

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

**SITKA TRIBE OF ALASKA’S OPPOSITION TO STATE OF ALASKA’S
AND SHCA’S MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

I. SUMMARY OF THE ARGUMENT

ADF&G and SHCA mischaracterize STA’s arguments. ADF&G insists that STA’s interpretation of 5 AAC 27.195(a)(2)¹ requires ADF&G to delay the commercial

¹ “In managing the commercial sac roe fishery in Section 13-B north of the latitude of Aspid Cape (Sitka Sound), the department shall . . . (2) distribute the commercial harvest by fishing time and area if the department determines that it is necessary to ensure that subsistence users have a reasonable opportunity to harvest the amount of herring spawn necessary for subsistence uses specified in 5 AAC 01.716(b).” 5 AAC 27.195(a)(2) (emphasis added).

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fishery until after the first herring spawn.² The real issue is that ADF&G interprets 5 AAC 27.195(a)(2) as *not authorizing* ADF&G to take any management action that would fundamentally change the way it has managed the sac roe fishery. Although 5 AAC 27.195(a)(2) does not require ADF&G to take any specific management action, it does require ADF&G to determine if it is necessary to distribute the commercial fishery in time and area in order to ensure that subsistence harvesters have a reasonable opportunity to harvest the amount of herring roe on branches necessary to meet their subsistence uses. By definition, ADF&G cannot be complying with the regulation if its interpretation incorrectly views these changes as being unauthorized.

In arguing that 5 AAC 27.195 precludes management actions that are inconsistent with the way it has and continues to manage the commercial fishery, ADF&G means that 5 AAC 27.195(a)(2) provides no authority to take an in-season management action that may impact the opportunity of the commercial fleet to harvest the full guideline harvest level (“GHL”).³ Under ADF&G’s interpretation, it cannot take management actions that may affect the ability of the commercial fishery to take the full GHL even if the action is necessary to ensure a reasonable opportunity for subsistence uses.

² See State Br. at 34.

³ See 5 AAC 27.160(g) (establishing the GHL formula); *but see* 5 AAC 27.059(a) (“If the department has adequate information, and if department management programs are in place, the department *may* manage commercial herring sac roe fisheries, to enhance the value of the landed product . . .”) (emphasis added).

ADF&G’s interpretation of 5 AAC 27.195(a)(2) is inconsistent with the regulation. The regulation requires ADF&G to determine whether it is necessary to distribute the commercial fishery in time and area in order to ensure reasonable opportunity when making decisions regarding opening the commercial fishery. ADF&G’s legal duty to distribute the commercial fishery if necessary applies throughout the full season and entire management area of the sac roe fishery. If allowing the entire force of the commercial fishery to harvest the full GHF prior to the first spawn conflicts with ADF&G’s legal responsibility to ensure reasonable opportunity for subsistence, ADF&G is required to take management actions, regardless of the potential impacts on the commercial fishery, to distribute the commercial fishery in time and area to the degree necessary to ensure reasonable opportunity.

ADF&G also mischaracterizes STA’s arguments regarding the interpretation and implementation of 5 AAC 27.195(b)⁴ to obscure the fact that ADF&G has admitted that it does not assess or consider the quality and quantity of spawn on branches when making in-season decisions to open the commercial fishery.⁵ ADF&G attempts to make the interpretation of 5 AAC 27.195(b) about whether ADF&G is required to assess the

⁴ “In addition to the provisions of (a) of this section, the department *shall* consider the quality and quantity of herring spawn on branches, kelp, and seaweed, and herring sac roe when making management decisions regarding the subsistence herring spawn and commercial sac roe fisheries in Section 13-B north of the latitude of Aspid Cape.” 5 AAC 27.195(b) (emphasis added).

⁵ See State Br. at 36.

quality and quantity of spawn on branches in-season. Under 5 AAC 27.195(b), ADF&G “shall” consider the quality and quantity of spawn on branches “when” making management decisions regarding the commercial fishery, including in-season decisions to open the commercial fishery. ADF&G has admitted that its current method for collecting information on quality and quantity of spawn on branches is neither timely nor relevant, and therefore it does not assess or consider the quality and quantity of spawn on branches when making management decisions. ADF&G’s decisions to open the commercial fishery are thus arbitrary and capricious and a violation of law.

II. ARGUMENT

A. ADF&G’s Interpretation of 5 AAC 27.195(a)(2) is Without Merit.

ADF&G argues that the original intent of the Board, and the original interpretation of the regulation by ADF&G, require an interpretation of 5 AAC 27.195(a) that prohibits ADF&G from taking in-season management actions to delay the commercial fishery.⁶ ADF&G cites nothing in the administrative record⁷ or

⁶ See State Br. at 34. This Court should take notice that the State has argued about the Board’s intent throughout its brief but has refused to produce the full administrative record of the Board’s actions. State Br. at 13 (“[T]he State has not attempted to compile for the Court the administrative record which contains all of the evidence supporting the Board’s conclusion.”). It has been more than a year since the complaint was filed. The State has resisted discovery requests under the Civil Rules by repeatedly claiming that discovery is not warranted in this case because it is limited to the administrative record. The State’s continued delay is prejudicial to STA’s motion for partial summary judgment, which was premised on the State’s representations that it had produced the full administrative record as of October 2019. See ALASKA R. CIV. P. 11(b).

⁷ ADF&G’s only reference to the Board’s administrative record has nothing to do with the Board’s original interpretation of the regulation. See State Br. at 34 (describing, without

law to support its interpretation, arguing simply that the regulation must be interpreted this way because authorizing ADF&G to take such a management action would “fundamentally change the commercial fishery” and thereby interfere with ADF&G’s management goal to maximize the opportunity for the commercial fleet to harvest the full GHL.⁸ ADF&G continues to defend the extremely narrow interpretation of 5 AAC 27.195(a)(2) that Forrest Bowers, then Director of Commercial Fisheries, expressed in an email to STA which was the genesis of this litigation.⁹

ADF&G also continues to rely on *Peninsula Marketing Association v. Rosier*, 890 P.2d 567 (Alaska 1995) to support its interpretation of 5 AAC 27.195.¹⁰ But ADF&G’s argument is internally inconsistent: If the Board originally intended for 5 AAC 27.195 to have the meaning that ADF&G contends, then there would be no need

citing, Board member Jenson’s 2015 statement regarding his own belief about the 2002 Board’s intent in promulgating 5 AAC 27.195).

⁸ The State represented that how ADF&G considers subsistence “will be borne out in the administrative record.” Ex. 15 at 2. However, the “Argument” section in the State’s brief does not contain any references or citations to the ADF&G record. It is apparent that the State’s repeated insistence that the Court should wait to decide the legal issues in this case until the “administrative record” was produced was misdirection and lacking candor.

⁹ See Ex. 12 at 1 (“If beginning the fishery before first spawning presented a known conservation concern the department would be well within our authority to act, and would do so, but we can’t undertake this sort of action solely to achieve a fishery resource allocation objective without direction from the Board of Fisheries.”); *id.* at 2 (“The department taking action to not allow commercial fishing in areas beyond those already closed, with the intent of providing increased subsistence fishing opportunity . . . would represent a direct fishery resource allocation action taken outside the Board of Fisheries process.”).

¹⁰ See State Br. at 39-42.

for ADF&G to rely on the Board’s January 2018 “finding” to support its position.¹¹ ADF&G resorts to *Rosier* because there is no support in the law or administrative record for its argument that the Board originally intended 5 AAC 27.195 to be applied as narrowly as ADF&G believes. *Rosier* provides no support for ADF&G’s *post hoc*, litigation-driven interpretation of 5 AAC 27.195(a)(2). If *Rosier* is interpreted and expanded as ADF&G argues, it would undermine the very foundation and stability of fishery regulation and management in Alaska because ADF&G would be prohibited from taking any management action that was merely proposed but not adopted as a requirement in a regulation by the Board.

1. ADF&G’s interpretation of 5 AAC 27.195(a)(2) is inconsistent with the plain language of the regulation and the Board’s intent.

ADF&G argues that “neither the Board nor [ADF&G] has ever interpreted 5 AAC 27.195(a)(2) as requiring [ADF&G] to delay the commercial fishery” because such an interpretation “would fundamentally change the commercial fishery” and “conflict” with other regulations that allow ADF&G to manage the fishery to take herring with the highest roe content.¹² ADF&G then concludes that 5 AAC 27.195(a)(2)

¹¹ See State Br. at 39 (“The Board’s actions at the January 2018 meeting necessarily included a finding that the Board’s regulations provide a reasonable opportunity for subsistence uses of herring spawn in Sitka Sound. *Given that finding*, the law is clear: the Department may not take action that contradicts the Board’s finding absent new information developed after the Board meeting.”) (emphasis added).

¹² State Br. at 34. *But see* STA Br. at 15, 30-32 (citing Ex. 6 at 3; BOF 5115) (ADF&G’s and the Board’s original interpretation of 5 AAC 27.195(a)(2) was that the regulation “requires

merely “allows” ADF&G the discretion to “distribute the commercial harvest throughout the management area” if ADF&G thinks doing so “is necessary as a way of protecting the areas where herring spawn on branches are traditionally taken for subsistence.”¹³

Dissecting ADF&G’s *post hoc* interpretation of 5 AAC 27.195(a)(2) demonstrates that it is contrary to the plain language of the regulation, the original intent of the Board when it adopted the regulation, and well-established legal principles for interpreting statutes and regulations.

- a. *The plain language of 5 AAC 27.195(a)(2) confirms the intent of the Board that the regulation is not merely a grant of discretion that allows ADF&G to distribute the commercial fishery, but instead, that ADF&G is required to distribute the commercial fishery if necessary to ensure a reasonable opportunity.*

that the department distribute the commercial harvest both geographically and temporally, if necessary, so that the subsistence fishery has a reasonable opportunity . . . management decisions must be made in-season by the department based on the department manager’s best judgment concerning the in-season situation.”). ADF&G is not entitled to any deference when interpreting the Board’s regulation, *see Tea ex. rel. A.T.*, 278 P.3d 1262 (Alaska 2012), and here, deferring to ADF&G’s “convenient litigating position” would be “entirely inappropriate.” *Hendricks-Pearce v. State, Dep’t of Corr.*, 323 P.3d 30, 46 n. 38 (Alaska 2014) (Fabe, C.J. dissenting).

¹³ State Br. at 34; *see also* State Br. at 35 (5 AAC 27.195(a)(2) “grant[ed] the area manager the discretion to distribute the commercial fishery away from the core area”); State Br. at 39 (“The Department simply may not take action to increase opportunity for subsistence uses at the expense of commercial uses premised on the notion . . . that further commercial restrictions are needed to ensure a reasonable opportunity for subsistence users.”)

ADF&G fails to acknowledge that 5 AAC 27.195(a)(2) is not merely a grant of discretion that *allows* ADF&G to distribute the commercial fishery, but instead it is a legal mandate. The Court must first look to the plain language of the statute or regulation to be interpreted.¹⁴ The regulatory language in 5 AAC 27.195(a)(2) could not be clearer—ADF&G “*shall*” distribute the commercial harvest if necessary to ensure reasonable opportunity. “*Shall*” means just what it says—ADF&G is not merely allowed, but required to take management actions necessary to ensure reasonable opportunity.¹⁵

b. *The Board intended that the in-season manager would determine if subsistence harvesters are being provided a reasonable opportunity.*

ADF&G fails to address the language in 5 AAC 27.195(a)(2) that requires it to “distribute the commercial fishery by fishing time and area *if the department determines it is necessary to ensure*” a reasonable opportunity for subsistence use. The Board’s intent in promulgating 5 AAC 27.195(a)(2) was clearly to require the in-season manager to manage the commercial fishery to ensure that subsistence users have a

¹⁴ See *Tea ex rel. A.T.*, 278 P.3d at 1265; 1A N. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 31.06 (7th ed. Rev. 2018) (“A regulation is a written instrument and the general rules of interpretation apply . . . [I]n accord with the tenants of statutory construction, courts attribute the plain meaning to the words of a regulation.”).

¹⁵ See *S. Anchorage Concerned Coalition, Inc. v. Muni. of Anchorage Bd. of Adjustment*, 172 P.3d 768, 772 (Alaska 2007) (“The language of the provision does use the word ‘shall,’ which in its ordinary use, is an affirmative command that is often taken to be mandatory.” (citing *State, Dep’t of Commerce & Econ. Dev., Div. of Ins. v. Schnell*, 8 P.3d 351, 357 (Alaska 2000))).

reasonable opportunity to harvest the amount of spawn on branches necessary for subsistence uses. The Board made it clear that the first step in fulfilling this legal duty is for the in-season manager to make a determination, before allowing a commercial fishery, how the opening would impact subsistence harvesters' opportunity to harvest the amount necessary for subsistence uses. BOF 5115 ("that would be something that would be a consideration during the conduct and prosecution of the harvest").

In describing the Board's intent, Board member Coffey explained that the in-season manager would have to make "in-season management decisions," addressing specific questions, including: "are the people being afforded a reasonable opportunity or not?" and "Do I have to disperse the fleet or not to afford a reasonable opportunity?" BOF 5115. "These are in-season management decisions which the *board* need not make." BOF 5115 (emphasis added).

ADF&G admitted that the in-season manger does not make determinations about whether subsistence users are afforded a reasonable opportunity to harvest the amount of spawn necessary for subsistence uses.¹⁶ Thus, ADF&G's in-season management

¹⁶ See Ex. 16 at 4 (Affidavit of Eric Coonradt) ("Upon information and belief, the department has never interpreted this regulation as requiring the department to make an independent assessment of whether there is a reasonable opportunity for subsistence uses of herring spawn in Sitka Sound.").

decisions to open the commercial fishery without making this determination are illegal.¹⁷

- c. *The Board intended ADF&G to distribute the commercial fishery through management of both time and area if necessary to ensure a reasonable opportunity even if doing so impacts the ability of the commercial fishery to harvest the full GHL.*

ADF&G insists that the 2002 Board “never interpreted” 5 AAC 27.195(a)(2) to require ADF&G to “delay the commercial fishery” because “such an interpretation would fundamentally change the commercial fishery” and conflict with regulations that establish the GHL and “allow”¹⁸ ADF&G to manage the commercial fishery to maximize the opportunity to take the full GHL.¹⁹ ADF&G thus argues that it may not take any management action that is a fundamental change in how it manages the commercial fishery to achieve harvest of the full GHL and to allow the commercial fishery to “take herring of the highest roe content.”²⁰

¹⁷ See, e.g., *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 790 (Alaska 2015) (“Where an agency fails to consider an important factor in making its decision, the decision will be regarded as arbitrary.”).

¹⁸ Compare 5 AAC 27.195(a)(2) (“the department *shall* . . . distribute the commercial harvest by time and area”) (emphasis added), with 5 AAC 27.059(a) (“the department *may* manage commercial herring sac roe fisheries, to enhance the value of the landed product . . .”) (emphasis added).

¹⁹ See State Br. at 36 n. 138 (ADF&G does not interpret or implement 5 AAC 27.195(a)(2)(a)(2) to authorize ADF&G to delay commercial openings until after the first spawn “because doing so would fundamentally alter the commercial fishery—and potentially render it non-viable.”); see also Ex. 12 at 1.

²⁰ State Br. at 34.

First, nothing in the plain language of 5 AAC 27.195(a)(2) supports reading into it a broad prohibition against taking any management action that is contrary to ADF&G’s past management practices focused on the commercial fishery achieving the full GHL and harvest herring with the highest roe content. The only qualifying language in 5 AAC 27.195(a)(2) regarding the mandate that ADF&G shall distribute the commercial fishery by time and area is that doing so “is necessary to ensure” reasonable opportunity. Also, the plain language of the regulatory framework for the management of the commercial and subsistence herring fisheries in Sitka Sound confirm that managing to ensure reasonable opportunity in 5 AAC 27.195(a)(2) is mandatory as compared to managing to achieve the full GHL, which is merely permissive.²¹

ADF&G’s interpretation of 5 AAC 27.195(a)(2) would read an almost all-encompassing exception into the mandate of the regulation. Instead of requiring ADF&G to take any management action related to time and area distribution that is necessary to ensure reasonable opportunity, ADF&G would be forbidden from taking many if not all effective management actions because doing so would interfere with maximizing the commercial fishery’s opportunity to take the full GHL and the highest quality roe. For example, the email from Forrest Bowers to STA demonstrates that ADF&G’s interpretation of 5 AAC 27.195(a)(2) forbids it from taking any action outside of the areas closed by the Board, or taking any action that would impact the timing of

²¹ See 5 AAC 27.059(a).

the commercial harvest.²² With such limitations, it is hard to see what meaningful management action ADF&G can take.²³

ADF&G's interpretation of 5 AAC 195(a)(2) is directly contrary to the intent expressed by the 2002 Board when it adopted the regulation. The Board amended proposed language for 5 AAC 27.195(a)(2) specifically to ensure that ADF&G could not interpret the regulation to limit management actions required by the regulation to only those that would not impact the opportunity to take the full GHL. BOF 5115. The original language considered by the Board required ADF&G to distribute the fishery "to the extent practicable." BOF 5115. The Board amended this language by deleting the words "to the extent practicable" and inserting language that required ADF&G to distribute the commercial harvest "if necessary" to provide a reasonable opportunity. BOF 5115. The reason the Board adopted this amendment was because the Department of Law advised that limiting management practices to only those that were "practicable" was inconsistent with the mandate of the subsistence law. BOF 5115. Board member Coffey explained,

the words to the extent practicable, used with the reasonable opportunity language, is inappropriate because it makes the subsistence priority subordinate to the practicality of the commercial fishery, which is not

²² Ex. 12 at 1.

²³ See *Schacht v. Kunimune*, 440 P.3d 149, 151 (Alaska 2019) (the Court is "reluctan[t] to adopt 'statutory constructions that reach absurd results.'" (quoting *Premera Blue Cross v. State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins.*, 171 P.3d 1110, 1120 (Alaska 2007))).

what—well, it’s not lawful, simply put. The practicality of affording reasonable opportunity subordinate to a commercial fishery is not permitted under state law. So, therefore, this properly addresses that. It does leave the determination of reasonable opportunity to the in-season manager. Is it—are the people being afforded a reasonable opportunity or not? Do I have to disperse the fleet or not to afford a reasonable opportunity? These are in-season management decisions which the board need not make. But at least with this amendment, the language of the regulation will be consistent with the subsistence priority, which is the intent of this all along. BOF 5115.

Here, ADF&G’s flawed interpretation of 5 AAC 27.195(a)(2) means that ADF&G distributes the commercial fishery “regardless of whether it is necessary to do so,”²⁴ “whenever possible,”²⁵ and based on the manager’s “personal preference.”²⁶ ADF&G’s management scheme is the essence of arbitrariness, and nothing could be further from the 2002 Board’s intent. ADF&G’s interpretation of 5 AAC 27.195(a)(2) was explicitly rejected by the Board—on advice from the Department of Law. BOF 5115.

Consistent with the 2002 Board’s intent, and the Board and Department of Law’s interpretation of Alaska’s subsistence law, 5 AAC 27.195(a)(2) requires ADF&G to determine whether it is necessary to distribute the commercial harvest in time or area

²⁴ State Preliminary Injunction Br. at 22.

²⁵ Ex. 16 at 4 (Affidavit of Eric Coonradt).

²⁶ Ex. 13 at 6 (Coonradt Dep. at 57).

to ensure that subsistence users have a reasonable opportunity to harvest the amount necessary for subsistence. ADF&G must make decisions to ensure a reasonable opportunity for subsistence even if those decisions might negatively affect the commercial harvest. Subsistence is the priority use of resources in Alaska.²⁷ The failure to take a management action that is necessary to ensure reasonable opportunity because of the impact that management action may have on the commercial fishery is a violation of 5 AAC 27.195(a)(2).

d. ADF&G's argument that 5 AAC 27.195(a)(2) does not apply outside of the areas closed by the Board is without merit.

The genesis of STA's lawsuit was then-Director of the Division of Commercial Fisheries Forrest Bowers' email communication with STA in which he provided ADF&G's narrow interpretation of 5 AAC 27.195(a)(2).²⁸ Mr. Bowers' email stated: "The department taking action to not allow commercial fishing in areas beyond those already closed, with the intent of providing increased subsistence fishing opportunity in the absence of a conservation purpose, would represent a direct fishery allocation action taken outside the Board of Fisheries process."²⁹ Under Mr. Bowers' interpretation of 5 AAC 27.195(a)(2), ADF&G is not authorized to take a management

²⁷ 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.").

²⁸ See Ex. 12.

²⁹ Ex. 12 at 2.

action to distribute the commercial fishery anywhere outside of those areas closed by regulation³⁰ even if ADF&G determined such an action was necessary to ensure reasonable opportunity.

ADF&G defended Mr. Bowers' interpretation of 5 AAC 27.195(a)(2) during the preliminary injunction stage of this litigation.³¹ Mr. Bowers' email, however, is not included or referenced as part of ADF&G's memorandum in support of its motion for partial summary judgment, nor included in the ADFG record. Reading between the lines, it appears that ADF&G may have abandoned its attempt to defend the narrow reading of 5 AAC 27.195(a)(2) advanced by Mr. Bowers.

In this current round of briefing, ADF&G contends that 5 AAC 27.195(a)(2) "allows the Department to distribute the commercial harvest *throughout the management area* if necessary as a way of protecting the areas where herring on branches are traditionally taken for subsistence."³² ADF&G admits that it interprets 5 AAC 27.195(a)(2) "as direction to avoid taking a large amount of herring *near the areas closed* to commercial fishing."³³ ADF&G also admits that the Board closures only "substantially achieved" the Board's intent when adopting 27.195(a)(2),³⁴

³⁰ See 5 AAC 27.150(7).

³¹ See State Preliminary Injunction Br. 27, 33 n. 121.

³² State Br. at 34.

³³ *Id.* at 21.

³⁴ *Id.* at 35.

meaning ADF&G agrees that there is more to 5 AAC 27.195(a)(2) than simply protecting the core subsistence areas.

ADF&G's tacit abandonment of Mr. Bowers' interpretation seems evident through the State's newest arguments. At the very least, ADF&G's position on whether 5 AAC 27.195(a)(2) applies beyond the closed areas has never been made clear. Neither the Court nor STA should have to try and guess how and where ADF&G is interpreting and implementing 5 AAC 27.195(a)(2).³⁵

Interpreting 5 AAC 27.195 as being limited to requiring management actions only within the closed areas would not only render the regulation meaningless, it would also undermine the Board's purpose in closing the areas to the commercial fishery. First, if 5 AAC 27.195(a)(2) is limited to management actions within the closed area, ADF&G would be relieved of all responsibilities. No commercial fishery is allowed in the closed area, hence there is nothing to manage. 5 AAC 27.195(a)(2) disappears even though it remains unchanged by the Board, and even though it is presumed to be valid.³⁶

Second, if ADF&G is not authorized or required to distribute the commercial

³⁵ See *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947) ("It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' " (quoting *United States v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 511 (1935)).

³⁶ AS 44.62.100; *Native Vill. of Elim v. State*, 990 P.2d 1, 14 (Alaska 1999) ("[A] regulation adopted under Alaska's administrative procedure statute, AS 44.62.100, is presumed to be valid . . .").

fishery in time or area outside the boundary of the closed area, it can allow the commercial fishery to harvest the entire GHJ right on the border of the closed area before any herring are allowed to reach the area. The closed area is useless if ADF&G ignores its responsibility to manage the commercial fishery to ensure that sufficient numbers of herring reach the core area to produce the quality and quantity of spawn necessary for subsistence uses.

ADF&G has never made it clear whether it interprets 5 AAC 27.195(a)(2) to require only those management actions that ensure there is a reasonable opportunity for subsistence uses within the closed areas or whether it is also required to take management actions to ensure there is a reasonable opportunity for subsistence harvest throughout all of Sitka Sound, wherever the spawn is located. ADF&G seems to admit that the in-season manager has the authority to “distribute the commercial harvest away from the core area *or other subsistence areas*, when he deems it necessary to ensure subsistence harvest.”³⁷ Subsistence harvests have historically occurred throughout the Sitka Sound management area.³⁸

The plain language of the regulation and the Board’s administrative record support the interpretation that 5 AAC 27.195(a)(2) requires management decisions to

³⁷ State Br. at 35.

³⁸ See Ex. 3 at 3.

ensure reasonable opportunity throughout Sitka Sound.³⁹ The 2002 Board clearly understood the need to ensure reasonable opportunity throughout Sitka Sound because the location of the spawn and thus the opportunity for subsistence harvest is unpredictable and not always present in the core area. BOF 5115 (“[S]pawn occurs anywhere and everywhere in this this area, and you never know ahead of time where it’s going to be.”). The plain language of the regulation requires management of the commercial sac roe herring fishery *in Section 13-B north of the latitude of Aspid Cape (Sitka Sound).*” 5 AAC 27.195(a)(2) also requires ADF&G to ensure that subsistence users have a reasonable opportunity to harvest the *amount of herring spawn necessary for subsistence uses specified in 5 AAC 01.176(b).*” In determining the amount reasonably necessary for subsistence (“ANS”) in 5 AAC 01.176(b), the Board found that “136,000 - 227,000 pounds of herring spawn are reasonably necessary for subsistence uses *in Section 13-A, and Section 13-B north of the latitude of Aspid Cape.*” Finally, pursuant to AS 16.05.258(a), which requires the Board to identify the fish stocks or portions of stocks that are “customarily and traditionally taken or used for subsistence” the Board found that herring spawn was customarily and traditionally used “in the waters of Section 13-B north of the latitude of Aspid Cape.”⁴⁰

³⁹ See 5 AAC 27.195(a) (“In managing the commercial sac roe fishery in Section 13-B north of the latitude of Aspid Cape (Sitka Sound) . . .”).

⁴⁰ 5 AAC 01.176(a)(1)(D)(ii).

Thus, the relevant Board subsistence regulations encompass all of section 13-B north of the latitude section of Aspid Cape (Sitka Sound). Nothing in the plain language of the regulations supports an interpretation of 5 AAC 27.195(a)(2) that is limited to only ensuring reasonable opportunity only within the closed areas. 5 AAC 27.195(a)(2) requires ADF&G to manage the commercial fishery to ensure that there is a reasonable opportunity for subsistence harvest throughout all of section 13-B north of the latitude section of Aspid Cape.

2. *Rosier* does not support ADF&G’s interpretation of 5 AAC 27.195(a)(2).

This Court should conclude that *Peninsula Marketing Association v. Rosier*,⁴¹ does not limit ADF&G’s authority under 5 AAC 27.195(a)(2) as the State contends.⁴² In *Rosier*, the Alaska Supreme Court explained that ADF&G may not implement a management program that was considered and rejected by the Board.⁴³ In *Cook Inlet Fisherman’s Fund v. State* (“*CIFF*”), the Court clarified that *Rosier* applied to circumstances in which the Board adopted a “specific management plan provision.”⁴⁴ ADF&G does not point to any specific management plan provision or program adopted

⁴¹ 890 P.2d 567 (Alaska 1995).

⁴² See State Br. at 39-43.

⁴³ *Id.* at 574 (“[T]he Commissioner may not use his emergency powers to implement a fisheries management program already considered and rejected by the Board, in the absence of newly developed information or events occurring after the Board’s decision.”).

⁴⁴ 357 P.3d 789, 799 (Alaska 2015) (applying *Rosier*, 890 P.2d).

by the Board that ADF&G would allegedly be contradicting if it fully implemented 5 AAC 27.195, and there is none.

ADF&G’s reliance on *Rosier* is based on its erroneous assumption that the Board “necessarily” or implicitly limited ADF&G’s authority to manage the herring fishery by determining that existing regulations provide a reasonable opportunity for subsistence.⁴⁵ But there is no basis in *Rosier* or *CIFF* to conclude that ADF&G may infer that it’s authority is limited by the Board’s implied actions. The Board did not consider and reject a policy or adopt a “specific management plan provision” that would limit ADF&G’s authority in any way. The Board could have repealed or amended 5 AAC 27.195, but it did not. Thus, ADF&G’s argument that the Board’s January 2018 findings regarding reasonable opportunity limited ADF&G’s authority to take management actions under 5 AAC 27.195 is meritless.

The statements from three Board members in January 2018 do not support ADF&G’s *Rosier* argument.⁴⁶ The statements are taken out of context from the Board members’ deliberations on three different proposals at the January 2018 meeting. For example, Board member Payton opined that “the regulations” taken as a whole provided a reasonable opportunity for subsistence. *See* BOF 5076, 5077, 5094-95.⁴⁷ The Board

⁴⁵ State Br. at 39.

⁴⁶ State Br. at 41.

⁴⁷ *See also* STA Br. at 45-49 (describing the January 2018 Board meeting and explaining why *Rosier* does not apply).

was never clearly informed, by Director Kelly who testified, that ADF&G viewed its authority under 5 AAC 27.195(a)(2) as narrowly as it claims in this litigation. Thus, it was reasonable for the Board members to assume that *the regulations*, if properly implemented, provided a reasonable opportunity.

ADF&G's *Rosier* argument is also irreconcilable with its purported interpretation of 5 AAC 27.195. If ADF&G's interpretation of 5 AAC 27.195(a)(2) is consistent with what the Board intended, then there is no reason to rely on the Board's January 2018 meeting to support the notion that ADF&G's authority was thereafter "limited." Mr. Coonradt testified that his interpretation of his authority under 5 AAC 27.195(a)(2) was the same in 2017 and 2018, *i.e.*, no one informed him that the Board's January 2018 findings limited ADF&G's authority. Thus, ADF&G's reliance on *Rosier* is merely a litigation position used as a post hoc rationale to justify ADF&G's failure to implement 5 AAC 27.195(a)(2).

B. ADF&G's Implementation of 5 AAC 27.195(a)(2) is Illegal.

This Court should conclude that ADF&G's interpretation of 5 AAC 27.195 is invalid, and consequently, ADF&G is not implementing the regulation lawfully. ADF&G's contention that it is implementing 5 AAC 27.195(a)(2) is based on the very limited implementation required under ADF&G's interpretation of the regulation.⁴⁸

⁴⁸ See State Br. at 35-36 ("[T]here is no factual dispute that Mr. Coonradt, the Department's area manager, continues to distribute the commercial harvest away from the core area, or other subsistence areas, where he deems it necessary to ensure subsistence harvest.").

ADF&G cites Mr. Coonradt’s decision during the 2017 season as an example of how it implements 5 AAC 27.195(a)(2).⁴⁹ But Mr. Coonradt admits that the basis for that decision was “everything being equal”—in other words, the action taken to move the commercial fishery further away from the closed area in 2017 did not affect the ability of the commercial fishery to take the full GHL.⁵⁰ Thus, even if a single management decision in 2017 might have been consistent with ADF&G’s narrow interpretation of the regulation, there is nothing in the record that demonstrates ADF&G is implementing 5 AAC 27.195(a)(2) consistent with the Board’s intent.⁵¹

⁴⁹ *Id.* (citing Coonradt Dep. at 51) (“We would, everything being equal, we would choose the opportunity further away.”).

⁵⁰ ADF&G’s characterization of the reasons for the 2017 commercial fishery opening are not consistent with the administrative record. ADF&G’s record clearly indicates that the reason the commercial fishery was opened near Hayward Strait instead of near the closed area boundary was because the commercial fleet could not get to the closed area boundary before the fish would have moved into the closed area. *See* ADFG 1788 (“March 18: . . . Large amounts of herring were observed by the R/V Kestrel and the commercial fleet in the waters south of Bieli Rock and the Chaichei Islands [near the closed area]. A test set indicated that herring maturity was increasing. Herring were moving fast and were deep. Furthermore, the fish were just to the south of the closure line and *department staff were concerned that the flood tide would push fish in to closed waters by the time a fishery would be open.*”) (emphasis added). ADF&G’s “Sitka Sound Herring Fishery Update #3,” from March 18, 2017, which would explain the true reasons for that particular commercial opening is conspicuously missing from the ADFG record. *See* ADFG 0269-0270 (Sitka Sound Herring Fishery Updates #2 and #4). STA requested that the State supplement the ADFG record with the missing information, but the State refused.

⁵¹ *See Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 169 (1962) (“A simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. *If those grounds are inadequate or improper, the court is powerless to affirm the administrative action.*”) (emphasis added).

The other examples ADF&G gives for implementing 5 AAC 27.195(a)(2) suffer from the same faulty premise. Mr. Coonradt’s affidavit is revealing in that he admits that ADF&G implements 5 AAC 27.195(a)(2) “whenever possible” and “whenever we possibly can.”⁵² Mr. Coonradt’s statements are consistent with ADF&G’s interpretation that it is not authorized to take a management action to ensure reasonable opportunity if doing so would alter the fundamental management practice for the commercial fishery; taking a management action to distribute the commercial fishery pursuant to 5 AAC 27.195(a)(2) is only “possible” if it does not impact the opportunity of the commercial fishery to harvest the full GHL.⁵³

ADF&G’s interpretation of 5 AAC 27.195(a)(2) also explains Mr. Coonradt’s testimony during his deposition that taking a management action that may benefit subsistence users is merely a “personal preference.”⁵⁴ ADF&G’s position is that if a management action to distribute the commercial fishery by time or area does not affect the ability of the commercial fleet to harvest the full GHL, then ADF&G has the

⁵² Ex. 16 at 4 (Affidavit of Eric Coonradt); State Br. at 35 (citing Coonradt Dep. at 134).

⁵³ Director Kelly’s statement at the 2018 Board meeting regarding ADF&G’s implementation of 5 AAC 27.195(a)(2) admits that ADF&G’s management goal is limited to achieving the full GHL for the commercial fishery. State Br. at 23 (citing BOF 4354-4660) (implementation of 5 AAC 27.195(a)(2) is “also totally predicated on where the herring go and present themselves in *commercially fishable congregations for quality*”) (emphasis added).

⁵⁴ Ex. 13 at 6 (Coonradt Dep. at 57).

discretion to implement those management actions even if it is not required to do so by the regulation.

Moreover, ADF&G has not pointed to any examples or any part of the administrative record showing that ADF&G has ever distributed, or even considered distributing, the commercial fishery in *time* to ensure reasonable opportunity. ADF&G’s single footnote addressing the issue of distribution by time makes the ambiguous claim that because ADF&G refuses to distribute the harvest by time prior to and during the first spawn does not “mean the department is failing to distribute the commercial harvest by time.”⁵⁵ ADF&G then fails to cite to any part of the ADF&G administrative record or any other evidence that demonstrates that ADF&G has taken or even considered taking a management action to distribute the commercial fishery by time.

No issue of material fact exists with respect to the question of ADF&G’s failure to implement 5 AAC 27.195(a)(2) if this Court rules that ADF&G’s interpretation of what the regulation requires is invalid.⁵⁶ ADF&G’s motion for partial summary

⁵⁵ State Br. at 36 n. 138.

⁵⁶ The State points out correctly that STA has also pled a “more general complaint: that the totality of ADF&G’s management violates some other unspecified law.” State Br. at 39. That other “unspecified law” is the Alaska Constitution, but STA’s constitutional claims are not before the Court on this round of summary judgment motions. *See* Order Pursuant to Stipulation (Oct. 27, 2019) (“The following briefing schedule applies to cross motions for summary judgment on Plaintiff’s Count I (whether Defendant Alaska Department of Fish and Game’s interpretation and implementation of 5 AAC 27.195 is lawful).”). The State offers no support for its argument that STA’s constitutional claims are “legally insufficient to state a

judgment should be denied and STA’s motion for partial summary judgment should be granted with a ruling that ADF&G must determine whether it is necessary to distribute the commercial fishery by time and area to ensure subsistence harvesters have a reasonable opportunity for subsistence.

C. ADF&G Does Not Establish That It Is Implementing 5 AAC 27.195(b)’s Requirement to Consider the “Quality and Quantity of Herring Spawn on Branches” When Making Management Decisions Regarding the Commercial Fishery.

ADF&G misrepresents how it implements 5 AAC 27.195(b) by asserting that it “is clearly assessing the quality and quantity of herring roe when making management decisions regarding the Sitka Sound herring fisheries.”⁵⁷ STA agrees that ADF&G is assessing the quality and quantity of herring roe available to the *commercial* fishery, but that is only part of ADF&G’s duties under 5 AAC 27.195(b). ADF&G must also consider the “quality and quantity” of “herring spawn on branches” available to *subsistence* harvesters “when making management decisions regarding the commercial fishery.”⁵⁸

claim, and the court should dismiss Count I as to ADF&G for that reason, as well.” State Br. at 39.

⁵⁷ State Br. at 38. The State does not join in SHCA’s argument that 5 AAC 27.195(b) is invalid because it was a scrivener’s error. SHCA Br. at 8-9; *id.* at 21 (“[T]he language codified at 5 AAC 27.195(b) is not what the Board actually adopted.”). SHCA offers no evidence to support its bold allegation that the Department of Law illegally altered the text of the Board’s regulation. *See id.* at 9. STA agrees with the State that Board regulations are presumptively valid, and this round of summary judgment motions was not intended to challenge the validity of 5 AAC 27.195(b). Thus, this Court should reject SHCA’s unsupported argument.

⁵⁸ 5 AAC 27.195(b).

STA submitted admissible evidence that ADF&G has not implemented 5 AAC 27.195(b)'s requirement to consider quality and quantity of herring spawn on branches. ADF&G's Sitka Sound Area Manager, Eric Coonrad, admitted that he does not consider quality and quantity of herring spawn on branches when making management decisions regarding the commercial fishery. During Mr. Coonrad's deposition, he read the regulation, agreed that 5 AAC 27.195(b) "requires" ADF&G to consider quality and quantity of spawn on branches, and admitted that he does not do so.⁵⁹ Mr. Coonrad explained that he does not "have any information on quality" and he does not consider quality and quantity of herring spawn on branches "at all" when making management decisions regarding the commercial fishery.⁶⁰

ADF&G does not point to any evidence in the record to dispute Mr. Coonrad's testimony that ADF&G does not consider the quality and quantity of herring spawn on branches. ADF&G's argument focuses on their assessment of the quality and quantity of herring roe available for the commercial fishery before the spawn has occurred. ADF&G clearly coordinates closely with the commercial fishery to conduct test fisheries to determine the quality and quantity of herring roe that is available for the commercial fishery before herring have spawned.

⁵⁹ Ex. 13 at 7-8.

⁶⁰ *Id.*

But assessing the quality and quantity of herring roe for the commercial fishery is only one aspect of 5 AAC 27.195(b). When the Board adopted 5 AAC 27.195(b), it understood that quantity and quality of “herring spawn on branches,” *i.e.*, the herring spawn available to be harvested for subsistence, was also an important factor that should be considered when making management decisions regarding the commercial fishery. BOF 0065 (“[Q]uality as well as the quantity of herring roe on branches . . . is an important consideration in the *management of the subsistence and commercial sac roe fisheries.*” (emphasis added)).

ADF&G’s reliance on the Subsistence Division’s post-season subsistence harvest survey is misplaced because the information collected by the Subsistence Division is not used “when making management decisions regarding the commercial fishery.”⁶¹ ADF&G’s Subsistence Resource Specialist for Southeast Alaska, Lauren Sill, explained that she does not coordinate with ADF&G’s Commercial Fisheries Division during the Sitka herring season.⁶² And Mr. Coonradt admitted that he does not have or use data from the post-season subsistence harvest surveys when making

⁶¹ State Br. at 37 (“[T]he Department collects data regarding the quality and quantity of herring spawn on branches through a collaborative effort with the Tribe, consisting of a post-season survey of subsistence users.”).

⁶² October 30, 2019 Deposition of Lauren Sill at 41 (“During the season I usually try to leave [Mr. Coonradt] alone, because I know that they’re super busy down there when the commercial fishery is going on.”).

management decisions regarding the commercial fishery.⁶³ *See also* ADFG 2041 (2019 Management Plan) (“The results of harvest monitoring for the 2017, 2018, and 2019 seasons are not available.”).

ADF&G’s other argument focuses on a mischaracterization of STA’s claim regarding the interpretation and implementation of 5 AAC 27.195(b). ADF&G attempts to make the interpretation of 5 AAC 27.195(b) about whether ADF&G is *required to assess in-season data* regarding the quality and quantity of spawn on branches.⁶⁴ STA agrees that the intricacies of how and when ADF&G considers the quality and quantity of herring spawn on branches are, to a limited extent, committed to ADF&G’s discretion. ADF&G is required, however, to meaningfully consider the quality and quantity of spawn on branches when making in-season management decisions related to opening the commercial fishery. In order to fulfill that legal mandate, ADF&G must collect information that is timely and relevant to managing the commercial fishery in order to ensure reasonable opportunity for subsistence.⁶⁵

⁶³ Ex. 13 at 7-8.

⁶⁴ State Br. at 36 (“The Tribe’s claim that 5 AAC 27.195(b) requires the Department to make an in-season assessment of the quality and quantity of the spawn on branches is meritless.”).

⁶⁵ 5 AAC 27.195(a)(2).

The Alaska Supreme Court requires that agencies engage in “hard look” decision-making and consider all of the “salient factors.”⁶⁶ “[T]he reviewing court must ensure that [the agency] has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making.”⁶⁷ Here, because 5 AAC 27.195(b) requires ADF&G to consider the quality and quantity of herring spawn on branches when making management decisions regarding the commercial fishery, the information that ADF&G considers must be relevant and meaningful to the management of the commercial fishery.⁶⁸ ADF&G has admitted that its current method for collecting information on quality and quantity is neither timely nor relevant.⁶⁹ ADF&G cannot simply rely on post-season subsistence harvest surveys from several years ago when making current management decisions regarding the commercial fishery.⁷⁰

⁶⁶ See *Tongass Sport Fishing Ass’n v. State, Board of Fisheries*, 866 P.2d 1314, 1319 (Alaska 1994).

⁶⁷ *Denali Citizens Council v. State, Dep’t of Natural Res.*, 318 P.3d 380, 385 (Alaska 2014) (quoting *Kachemak Bay Conservation Society v. State, Dep’t of Natural Res.*, 6 P.3d 270, 275 (Alaska 2000)).

⁶⁸ See *Manning v. State, Dep’t of Fish & Game*, 355 P.3d 530, 535 (Alaska 2015) (review of agency action “consists primarily of ensuring that the agency has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making”); *Pacifica Marine, Inc.*, 356 P.3d at 790 (“Where an agency fails to consider an important factor in making its decision, the decision will be regarded as arbitrary.”).

⁶⁹ ADF&G acknowledges that subsistence harvest data from the 2016 season is irrelevant for managing the commercial fishery in 2018. Coonrad Depo. at 46 (“You can’t use old data.”).

⁷⁰ See *Denali Citizens Council*, 318 P.3d at 387 (“Under Alaska law, agencies must give ‘reasoned discretion to all the material facts and issues’ and ‘engage[] in reasoned decision making.’ These requirements speak more to the reasonableness of the agency’s decision-making process than to the reasonableness of its final decision.” (quoting *Trustees for Alaska*

This Court should conclude that the Board would not have adopted a regulation that requires ADF&G to consider irrelevant information. Collecting subsistence harvest data was not intended to be simply an academic exercise. Such an interpretation would eviscerate the Board’s clear intent for ADF&G to incorporate subsistence concerns into commercial fisheries management. ADF&G’s failure to collect timely and relevant information that can be used in making in-season management decisions for the commercial fishery, including making a determination about whether it is necessary to distribute the commercial fishery in time and area to ensure reasonable opportunity, is an illegal failure to implement 5 AAC 27.195(b).

It is possible for ADF&G to consider the quality and quantity of herring spawn on branches in a timely and relevant way, including through “in-season” assessments. The Record produced by the State in this case demonstrates two ways that ADF&G could fulfill its regulatory duties under 5 AAC 27.195(b). First, the Memorandum of Agreement (“MOA”) among ADF&G, the Board, and STA, created an in-season task force that allowed ADF&G to gather information regarding the subsistence harvest in-season. ADFG 2698 (“ADF&G will consult the Tribe during pre-season, *in-season* and post-season data gathering activities.”) (emphasis added). The MOA was premised on

v. State, Dep’t of Natural Res., 795 P.2d 805, 811 (Alaska 1990); *Kachemak Bay Conservation Soc.*, 6 P.3d at 275)); *Kachemak Bay Conservation Soc.*, 6 P.3d at 294 (an agency has a “duty to take a *continuing* ‘hard look’” at the salient problems to engage in reasoned decision making) (emphasis added).

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the notion that ADF&G would use information provided by STA to make management decisions regarding the commercial fishery. ADFG 2698 (“During *in-season* meetings to determine fishery openings, the Tribal Liaison and ADF&G will consult regarding whether the proposed opening will affect customary and traditional harvesters.”) (emphasis added).

STA is not suggesting that 5 AAC 27.195(b) *requires* ADF&G to implement the MOA; however, when the Board contemporaneously promulgated 5 AAC 27.195 and signed the MOA, it clearly understood that collecting relevant in-season information was important and the MOA was one way that ADF&G could assess “in-season” quality and quantity of herring spawn on branches. ADF&G has done nothing to develop an alternative method of gathering relevant in-season information regarding the quality and quantity of spawn on branches since it unilaterally withdrew from the MOA in 2009, and therefore, ADF&G has not engaged in reasoned decision-making.

Second, ADF&G already has access to in-season data that can be used to assess quality and quantity of herring spawn on branches in-season. ADF&G’s research indicates that quality of herring spawn on branches is “related to number of days of the spawning activity.” ADFG 2738. “It has been found that mean consecutive days of spawning days in subsistence use areas of Sitka Sound can be a reasonably good predictor of harvest success.” ADFG 2738. ADF&G documents total days of spawning activity and number of miles of shoreline with active spawn. ADFG 2738. Thus, it is

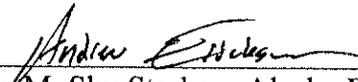
possible for ADF&G to use existing data as indicators for “quality and quantity” of herring spawn on branches, so long as ADF&G rationally explains the basis for its reliance on the best available scientific information and documents how it considered the information when making management decisions regarding the commercial fishery. It is simply not true that “ADF&G does not have the tools it would need to make the assessments the Tribe contends are necessary.”⁷¹

This Court should conclude that 5 AAC 27.195(b) requires ADF&G to consider “quality and quantity” of spawn on branches when making management decisions regarding the commercial fishery and that ADF&G ignored that requirement in 2017 and 2018. STA is entitled to summary judgment because ADF&G admitted it does not consider information regarding “quality and quantity” of spawn on branches when making management decisions. The State’s argument that ADF&G is not required to consider “in-season” information misses the point: ADF&G does not consider the relevant information “at all,” and consequently, there is no way to review whether ADF&G has taken a hard look at “quality and quantity” of herring spawn on branches when managing the commercial fishery.

⁷¹ SHCA Br. at 23.

Dated this 20th day of December 2019, at Anchorage, Alaska.

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