevant subsections of 5 AAC 27.195 provide clear and unambiguous mandates to ADF&G.[16] ADF&G never addresses the plain language of 5 AAC 27.195 or explains what genuine ambiguity exists that warrants deference to its interpretation.

ADF&G's reliance on *Weaver Brothers, Inc. v. Alaska Transportation Commission* is misplaced.[17] *In Weaver Brothers* the question was whether a permit transfer application satisfied a regulatory requirement for "active and regular use," or whether the transferor's permit was "dormant."[18] The Court recognized that interpreting "active and regular use" and "dormant" depended on the unique factual determinations and circumstances of the application. Because the regulatory agency was in a better position to apply the regulation to the specific facts, and the case

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15 *See* STA Memorandum in Support of Partial Summary Judgment at 31-32.

16 *See id*.; STA's Opposition to State's and SHCA's Motions for Partial Summary Judgment at 7-19; 21-25.

17 588 P.2d 819 (Alaska 1978).

18 *Id*. at 820-822, n. 3-4.

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presented fundamental policy questions "concerning the adequacy of service to various routes and the regulation of competition in those routes," the Court deferred to the agency's regulatory interpretation.[19]

But STA is not asking this Court to review ADF&G's application of 5 AAC 27.195 to a particular decision or factual circumstance. STA's claim is premised on the fact that ADF&G is not making any determinations regarding whether subsistence harvesters are ensured a reasonable opportunity for subsistence, or considering the quality and quantity of herring spawn on branches when making management decisions regarding the commercial fishery. The simple question before this Court is whether 5 AAC 27.195 requires ADF&G to make those determinations and considerations in the first instance. This Court should conclude that 5 AAC 27.195 unambiguously requires those determinations and considerations, and thus, there is no need to defer to ADF&G's interpretation.[20]

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[19] *Id.* at 821.

[20] Once ADF&G makes the determinations required by 5 AAC 27.195 and adequately explains its decision-making, a future challenge to those determinations may warrant deference analogous to *Weaver Brothers*. It is true that the Court defers to ADF&G's expertise when making "management decisions" involving the implementation of the Board's regulations. *See, e.g., Cook Inlet Fisherman's Fund ("CIFF") v. State, Dep't of Fish & Game*, 357 P.3d 789, 804 (Alaska 2015) (recognizing "long-standing policy of not second-guessing the Department's management decisions based on its specialized knowledge and expertise"). But that question has not been presented to the Court because ADF&G has illegally interpreted 5 AAC 27.195 to avoid making the required determinations in the first instance; thus, there is no "management decision" for this Court to review.

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2. There is no official interpretation of 5 AAC 27.195 to which his Court could defer because the Board has not taken any action to clarify the regulation's meaning.

ADF&G ignores the fact that the Board, and not ADF&G, was the agency that promulgated 5 AAC 27.195.[21] The Court should not defer to an interpretation from an agency that did not write the regulation because that would undermine the fundamental purpose of deference, which is to allow the agency that wrote the regulation to explain what it meant.[22] It is also axiomatic that "the regulatory interpretation must be one actually made by the agency."[23] The Board's official interpretation of its own regulation would be entitled to deference from the court,[24] but there has been no official Board action interpreting 5 AAC 27.195 since its promulgation.

ADF&G offers two unavailing arguments that deference is appropriate in this case. First, ADF&G attempts to distinguish *Tea ex. Rel. A.T.* by relying on the false premise that the Board is a party to this motion and has implicitly endorsed ADF&G's interpretation of 5 AAC 27.195.[25] In *Tea*, the Court explicitly rejected deference to an

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[21] State's Opposition to STA's Motion for Partial Summary Judgment at 7-10. There is no dispute that the Board promulgated 5 AAC 27.195, and not ADF&G. *See* AS 16.05.251 (the Board "may adopt regulations it considers advisable").

[22] *See Rose*, 647 P.2d at 161; *Wilkie*, 139 S. Ct. at 2412.

[23] *Wilkie*, 139 S. Ct. at 2412; *see Tea*, 278 P.3d at 1263.

[24] *See Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 397 (Alaska 1990) (deference to the Board); *Meier v. State, Bd. of Fisheries*, 739 P.2d 172, 174 (Alaska 1987) (same).

[25] *See* State's Opposition to STA's Motion for Partial Summary Judgment at 9, 10 n. 34.

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agency that did not promulgate the regulation at issue.[26] The Court explained, "[w]e typically interpret regulations with some deference to the agency's own interpretation, but the agency that promulgated [the regulation] is not a party and has not otherwise offered an interpretation."[27] When the agency that promulgated the regulation is not a party or has not offered an official regulatory interpretation, the Court must "interpret the regulation using [its] independent judgment."[28]

Even if the Board is considered a party for purposes of the instant cross-motions (which it is not),[29] ADF&G's assertion that the Board has implicitly endorsed ADF&G's interpretation of 5 AAC 27.195 is incorrect.[30] The Board cannot take action or endorse legal positions "implicitly." In *State v. Tanana Valley Sportsmen's Association, Inc*., the Court explained that the Board may not "impose requirements not

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[26] *Tea*, 278 P.3d at 1263.

[27] *Id.*

[28] *Id*. The State's observation that the *Tea* Court ultimately adopted the same interpretation advanced by the agency in that case is irrelevant for purposes of the standard of review. *See* State's Opposition to STA's Motion for Partial Summary Judgment at 8 n. 28. The *Tea* Court did not give any weight to the Office of Children's Services' regulatory interpretation. *Tea,* 278 P.3d at 1263.

[29] *See* State's Memorandum In Support of Summary Judgment: Count I at 5 n. 17 ("As the parties' stipulation and the court's order make clear, this round of summary judgment motions is limited to STA's claims against ADF&G in Count I."). This Court should take judicial notice of the fact that the Department of Law attorney representing the Board, Aaron Peterson, is not a signatory on ADF&G's briefs, which may mean that the Board does not share ADF&G's litigating position on this issue.

[30] *See id.* at 10 n. 34 ("By leaving the regulation as is, it is affirming the Department's interpretation.").

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contained in written regulations by means of oral instructions" to ADF&G.[31] When the Board "interprets or makes specific the law enforced or administered," it must comply with the Administrative Procedure Act ("APA").[32]

ADF&G argues that the Board meetings where it rejected proposals to amend 5 AAC 27.195 complied with the APA, but a majority of four votes is "required to carry all motions, regulations, or resolutions."[33] The Board did not "carry" any action regarding the regulation post-2002. Furthermore, ADF&G erroneously concludes that the Board's rejection of proposals to amend 5 AAC 27.195 implicitly endorsed an interpretation by ADF&G of 5 AAC 27.195 that had never been plainly and fully explained to the Board on the record.[34] For example, nothing in the record demonstrates that the Board was informed that ADF&G believed the "closed area" regulation "mostly addressed" concerns regarding the commercial fishery's effects on subsistence harvests.[35] Nor does ADF&G ever demonstrate in the record where any Board member explicitly endorsed ADF&G's interpretation and implementation of 5 AAC 27.195(a)(2). The only Board member that directly addressed ADF&G's

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31 583 P.2d 854, 858 (Alaska 1978).

32 *Kenai Peninsula Fisherman's Co-Op. Ass'n v. State*, 628 P.2d 897, 907 (Alaska 1981).

33 *Peninsula Marketing Ass'n v. Rosier*, 890 P.2d 567, 574 (Alaska 1995) (citing AS 16.05.320).

34 *See* State's Memorandum In Support of Summary Judgment: Count I at 21. ADF&G also does not explain why this Court should give deference to ADF&G's interpretation if the Board's original intent is clear from the record.

35 *See* State Preliminary Injunction Br. at 38.

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implementation of the regulation was Board Member Payton, who cited ADF&G's failure to implement the regulation as the reason it was necessary to expand the closed area:

> It was also mentioned by Director Kelley the Department is directed by the Sitka Sound commercial sac roe herring fishery to distribute commercial harvest by time and area if the Department determines it is necessary to ensure reasonable opportunity to harvest the amount of spawn. And I would refer to map—page number 13 in oral report three, tab 22, the Sitka Sound herring spawn and fishery areas. And by my assessment of that map, in most years the commercial harvest and the commercial area is very adjacent to this core area. *So I don't believe the Department is following that mandate that well in the management plan* and then [increasing the closed area] may be appropriate to separate some of the disturbance of the herring and then—and allow more of a reasonable opportunity and then allow the [amount necessary for subsistence] to fall in the mid-range or higher end. That being said, in certain years this would definitely have an effect on the commercial sac roe fishery and Department comments say might not achieve the GHL or it would increase fishing times, slow the fishery down. BOF 5093 (emphasis added).

ADF&G cites no authority for its novel argument that the Board may implicitly affirm ADF&G's regulatory interpretation.[36] If any intent can be inferred from the Board's refusal to amend, repeal, or explicitly endorse ADF&G's interpretation of 5 AAC 27.195, it is that the Board's original intent was left unmodified.[37]

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[36] *See* State's Opposition to STA's Motion for Partial Summary Judgment at 9, 10 n. 34

[37] The cases cited by ADF&G in which the Court deferred to the *Board's* decision-making are likewise inapplicable to the standard of review here. *See* State's Opposition to STA's Motion for Partial Summary Judgment at 10 n. 31 (citing *Gilbert*, 803 P.2d at 397; *Meier*, 739 P.2d at 174). Here, the question presented only requires the Court to determine the regulation's

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Second, ADF&G erroneously contends that because it and the Board are "functionally" the same agency, 5 AAC 27.195 is really ADF&G's regulation.[38] That novel assertion is untenable because ADF&G and the Board are distinct agencies with separate roles. In *Peninsula Marketing Association v. Rosier*, the Court explained that the Legislature clearly intended to "divide rule-making and administrative authority" between the Board and ADF&G.[39] The statutory powers and duties of ADF&G relate "principally to administration and budgeting."[40] The Board makes policy decisions and adopts regulations.[41]

When there is "split authority" between agencies for adopting and implementing regulations, deference to a regulatory interpretation should only be given to the agency that promulgated the regulation.[42] In *Martin v. Occupational Safety and Health Review*

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meaning. The regulation is presumed to be valid. *See Native Vill. of Elim v. Stat*e, 990 P.2d 1, 14 (Alaska 1999).

38 *See* State's Opposition to STA's Motion for Partial Summary Judgment at 7; SHCA's Opposition to STA's Motion for Partial Summary Judgment at 4 ("[A]lthough the Board and ADF&G have separate powers—the Board promulgates rules; ADF&G implements them—they are in effect one agency.").

39 890 P.2d 567, 572 (Alaska 1995).

40 *Id*. (citing AS 16.020, .050).

41 *Id*. (citing AS 16.05.251).

42 ADF&G misstates the D.C. Circuit's reasoning in *Amerada Hess Pipeline Corp. v. F.E.R.C.*, 117 F.3d 596 (D.C. Cir. 1997). *See* State's Opposition to STA's Motion for Partial Summary Judgment at 10 n. 31. The D.C. Circuit did not defer to FERC's regulatory interpretation simply because FERC "is entrusted with administering the regulations." *See id*. Instead, the D.C. Circuit concluded that FERC specifically "adopted the rules and regulations" that were initially promulgated by a different agency when Congress transferred regulatory authority to FERC. *Amerada Hess Pipeline Corp*., 117 F.3d at 601. Thus, there was only one

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Commission, the U.S. Supreme Court considered an "unusual regulatory structure" in which the Occupational Safety and Health Act ("OSH Act") authorized the Secretary of Labor to promulgate and enforce workplace standards, and the Occupational Safety and Health Review Commission to adjudicate disputes arising from enforcement of those standards.[43] Both federal agencies claimed authority to interpret regulations adopted under the OSH Act; however, the Court concluded that deference should only be given to the Secretary's regulatory interpretation because that was the agency that promulgated the regulations. "Because the Secretary promulgates these standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question."[44] The Court noted that there is a presumption that the legislature delegates the sole authority to interpret regulations to the agency charged with promulgating those regulations.[45]

Here, the Alaska Legislature explicitly delegated rulemaking authority to the Board, and not ADF&G.[46] Like the OSH Act, Alaska's fisheries management statute has a "split-enforcement structure" that was "designed to achieve a greater separation

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agency (FERC) responsible for promulgating and implementing the regulations. *Id*. The rule that courts "generally do not accord deference to an agency's interpretation of regulations promulgated by another agency" still stands.

43 499 U.S. 144, 152-53 (1991).

44 *Id*. at 152.

45 *Id*. at 152-53.

46 *Rosier*, 890 P.2d at 572-73.

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of functions than exists in a conventional unitary agency."[47] The Board consists of seven members who are appointed by the governor and confirmed by the Legislature; their terms are staggered so that no single administration can dictate fisheries policy, *i.e.*, "to limit the direct influence of the Governor on daily fish and game management issues."[48] In contrast, ADF&G is headed by a political appointee and makes policy priorities that are independent from those of the Board. If this Court accepts ADF&G's argument that it should receive deference when interpreting Board regulations on their face, it would undermine the Board's prerogative to make policy and direct ADF&G through regulatory mandates as the Legislature intended. Certainly, ADF&G has some discretion in how it implements the regulations when making "management decisions" based on facts and seasonal determinations beyond the Board's purview.[49] But if ADF&G is allowed to interpret the scope of its authority generally under the Board's regulations in a way that negates clear regulatory requirements, the Board's

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47 *Martin*, 499 U.S. at 151, 155; *see Rosier* 890 P.2d at 572-73.

48 *Rosier*, 890 P.2d at 572 ("The members of the Board serve staggered three-year terms. Appointed members must be approved by the Legislature in joint session and can only be removed for specified misconduct. These protective measures were instituted to ensure that fisheries decisions are made by knowledgeable persons based on their independent judgment, rather than immediate political pressure.") (emphasis added) (internal citations omitted).

49 *See, e.g., CIFF*, 357 P.3d at 804 (recognizing deference to ADF&G's "management decisions").

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responsibility to make policy and determine the scope of ADF&G's authority would essentially be transferred to ADF&G.[50] That is not what the Legislature intended.

3. ADF&G's interpretation of 5 AAC 27.195 does not represent the agency's fair and considered judgment.

This Court should conclude that ADF&G's interpretation of 5 AAC 27.195 is merely a *post hoc* rationalization for the agency's failure to follow the regulation. It is abundantly clear that ADF&G's "interpretation" is merely the Department of Law's litigating position: (a) Mr. Coonradt admitted that there is no written interpretation or guidance for implementing 5 AAC 27.195;[51] (b) Mr. Coonradt admitted that he was never given instructions regarding implementing 5 AAC 27.195 other than his own reading of the regulation;[52] and (c) ADF&G points to nothing in the record generated prior to this litigation to support its interpretation. "[A] court should decline to defer to a merely 'convenient' litigation position' or 'post hoc rationalization' advanced to defend past agency action against attack."[53]

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[50] ADF&G's argument that it is "functionally interpreting its own regulation" completely ignores the Legislature's intent to separate regulatory duties. *Compare* State's Opposition to STA's Motion for Partial Summary Judgment at 10, *with Rosier*, 890 P.2d at 572. Although ADF&G "advised" the Board about the regulation, the Board exercises its own independent judgment and does not simply rubber stamp ADF&G's recommendations.

[51] *See* STA's Memorandum In Support of Partial Summary Judgment at 27 (citing Coonradt Depo. at 25).

[52] *Id*.

[53] *Wilkie*, 139 S. Ct. at 2417 (quoting *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 155 (2012); *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988)); *accord Hendricks-Pearce v. State, Dep't of Corr*., 323 P.3d 30, 46 n. 38 (Alaska 2014) (Fabe, C.J.

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Although agency regulatory interpretations that are "longstanding and continuous" may be helpful to a reviewing court,[54] ADF&G's interpretation of 5 AAC 27.195 was offered for the first time in this litigation and is neither longstanding nor continuous.[55] For example, nothing in the record indicates that prior to this litigation ADF&G believed that *Rosier* limited the Sitka Area Manager's authority to take management actions[56] or that ADF&G believed it is not required to consider the quality and quantity of herring roe on branches when making management decisions "in season."[57] And ADF&G's interpretation of 5 AAC 27.195 has changed since the 2005 Management Plan: In 2005, ADF&G acknowledged that "[i]n order to provide a reasonable opportunity for subsistence, ADF&G must consider whether it is necessary to distribute the harvest time and area in the commercial fishery;"[58] now, ADF&G believes that it "could not without new information take action to restrict the commercial fishery, on the basis of a lack of reasonable opportunity for subsistence

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dissenting) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.") (citing *Bowen*, 488 U.S. at 213).

54 *See Marathon Oil Co. v. State, Dep't of Natural Res.*, 254 P.3d 1078, 1082 (Alaska 2011).

55 *See Wilkie*, 139 S. Ct. at 2417 n. 6 ("The general rule, then, is not to give deference to agency interpretations advanced for the first time in legal briefs."); *City of Valdez*, 372 P.3d at 247 (declining to give deference to agency's 12-year-old interpretation).

56 *See* State's Memorandum In Support of Summary Judgment: Count I at 39-41.

57 *Id*. at 38.

58 Ex. 8 at 8 (2005 Management Plan).

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uses, because that would essentially veto the Board's January 2018 finding that there was a reasonable opportunity for subsistence."[59] Thus, ADF&G's *post hoc* rationalization is nothing more than a convenient litigating position justifying why ADF&G has not made the determinations 5 AAC 27.195 requires. Deference is "entirely inappropriate."[60]

4. ADF&G's interpretation of 5 AAC 27.195 is "plainly erroneous" and inconsistent with the subsistence law.

Finally, this Court should use its independent judgment to determine the meaning of 5 AAC 27.195 without deference to ADF&G's unreasonable interpretation.[61] Regulations may not be interpreted by agencies to be inconsistent with statutes.[62] Here, ADF&G's interpretation elevates the commercial fishery to the same or higher importance as subsistence, violating Alaska's statutorily-mandated

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59 State Preliminary Injunction Br. at 33 (Feb. 4, 2019).

60 *Hendricks-Pearce*, 323 P.3d at 46 n. 38 (Fabe, C.J. dissenting).

61 *See Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 301-02 (Alaska 2014) (reviewing whether agency's interpretation of its regulation is "plainly erroneous and inconsistent with the regulation" and "whether the agency's interpretation is inconsistent with or contrary to the statute on which the regulation the based"); *see also Trustees for Alaska*, 835 P.2d at 1245 (reviewing whether agency's regulatory interpretation was consistent with statute); *Forquer v. State, Comm. Fisheries Entry Comm'n*, 677 P.2d 1236, 1241 (Alaska 1984) (same).

62 *City of Valdez*, 372 P.3d at 246 ("We consider whether the regulation is consistent with and reasonably necessary to carry out the purposes of [its enabling statute] and whether [it is] reasonable and not arbitrary.") (internal quotation marks omitted); *Templeton*, 598 P.2d at 81 ("[R]egulations must be read so as to be consistent with" the statutes.).

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subsistence priority.[63] ADF&G argues that it cannot "fundamentally" alter the commercial fishery or take management action to benefit subsistence harvesters unless "everything [is] equal," *i.e.*, the action taken to move the commercial fishery does not affect the ability of the commercial fishery to harvest the full GHL.[64] But ADF&G's interpretation is inconsistent with the statutory subsistence priority and the Board's intent to require distribution of the commercial fishery to ensure a reasonable opportunity for subsistence, regardless of the distribution's potential harm to the commercial fishery.[65] This Court should conclude that ADF&G's interpretation of 5 AAC 27.195 is "plainly erroneous" and does not warrant deference.

B. ADF&G is Not Implementing 5 AAC 27.195(a)(2).

ADF&G argues that there is no genuine factual dispute that it *has* implemented 5 AAC 27.195(a)(2). But that argument is directly contradicted by complete lack of anything in the ADF&G administrative record demonstrating implementation of the regulation and ADF&G's admissions. ADF&G has admitted that it does not take the

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63 *See* Ch. 1, § 1(c)(1), SSSLA 1992 ("[S]ubsistence uses of Alaska's fish and game resources are given the highest preference, in order to accommodate and perpetuate those uses.").

64 *See* STA's Opposition to State's and SHCA's Motions for Partial Summary Judgment at 21-23 (quoting Coonradt Dep. Ex. 19 at 6).

65 If ADF&G's interpretation of 5 AAC 27.195 is correct, then the Board's regulation is invalid because it does not provide for the statutorily-required subsistence priority. *See* AS 16.05.258.

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first essential step in implementing 5 AAC 27.195(a)(2).[66] Mr. Coonradt, the in-season manager for the sac roe fishery, stated in a sworn affidavit that "the department has never interpreted [5 AAC 27.195(a)(2)] as requiring the department to make an independent assessment of whether there is a reasonable opportunity for subsistence use of herring spawn in Sitka Sound."[67] Mr. Coonradt's testimony during his deposition is consistent with his affidavit where he admits that there is no in-season determination about whether subsistence harvesters are being provided a reasonable opportunity—that the only thing ADF&G does related to determining whether there is a reasonable opportunity is collect data through the Subsistence Division report.[68] Yet, the 2002 Board clearly instructed that ADF&G in-season manager, before opening the commercial fishery, must first determine whether "people are being afforded a reasonable opportunity or not" and then, second, determine "[d]o I have to disperse the fleet or not to afford a reasonable opportunity." BOF 5115. ADF&G cannot possibly make a determination whether it is necessary to distribute the commercial fishery by

66 STA thoroughly briefed many of the points the State and SHCA raise in this round of briefing in STA's Opposition to the State's and SHCA's Motions for Partial Summary Judgement. STA will not repeat those arguments here and instead directs the Court to STA's Opposition at 4-21 for arguments demonstrating the lack of merit in the ADF&G's and SHCA's interpretation of 5 AAC 27.195, and to pages 21-32 for arguments demonstrating that ADF&G has failed to implement the regulation and thereby violated the law.

67 Ex. 16 at 4 (Coonradt Aff. ¶ 11).

68 Coonradt Dep. Ex. 19 at 3.

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time and area to ensure reasonable opportunity if it refuses to determine whether subsistence users are being afforded a reasonable opportunity.[69]

ADF&G also admits that it will not consider taking an action pursuant to 5 AAC 27.195(a)(2) that would fundamentally alter the way it manages the commercial fishery to harvest the full GHL, including taking actions prior to the first spawn or outside of the areas closed to the commercial fishery by the Board.[70] The best ADF&G can come up with to show how it implements the regulation is a single decision in 2017 to move the commercial fishery which, according to the testimony of the in-season manager, was taken only because the commercial fishery had an at least equal harvest

[69] ADF&G argues that the requirement in 5 AAC 27.195 that ADF&G "monitor a subsistence fishery in season and make in-season adjustments" is "inconsistent with the Board's general practice." State's Opposition to STA's Motion for Summary Judgment at 23-24. But in fact, there is no "general practice." The Board may manage similar fisheries in generally similar ways, but the Board primarily takes the particular and often unique circumstance of the hundreds of commercial fisheries under its jurisdiction into consideration, and then attempts to develop appropriate management plans. *See, e.g.*, 5 AAC 03.001 through 5 AAC 28.975 (demonstrating the many different management plans the Board has created for commercial fisheries across the State). Moreover, there are other fisheries where ADF&G is required to assess whether "reasonable opportunity for subsistence has been or will be provided within the season" before ADF&G can open a commercial fishery. *See, e.g.*, 5 AAC 05.360(i) ("Yukon River King Salmon Management Plan") (authorizing ADF&G to open a commercial fishery if "reasonable opportunity for subsistence uses of king salmon has been or will be provided within the season").

[70] *See* STA's Opposition to State's and SHCA's Motions for Partial Summary Judgment at 21-25; *see also* Ex. 12 at 1-2 (Forrest Bowers email) (ADF&G "can't undertake this sort of action solely to achieve a fishery resource allocation objective").

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opportunity in another area.[71] Prioritizing or equalizing management for the GHL violates the regulation and the subsistence priority.[72]

Notably, neither ADF&G nor SHCA rely on or analyze the regulation's plain language or the 2002 Board's administrative record to support their arguments about what is required to legally implement 5 AAC 27.195(a)(2). ADF&G also fails to make any coherent argument that *Rosier* requires or supports its interpretation or implementation of the regulation. ADF&G's argument now appears be that the 2018 Board "necessarily" "concluded that [ADF&G] *management* pursuant to 5 AAC 27.195(a)(2) provides a reasonable opportunity for subsistence."[73] Thus, ADF&G erroneously believes that *Rosier* forecloses it from taking any management action that is different from how it has managed the commercial fishery in the past *i.e.* to maximize the commercial opportunity to harvest the full GHL.[74] ADF&G's argument is that it now interprets what the Board did in 2018 as making a "*fundamental*

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71 *See* Coonradt Dep. Ex. 19 at 6 ("We would, everything being equal, we would choose the opportunity [for the commercial fishery] further away.").

72 *See supra* notes 64-66 and accompanying text.

73 State's Opposition to STA's Motion for Partial Summary Judgment at 18 (emphasis added).

74 *Id.*

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. . . resource allocation decision."[75] This helps ADF&G explain and support the interpretation of 5 AAC 27.195(a)(2) provided in Forrest Bower's email.[76]

As STA has demonstrated, *Rosier* does not affect ADF&G's authority because the Board did not formally adopt a "specific management plan provision" or make any "fundamental" resource allocation decision that ADF&G would be contradicting if it fully implemented 5 AAC 27.195(a)(2) as required by the regulation's plain language and the intent of the 2002 Board.[77] ADF&G's *Rosier* argument is nothing more than an assertion that the Board may implicitly endorse ADF&G's interpretation of 5 AAC 27.195. As STA pointed out above, if the Board "interprets or makes specific the law enforced or administered," it must comply with the APA.[78] But here, the Board never took an affirmative, official action to interpret 5 AAC 27.195.

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75 *Id* (emphasis in original).

76 *See* Ex. 12 at 1-2 (Forrest Bowers email). ADF&G argues that Mr. Bower's email is not sufficient to establish that ADF&G is not implementing 5 AAC 27.195(a)(2) according to the law. See State's Opposition to STA's Motion for Partial Summary Judgment at 21. But Mr. Bowers was the acting Director of Commercial Fisheries at the time he sent the email. His interpretation of ADF&G's management authority and responsibility was, to the best of STA's knowledge, controlling. ADF&G stood by Mr. Bower's interpretation of the regulation throughout the preliminary injunction stage of this litigation, and to date has never clearly disavowed them. Moreover, the current in-season manager, Eric Coonradt's interpretation of the regulation is consistent with Mr. Bower's interpretation. *See supra* notes 70-72 and accompanying text. ADF&G's implementation of the regulation under Mr. Bower's interpretation is necessarily illegal because the interpretation of what ADF&G is and is not authorized and required to do is illegal.

77 *See* STA's Opposition to State's and SHCA's Motions for Partial Summary Judgment at 19-21 (citing *CIFF*, 357 P.3d at 799).

78 *See supra* notes 30-32 and accompanying text.

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C. ADF&G's Interpretation and Implementation of 5 AAC 27.195(b) Is Illegal.

Likewise, ADF&G admits that it does not consider the quality and quantity of herring spawn on branches when making management decisions. ADF&G tries to minimize the admission Mr. Coonradt made during his deposition,[79] however, Mr. Coonradt was asked first if he factored in "subsistence needs for quality when you are managing the commercial fishery' to which he replied "No, we don't because we don't get any information on quality."[80] Then, Mr. Coonradt was provided a copy of 5 AAC 27.195(b), which he read, and then confirmed that he understood the regulation "does require us" and then he admitted "we don't have any information on quality. So no, we cannot assess quality, at all."[81] If the current ADF&G in-season manager cannot assess quality at all, he certainly cannot, and admittedly does not, meaningfully consider it when making management decisions.[82] Mr. Coonradt's admissions are consistent

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79 *See* State's Opposition to STA's Motion for Partial Summary Judgment at 22.

80 Ex. 13 at 7.

81 Ex. 13 at 8.

82 ADF&G attempts to cover for Mr. Coonradt's admission by arguing that 5 AAC 27.195(b) does not require ADF&G "to *consider* the quality of spawn in season." State's Opposition to STA's Motion for Partial Summary Judgment at 22 (emphasis added). Under ADF&G's newest *post hoc* interpretation, 5 AAC 27.195(b) does not require ADF&G to consider the quality and quantity of spawn on branches *when making management decisions regarding the … commercial sac roe fishery.* Instead, ADF&G's view is apparently that it can selectively consider quality and quantity only when convenient to do so, and not for vital in-season management decisions. This flies in the face of the Board's directive in 2002 that quality and quantity of herring spawn on branches is an important consideration in the *management* of the commercial sac roe fishery. BOF 0070; *see also* BOF at 5112.

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with the fact that there is nothing in the administrative record that shows ADF&G considering the quality and quantity of herring spawn on branches when making management decisions to open the commercial fishery. ADF&G has therefore acted illegally each time it has made a decision to allow a commercial fishery because it has failed to comply with the mandatory provisions the Board has required for the management of the commercial fishery.

D. SHCA's Opposition Demonstrates that its Argument Is With the Policy Mandated by State Subsistence Law and Implemented by the Board.

SHCA argues that implementation of 5 AAC 27.195(a)(2) and (b) necessarily, regardless of the circumstances in-season, requires ADF&G to delay the opening of the commercial fishery until after the herring have begun spawning, and that the "commercial fishery would not survive" if that was to occur. SHCA then concludes that "the Board cannot conceivably have intended" that its regulations would have such an effect. [83]

STA is not seeking a decision from this Court mandating how ADF&G must gather information about the quality and quantity of spawn on branches. STA has made it clear that "the intricacies of how and when ADF&G considers the quality and quantity of herring spawn on branches are . . . committed to ADF&G's discretion" provided that the information ADF&G collects and relies on for its management decisions is timely

[83] SHCA's Opposition to STA's Motion for Partial Summary Judgment at 2.

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and relevant, and provided of course that ADF&G actually considers that information.[84] STA also provided examples of how ADF&G could consider quality and quantity of spawn on branches that do not depend exclusively on in-season on-the-ground surveys, including the 2002 Memorandum of Agreement between STA and ADF&G, formally adopted by the Board as an official Board Finding, and unilaterally abandoned by ADF&G in 2009.

SHCA's claim that it is not possible for ADF&G to implement 5 AAC 27.195 without destroying the commercial fishery is pure unfounded speculation. ADF&G admits it has never attempted to fully implement the regulation,[85] so there is no way to know precisely what tools and processes ADF&G would develop and employ, or how implementation pursuant to the clear mandates of 5 AAC 27.195 would impact the commercial fishery. For example, ADF&G has admitted that it can manage the fishery as a "controlled" fishery instead of the "derby style" it commonly facilitates which allows the full force of the fishery to target a school of herring prior to the first spawn until it harvests the full amount that can be handled by the processors.[86] ADF&G has

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[84] STA's Opposition to State's and SHCA's Motions for Partial Summary Judgment at 28-29.

[85] *See supra* pages 18-20. .

[86] Hebert Dep. Ex. 20 at 3-4; State's Memorandum in Support of Partial Summary Judgment at 15-16.

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also admitted that there are secondary and tertiary spawns that provide harvest opportunities after the first spawn has concluded.[87]

It is also not possible to predict how the commercial fishery would respond to management changes ADF&G may make in order to legally implement 5 AAC 27.195. The fleet can move and operate quickly to respond to management decisions[88] including, presumably, to decisions that disperse the fishery in time and area to ensure reasonable opportunity. The commercial fleet can also, as it has in past seasons, enter into a coop fishery. During the most recent Board meeting, Board Member Johnson recognized that the coop fishery "tends to slow down the fishery somewhat" and thus enhance subsistence opportunity.[89] BOF 5073. Board Member Johnson noted that that "if the industry is sincere about collaborating" entering into a coop fishery could potentially "increase spawning in areas and provide subsistence users additional opportunity in getting what they need. BOF 5073. Board Chair Jensen agreed that the coop fishery "does work" and prevents "wide—wild openings"—the coop is applied when ADF&G "doesn't want the fishermen to catch a lot of fish." BOF 5074. There is generally no incentive for the commercial fleet to enter into a coop fishery under

87 Coonradt Dep. Ex. 19 at 8-9.

88 *See, e.g.*, State's Memorandum in Support of Partial Summary Judgment at 15 (commercial fleet can respond to announced opening in 1 to 2 hours if necessary).

89 *See also* Hebert Dep. Ex. 20 at 3-4.

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ADF&G's current illegal management strategy.[90] SHCA's claim that implementing 5 AAC 27.195 is impossible without destroying their fishery rings hollow in light of the commercial fleet's ability to contribute to management solutions and adjust to management actions.

The most revealing part of SHCA's argument, however, is its position that the Board could not "conceivably have intended" to adopt a regulation that would "fundamentally alter management of the herring fisheries in Sitka Sound" and thus conflict with "achievement of the Guideline Harvest Level."[91] SHCA ignores the plain language of the regulation and the 2002 Board record,[92] but even more fundamentally, SHCA ignores the mandate of the state subsistence statute, which requires that subsistence uses are the priority use of fish stocks in Alaska.[93] It is certainly possible

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90 The Board cannot require a coop fishery by regulation. In *State of Alaska, Bd. of Fisheries v. Grunert,* 139 P.3d 1226 (Alaska 2006), the Court held that the Board did not have the authority to require a coop fishery through regulation. It is clear, however, that ADF&G's management decisions and the circumstances of the fishery in particular years can provide the incentive necessary for the sac roe fishery to voluntarily agree to a coop fishery.

91 SHCA's Opposition to STA's Motion for Partial Summary Judgment at 2-3.

92 *See* STA's Memorandum in Support of Motion for Partial Summary Judgment at 31-32.

93 *See* Ch. 1, § 1(c)(1), SSSLA 1992 ("[S]ubsistence uses of Alaska's fish and game resources are given the highest preference, in order to accommodate and perpetuate those uses."). For background on the legislative history and intent of the subsistence statute, *see, e.g. Manning v. State, Dep't of Fish & Game,* 420 P.3d 1270 (Alaska 2018); *McDowell v. State,* 785 P.2d 1 (Alaska 1989); *Madison v. Alaska Dep't of Fish & Game,* 696 P.2d 168 (Alaska 1985). The State claims that STA has abandoned its claim that ADF&G has violated AS 16.05.258. State's Opposition to STA's Motion for Partial Summary Judgment at 1, n.1. The Board's intent in adopting 5 AAC 27.195 was indisputably to implement the subsistence priority mandated by the subsistence statute. *See* BOF 5115. If ADF&G actually implemented

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that in certain years, pursuant to the requirements of the regulation, it will be necessary for ADF&G to take management actions that will impact the commercial fishery's ability to harvest the full GHL. However, as Assistant Attorney General White advised the Board while adopting the regulation in 2002, restricting the commercial fishery is required if doing so is necessary to provide for reasonable opportunity. BOF 5115. SHCA's real argument is with the Legislature and Governor for enacting the subsistence priority and the Board for the means it has chosen to implement the priority.

E. 5 AAC 27.195(b) Was Validly Certified and Published Pursuant to the APA and Accurately Captures the Board's Intent in Adopting the Regulation.

SHCA argues that 5 AAC 27.195(b) is not enforceable because the text contained in the regulation was not adopted by the Board.[94] But once 5 AAC 27.195 was published in the Alaska Administrative Code, the presumption is raised that text of the regulation as published is the text of the regulation adopted.[95] To rebut the

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the regulation pursuant to its plain language and clear intent, reasonable opportunity would be ensured and thus the mandate of the statute fulfilled. It also necessarily follows that ADF&G is violating the subsistence statute if it is not implementing a regulation the Board adopted to ensure reasonable opportunity.

94 SHCA's Opposition to STA's Motion for Partial Summary Judgment at 11-13.

95 *See* AS 44.62.110.

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presumptions, SHCA would have to demonstrate a "substantial failure to comply with the Administrative Procedures Act."[96] SHCA fails to allege any violation of the APA.[97]

SCHA relies on ADF&G's 2002 Management Plan for support.[98] The Plan was published in February of 2002 and produced by ADF&G's regional staff.[99] However, on March 15, 2002 as part of the certification process required by the APA,[100] the Department of Law regulations attorney sent a copy of 5 AAC 27.195 containing the current text of the regulation to the Commissioner of ADF&G, to the Executive Director of the Board, and to Assistant Attorney General Steve White who served as the Board's attorney for the January 2002 meeting and advised the Board during the adoption of 5 AAC 27.195.[101] ADF&G Commissioner Rue, on March 15, 2002, signed an order certifying that the regulations are "a correct copy of the regulation changes the

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96 *Mech. Contractors of Alaska, Inc. v. State, Dep't of Pub. Safety*, 91 P.3d 240, 251 (Alaska 2004) (citing AS 44.62.100)).

97 SHCA does not argue that it did not have notice of the language of the adopted regulation. Once 5 AAC 27.195 was filed by the Lieutenant Governor, it did not become effective for thirty days, and SHCA could have objected during that time. AS 44.62.180. SHCA does not introduce evidence that it opposed the adopted language of the final published regulation.

98 SHCA's Opposition to STA's Motion for Partial Summary Judgment at 12.

99 Ex 6 at 1 (2002 Management Plan).

100 Before the regulation is filed by the Lieutenant Governor, the regulations attorney reviews the regulation to determinate the legality of the regulation, the existence of statutory authority to adopt the regulation, the clarity of the regulation, and compliance with the drafting manual for administrative regulations. *See* AS 44.62.060.

101 Ex. 17.

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Alaska Board of Fisheries adopted at its January 7-14 meeting."[102] There is no evidence that the Board Executive Director or the Board's attorney ever raised any objection to the certified language.[103] SHCA's argument is meritless.

F. ADF&G Has Failed to Provide Adequate Decisional Documents.

STA demonstrated in its opening brief that in making the determination required by 5 AAC 27.195(a)(2) and otherwise implementing the regulation, ADF&G is clearly required to provide a decisional document that adequately demonstrates that it has taken a hard look at the salient facts and engaged in reasoned decision-making. ADF&G does not dispute that the law requires it to provide a decisional document. Instead, ADF&G argues unpersuasively that its news releases serve as adequate decisional documents.[104] ADF&G claims that the news releases contain the "factors relevant to determining when and where to open a commercial set" and therefore provide the court with an

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102 *Id.* at 4.

103 SHCA also fails to demonstrate any significant difference between the *meaning* of the language that it claims was adopted by the Board and the text of the final regulation. SHCA makes no textual or interpretive argument as to why recognizing that quality and quantity of herring roe on branches is an important consideration in the management of the subsistence and commercial fisheries is meaningfully different than the text of 5 AAC 27.195(b)—"the department shall consider the quality and quantity of herring spawn on branches when making management decisions regarding the subsistence herring spawn and commercial sac roe fisheries."

104 State's Opposition to STA's Motion for Summary Judgment at 25-26.

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adequate explanation of "ADF&G's decision making process with respect to opening the commercial fishery."[105]

This is a clear and unequivocal admission by ADF&G that, when deciding whether to open the commercial fishery, it does not make the determination required by 5 AAC 27.195(a)(2) as to whether it is necessary to disperse the commercial harvest in time and area in order to ensure reasonable opportunity, and it does not consider the quality and quantity of herring spawn on branches as mandated by 5 AAC 27.195(b). In ADF&G's view, its press releases need not even mention 5 AAC 27.195 because nothing in the regulation is a relevant factor for its decisions to open the sac roe fishery. ADF&G's admitted failure to make the determinations and considerations required by 5 AAC 27.195 renders its decisions to open the commercial fishery illegal.

That ADF&G's past news releases are inadequate is obvious from the requirements established in well-settled law. A decisional document must reflect the "facts and premises on which the decision" is based[106] and "provide a reviewing court with sufficient information to determine whether the agency has complied with its legal obligations."[107] As ADF&G admits, its press releases contain nothing about

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105 *Id.*

106 *Southeast Alaska Conservation Council v. State*, 665 P.2d 544, 549 (Alaska 1983).

107 *Ship Creek Hydraulic Syndicate v. State Dep't of Transp. & Pub. Facilities*, 685 P.2d 715, 717 (Alaska 1984).

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implementing 5 AAC 27.195. *See, e.g.*, ADFG 0323 (opening the commercial fishery on March 26, 2018, without explaining any reasons).

The Alaska Supreme Court's decision in *Cook Inlet Fisherman's Fund ("CIFF")*[108] is instructive. In *CIFF*, the Court upheld a superior court's decision denying the plaintiffs' request for a Civil Rule 56 continuance to depose ADF&G employees for information related to its management decisions for the Cook Inlet fishery. The Court found that depositions were unnecessary because the "management decisions themselves—the emergency orders, w*hich included the reasons for them*—were compiled and presented."[109] The emergency orders and press releases submitted to the court in *CIFF* show that ADF&G issues emergency orders that provide a "Justification" for the emergency management action. [110] The justification includes a summary of the requirements of the relevant regulation, an explanation of the salient factors considered, and the reasoning for ADF&G's management decision.[111]

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108 357 P.3d 789 (Alaska 2015).

109 *Id*. at 797-98 (emphasis added).

110 Ex. 18 (Emergency Orders 2-KS-1-21-13 and 2 KS -1-34-13 were submitted by the State as Exhibit 2, pp.7-8 and 15-16, to the superior court in the *CIFF* litigation. Notably, the regulation at issue in the emergency orders requires ADF&G to provide "reasonable harvest opportunities" to the Kenai and Kasilof River sport fisheries.).

111 *Id.*

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ADF&G's has taken the position that, as a matter of law, its past press releases were adequate decisional documents.[112] They clearly were not, and do not provide the court with an adequate record for reviewing the decisions made. This court should grant STA's motion for partial summary judgement finding that as a matter of law, ADF&G's past press releases fail to meet the legal standard for an adequate decisional document.

III. CONCLUSION

For the foregoing reasons, this Court should grant STA's motion for partial summary judgment on Count I and deny the State's and SHCA's motions for partial summary judgment. ADF&G's interpretation and implementation of 5 AAC 27.195 is illegal. The appropriate remedy is an order declaring ADF&G's interpretation of 5 AAC 27.195 invalid and requiring ADF&G to adequately document its determinations and reasons for taking management actions during the 2020 herring season.

Dated this 23rd day of January 2020, at Anchorage, Alaska.

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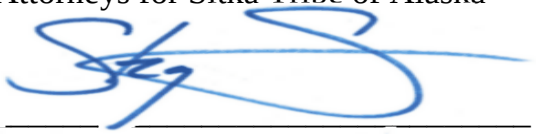
Attorneys for Sitka Tribe of Alaska



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[112] It is STA's position that ADF&G may continue to issue its commercial fishery management decisions through press releases, but those press releases must conform to the legal standards of an adequate decisional document.

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Certificate of Service

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