IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

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.

Filed in the Trial Courts
State of Alaska First District
Sitka
MAR 31 2020
Clerk of the Trial Courts
By _____ Deputy

Case No. 1SI-18-212CI

ORDER RE: CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON COUNT ONE

Plaintiff Sitka Tribe of Alaska ("STA"), defendants Alaska Department of Fish and Game ("ADFG") and the Alaska Board of Fisheries ("BOF") (collectively "the State" defendants), and defendant-intervenor Southeast Herring Conservation Alliance ("the Alliance") cross move for partial summary judgment on Count One of STA's complaint.[1] The narrow issue on this round of cross motions was agreed to by all parties in advance as reflected in the court's October 27, 2019 order.[2] The issue is whether ADFG's interpretation and implementation of 5 AAC 27.195 is lawful. To the extent that STA's Count One consists of claims beyond the claim that ADFG has unlawfully interpreted and implemented 5 AAC 27.195, those claims are not affected by this order and remain open to litigation in this case. Oral argument was held on January 28, 2020 and the motions are ripe for decision.

Summary judgment is proper if there is no genuine factual dispute and the moving party is entitled to judgment as a matter of law.[3] When factual disputes exist, the non-movant's version of the facts must be accepted as true and capable of proof, and the court must not weigh the evidence

[1] Motions #21, #22, #19, respectively.
[2] Order #18.
[3] Civil Rule 56; *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 757 (Alaska 2008).

or evaluate witness credibility.[4] All reasonable inferences to be drawn from the facts presented must be drawn in favor of the non-moving party.[5] All parties assert that there is no dispute as to any material fact and that they are entitled to judgment as a matter of law.

Count One of STA's complaint alleges that ADFG's interpretation of 5 AAC 27.195(a)(2) and (b) is unlawful and that its implementation of the regulation under its erroneous interpretation is unlawful. The first piece of the puzzle is for the court to properly ascertain the meaning of 5 AAC 27.195(a)(2) and (b). Because the parties' disagreement over the meaning of subsection (b) is partly dispositive, that subsection is dealt with first below.

5 AAC 27.195(b) reads:

> (b) 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.

STA posits that subsection (b) requires ADFG to consider the quality and quantity of herring spawn in-season. The State cites Eric Coonradt's affidavit for its contrary position that ADFG is not required to consider quality and quantity of herring spawn in-season. Coonradt is the Sitka Area Management Biologist for ADFG, Commercial Fisheries. Coonradt's affidavit states that ADFG has never interpreted subsection (b) as requiring ADFG to assess the quality and quantity of herring spawn in-season, but that instead quality and quantity data is typically not available until years after the end of a fishing season.[6] During his deposition, Coonradt explained that although there is no written document setting out ADFG's interpretation of the regulation that he is aware of, his understanding of the regulation is based on his own reading and experience as to how the regulation has been applied in the past.[7]

In another corner, the Alliance contends that the codified language of subsection (b) is unenforceable because it does not reflect the language promulgated by BOF. To support its contention the Alliance cites a BOF draft plan for subsection (b) in the record. The draft plan appears to provide a more permissive standard for ADFG:

> In managing the Sitka Sound commercial sac roe herring fishery the department shall

---

[4] *Id.*
[5] *Id.*
[6] Eric Coonradt Affidavit ¶ 11–12.
[7] *Id.*

. . .

(3) recognize that quality and quantity of herring roe on branches and herring sac roe is an important consideration in the management of the subsistence and commercial sac roe fisheries.[8]

The Alliance also cites a document titled Summary of Actions of the Board for January 7–14, 2002, the year 5 AAC 27.195 was promulgated, which explains that the amended language of the draft plan merely recognizes that quality and quantity of herring roe on branches, kelp and seaweed, and sac roe is an important consideration in the management of subsistence and commercial sac roe fisheries."[9]

STA counters with its own exhibit purporting to show that the subsection (b) language as codified is a true and correct version of the language adopted by BOF.[10] The legal issue before the court—whether ADFG's interpretation and implementation of 3 AAC 27.195 is lawful—cannot be resolved as to subsection (b) without first resolving the factual issue of whether that subsection as codified has the force of law. Under AS 44.62.110, the "publication of a regulation in the [AAC] raises a rebuttable presumption that the text of the regulation as so published is the text of the regulation adopted." To overcome the presumption, a challenger must show a substantial failure to comply with the APA.[11] The Alliance bears the burden to prove the inconsistency.[12] But the Alliance has submitted sufficient evidence from the BOF record to raise a genuine issue of material fact as to whether subsection (b) reflects what the BOF originally adopted and is thus enforceable. Summary judgment is accordingly not appropriate as to subsection (b).

5 AAC 27.195 (a) reads:

(a) In managing the commercial sac roe herring fishery in Section 13-B north of the latitude of Aspid Cape (Sitka Sound), the department shall

---

[8] BOF Record, 70.
[9] BOF Record, 64.
[10] STA's Exhibit 17.
[11] *Mech. Contractors of Alaska, Inc. v. State, Dep't of Pub. Safety*, 91 P.3d 240, 251 (Alaska 2004).
[12] *City of Valdez v. State*, 372 P.3d 240, 246 (Alaska 2016) ("When reviewing the validity of a regulation, in the absence of any contention that the agency failed to comply with the required procedures for promulgation, we presume that it is valid and place the burden on the challenging party to prove otherwise") (citing case law traceable back to *Kingery v. Chapple.*); *Kingery v. Chapple*, 504 P.2d 831, 833–34 (Alaska 1972) (citing the precursor to AS 44.62.110) ("Under these *factual circumstances* and the statutory presumption of validity, the superior court properly *found* that there was no substantial failure to comply with [a requirement for the promulgation of a regulation].") (emphasis added) (treating the inquiry of whether a regulation was properly promulgated as a factual issue).

> (1) manage the fishery consistent with the applicable provisions of 5 AAC 27.160(g) and 5 AAC 27.190;
>
> (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).

ADFG's interpretation of 5 AAC 27.195 is a hodgepodge. Discerning exactly what ADFG's interpretation is has proven to be an elusive task. The interpretation is not captured in a single place. To complicate matters, the parties largely disagree on what ADFG's interpretation is in the first place.

Coonradt's affidavit is once again referred to by the parties for ADFG's interpretation of subsection (a). Therein, Coonradt states that ADFG has never interpreted subsection (a) to require ADFG to make an "independent assessment" of whether a reasonable opportunity for subsistence uses of herring spawn exists in Sitka Sound.[13] STA also asserts that ADFG has informally interpreted subsection (a) to prioritize the commercial harvest over subsistence by not requiring ADFG to delay the commercial harvest until after the herring spawn near shore even if ADFG determines that the delay is necessary to ensure a reasonable opportunity for the subsistence harvest. STA cites Coonradt's deposition where he explained:

> We try to have openings away from the commercial closed area whenever we possibly can . . . So if we have . . . opportunities close to the closed area or let's say we have opportunity right on the border of the closed area and we also have an opportunity a mile away. We would, everything being equal, we would choose the opportunity further away.[14]

STA also cites Forrest Bowers' November, 2018 email. Forrest Bowers is the former ADFG Director of Commercial Fisheries. In his email, Bowers states:

> 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 fishery conservation purpose, would represent a direct fishery resource allocation action taken outside the Board of Fisheries process.[15]

---

[13] Eric Coonradt Affidavit ¶ 2.
[14] Eric Coonradt Deposition, 51.
[15] STA's Exhibit 12.

Among other documents, ADFG refers to the written explanation of Proposal 500, the precursor to 5 AAC 27.195, which described the problem that it was designed to address:

> . . .
> In 2001 there were residents of Sitka and members of communities that depend upon Sitka for their customary and traditional herring eggs who, exercising due diligence, did not meet their subsistence herring egg needs. If the Sitka Sound sac roe commercial fishery is not required to disperse their harvest over geographical areas and areas important to subsistence herring egg harvest are not recognized in regulation there is the potential for unmet subsistence needs again next year.
>
> This proposal addresses management of the Sitka Sound commercial sac roe herring fishery that allows for intensive commercial harvest in the most important areas for subsistence herring egg harvest.
>
> In 2001, the entire commercial harvest of 12,005 tons was removed from a single area directly adjacent to the traditional subsistence herring egg harvest areas of Middle, Crow and Kasiana islands. This area is a relatively pristine ecosystem and a mainstay for subsistence harvesters. Perhaps the most important characteristic of this area is its proximity to the community of Sitka and the relatively calm "inside" Sitka Sound waters where these harvest areas are located. These factors provide the opportunity and safety required for skiff harvesters and the necessary conditions for egg-on-branch deposition.[16]

During a BOF hearing on Proposal 500, members discussed an amendment which proposed the replacement of the language "to the extent practicable, distribute the commercial harvest," with, "distribute the commercial harvest, if necessary, so that subsistence users have a reasonable opportunity to harvest."[17] Before unanimously passing the amendment, Board Member Coffey spoke to its intent:

> Mr. Coffey: [the amendment leaves] the determination of reasonable opportunity to the in-season manager . . . . 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.[18]

---

[16] BOF Record, 65.
[17] BOF Record, 5115.
[18] BOF Record, 5115.

Proposal 500 was ultimately adopted by BOF, becoming 5 AAC 27.195(a)(2). In ADFG's February 2020 Management Plan for the Southeast Sac Roe Herring Fishery, ADFG states that the newly promulgated 5 AAC 27.195 requires:

> that the department distribute the commercial harvest both geographically and temporally, if necessary, so that the subsistence fishery has a reasonable opportunity to harvest the amount of spawn, which the board has determined to be necessary for subsistence.[19]

The court finds the above citations useful in both discerning what ADFG's interpretation is and the intent behind 5 AAC 27.195.

Where an agency decision concerns expertise as to complex subject matter or fundamental policy formulations, the court must defer to the agency decision if the decision has a reasonable basis in law and fact.[20] When this standard applies, the court must defer to the agency's interpretation of its own regulation unless its interpretation is plainly erroneous and inconsistent with the regulation.[21] Additionally, courts must give even more deference (i.e. beyond reasonable basis deference) to agency interpretations that are "'longstanding and continuous.'"[22] The parties do not dispute the complexity of the subject matter involved in interpreting and applying 5 AAC 27.195. Here, ADFG's decisions concern expertise as to complex subject matter. But this court is not convinced that ADFG's interpretation is longstanding and continuous. Therefore, this court reviews ADFG's interpretations—to the extent that they can be discerned—under the reasonable basis standard and defers unless ADFG's interpretation is plainly erroneous and inconsistent with the regulation.

Here, the language of subsection (a) is quite plain. By its express words, its mandates apply to all of Sitka Sound. Under the first subpart, ADFG "shall (1) manage the fishery consistent with the applicable provisions of 5 AAC 27.160(g) and 5 AAC 27.190." 5 AAC 27.160(g) imposes a mandatory duty on ADFG to establish a guidelines harvest level (GHL) for the herring sac roe fishery. 5 AAC 27.190 imposes both mandatory duties and permissive powers on ADFG. Under 5 AAC 27.190, ADFG is required to identify stocks of herring on a spawning area basis; establish minimum spawning biomass thresholds below which fishing will not be allowed; and assess the abundance of mature herring for each stock before allowing fishing to occur. ADFG is granted the

---

[19] STA's Exhibit 6, 3.
[20] *Weaver Bros. v. Alaska Transp. Comm'n*, 588 P.2d 819, 821 (Alaska 1978).
[21] *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 788 (Alaska 2015).
[22] *Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 299 (Alaska 2014).

power, but is not required, to allow a harvest of herring as an exploitation rate between 10–20% of the estimated spawning biomass when that biomass is above the minimum threshold level; identify and consider sources of mortality in setting the harvest guidelines; and modify fishing periods to minimize incidental mortalities during commercial fisheries. By its express language, nothing in 5 AAC 27.160(g) or 5 AAC 27.190 conflicts with ADFG's mandates under subpart (2). ADFG's mandates under subpart (2) do not conflict with its mandatory duties under 5 AAC 27.160(g) or 5 AAC 27.190. To the contrary, 5 AAC 27.190(4) is explicitly subjected to conflicting duties imposed on ADFG.

Under the second subpart, ADFG "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)." Under 5 AAC 01.716(b), the spawn necessary for subsistence use is 136,000–227,000 pounds. In other words, ADFG is required to (1) determine whether subsistence users have a reasonable opportunity to harvest the amount of herring spawn necessary for subsistence uses in Sitka Sound as a whole, which is 136,000–227,000 pounds; and (2) if ADFG determines that a reasonable opportunity does not exist, distribute the commercial harvest by fishing time and area to the extent and in a way necessary to ensure a reasonable opportunity does exist in Sitka Sound as a whole. ADFG must make these determinations before permitting a commercial harvest in the Sitka Sound. This interpretation is consistent with both the plain wording of 5 ACC 27.195, its context, and the legislative history, including that history which illuminates the purpose behind the regulation, referred to above.[23]

To the extent that ADFG interprets subsection (a) as not requiring the agency to determine whether a reasonable opportunity exists for the subsistence harvest, the interpretation is unreasonable and inconsistent with the plain language and context of the regulation. To the extent that ADFG interprets subsection (a) as requiring the subordination of its duty to distribute the commercial harvest by time and area to opening the commercial harvest in any way, the interpretation is unreasonable and inconsistent with the plain language and context of the regulation. On the other hand, to the extent that ADFG interprets subsection (a) in conformity with the court's independent interpretation above, the court defers to the interpretation.

---

[23] *See, Tew ex rel. A.T.*, 278 P.3d 1262, 1265 (Alaska 2012) (Explaining that the court conducts an independent interpretation of a statute or regulation based on its plain wording, history, and purpose; the clearer its text, the more convincing its history must be to overcome it).

Having determined the meaning of subsection (a), the court's next task is to ascertain whether ADFG's implementation of that subsection is lawful. Once the interpretation of a regulation is resolved, the agency's application of a regulation to the particular factual circumstances is committed to the agency's sound discretion.[24] The court's review of the agency's application of the regulation is "limited to whether the decision was arbitrary, unreasonable or an abuse of discretion."[25] ADFG defends by asserting it has consistently implemented the regulation since its promulgation in 2002. ADFG cites, among other things, Eric Coonradt's affidavit, where he states:

> The department continues to implement 5 AAC 27.195(a)(2) by distributing commercial fishery openings throughout the management area, and away from the closed areas whenever possible.[26]

ADFG also cites the following question and answer during a January, 2018 BOF meeting:

> Mr. Johnson:
> [H]ow is [the 5 AAC 27.195(a)(2) mandate] manifest in the way the fishery is managed?
>
> Director Scott Kelley [of the Division of Commercial Fisheries]:
> . . . . we're very cognitive of implementing that part of the regulation, but again, it's also totally predicated on where the herring go and present themselves in commercial fishable congregations for quality . . . but you can see, from where we distributed the fishery that we're trying to adopt that—manage around that regulation.[27]

These statements may show that ADFG believes it is lawfully implementing subsection (a), but whether ADFG's implementation can be objectively reviewed is another matter. STA argues that ADFG has failed to lawfully implement the regulation because it has not documented its implementation decisions sufficiently for adequate judicial review of the issue. ADFG retorts that its periodic news releases adequately document its implementation decisions.

The State makes two arguments for why ADFG is not required to make determinations under subsection (a). First, it argues that the 2012 so-called "closed-area" regulation—5 AAC 27.150(7)—excuses ADFG from making determinations of whether a reasonable opportunity for the subsistence harvest exists in Sitka Sound. The parties agree that 5 AAC 27.150(7) prohibits the opening of the commercial fishery within an area of approximately 14 square miles. The parties also

---

[24] *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 788 (Alaska 2015).
[25] *Id.*
[26] Eric Coonradt Affidavit ¶ 11.
[27] BOF Record, 5062–64 (January, 2018 Board Proceeding, 70–72).

agree that the closed-area approximates what the parties refer to as the "core area" where the subsistence harvest has traditionally been concentrated in Sitka Sound. But nothing in the plain wording or any regulatory history that the State has provided shows that 5 AAC 27.150(7) conflicts with or abrogates ADFG's duties under 5 AAC 27.195(a). Instead, the fact that the commercial fishery is prohibited from operating in the closed-area can be considered by ADFG in making its subsection (a) determinations, but 5 AAC 27.150(7) is not dispositive of those determinations.

The second argument the State advances is that *Rosier* prevents ADFG from determining that a reasonable opportunity for the subsistence harvest does not exist in Sitka Sound. In January, 2018 multiple BOF members opined that a reasonable opportunity already exists for the subsistence harvest. In *Rosier*, BOF had promulgated a regulation setting a chum salmon cap for the False Pass Fishery.[28] At a subsequent BOF meeting, ADFG proposed to BOF that the chum cap be lowered, but BOF voted against the proposal and it failed.[29] Governor Hickel then directed ADFG to use its emergency powers to increase chum escapement into the river system despite BOF's declination of the lower chum cap proposal.[30] The superior court enjoined ADFG from implementing the Governor's directive on the ground that ADFG was prohibited from taking emergency action on the same information that was available to BOF when it rejected the identical proposal.[31] The Alaska Supreme Court affirmed, reasoning that were ADFG to institute the chum cap based solely on the information already presented to BOF when it denied the proposal, ADFG would be unlawfully vetoing the BOF's decision.[32]

Rosier is inapplicable to the circumstances here. Unlike in *Rosier*, no party submitted a proposal to BOF for BOF to determine that a reasonable opportunity for subsistence use existed in Sitka Sound, thus BOF did not have an opportunity to reject such a proposal. Nor is the determination of whether a reasonable opportunity for the subsistence harvest exists, which is an application of an existing BOF regulation, the same as the ADFG emergency order in *Rosier*.

The inapplicability of *Rosier* is also demonstrated by *Cook Inlet*. In *Cook Inlet*, ADFG made discretionary in-season management decisions that purportedly were contrary to BOF's intent behind the management plan for the Upper Cook Inlet Fishery.[33] The Alaska Supreme Court held

---

[28] *Peninsula Mktg. Ass'n v. Rosier*, 890 P.2d 567, 568 (Alaska 1995).
[29] *Id.*
[30] *Id.*
[31] *See, id.*
[32] *Id.* at 574.
[33] *Cook Inlet Fisherman's Fund v. State, Dep't of Fish & Game*, 357 P.3d 789, 799 (Alaska 2015).

that "unlike in *Rosier*, where [ADFG] clearly contravened [BOF's] decision, nothing in this case indicates that [ADFG's] discretionary in-season management decisions conflicted with the [BOF's] management plans . . . .[there is no] specific management plan provision [ADFG] allegedly violated."[34] Here, there is no indication that an ADFG determination that a reasonable opportunity does not exist for the subsistence harvest would conflict with a specific BOF regulatory or management plan provision.

Regardless, assuming *arguendo* that *Rosier's* rule does apply, ADFG has new information since January, 2018 which would likely be relevant in making a determination. For example, Kyle Herbert, the current Southeast Region Herring and Dive Research Program Supervisor for ADFG, testified in his affidavit that the herring spawn in 2018 was focused west of Sitka; that the 2018 herring spawn harvest was poor; and that the spawn mileage in 2018 was lower than typical but was offset by the above average width of the spawn.[35] Therefore, *Rosier* is inapplicable and ADFG is not bound by any determination made by BOF at the January, 2018 meeting relating to its duties under 5 AAC 27.195(a).

Due process does not require an agency to explain and defend every decision it makes.[36] "Nevertheless, if a statute requires reasoned decisions, and the legislature has not expressly or by implication limited judicial authority to decide how to review administrative action, courts may and should require agencies to explain their decisions."[37] *Ship Creek* only required decisional documents for agency determinations in exercise of their adjudicative powers.[38] Decisional documents are suggested but not required of an agency in the agency's exercise of a quasi-legislative (regulation promulgation) or other non-adjudicative action.[39] But Alaska law does require that in important non-

---

[34] *Id.*

[35] Kyle Herbert Affidavit, ¶¶ 16, 18, 21 (STA's Exhibit D).

[36] *See, Ship Creek Hydraulic Syndicate v. State, Dep't of Transp. & Pub. Facilities*, 685 P.2d 715, 717 (Alaska 1984) (internal citation omitted).

[37] *Id.* (internal citation omitted). The form of a decision document is committed to the discretion of the agency, "so long as a decisional document adequately reflects the facts and premises on which a decision is based. *Id.* at 719. (internal citation omitted). The "precise form a decisional document takes depends on how the document is used."

[38] *See, Johns v. Commercial Fisheries Entry Comm'n*, 758 P.2d 1256, 1260 (Alaska 1988).

[39] *See, id.* "A decisional document, done carefully and in good faith, serves several salutary purposes. It facilitates judicial review by demonstrating those factors which were considered. It tends to ensure careful and reasoned administrative deliberation. It assists interested parties in determining whether to seek judicial review. And it tends to restrain agencies from acting beyond the bounds of their jurisdiction." *Alaska Conservation Council, Inc. v. State*, 665 P.2d 544, 549 (Alaska 1983), *overturned due to legislative action.*

adjudicative determinations, "the record should at least explain the reasons for the agency's action."[40]

ADFG's determinations under 5 AAC 27.195 do not resolve disputes to specific individuals, as adjudicative actions do, and do not determine past and present rights and liabilities, as quasi-legislative actions do.[41] Instead, ADFG determinations under the regulation are non-adjudicative "quasi-executive" actions.[42] Because ADFG's determinations under the regulation are non-adjudicative, a formal decisional document is not required, but the record must clearly reflect the reasoning underlying the agency's implementation decisions under subsection (a).

Here, ADFG cites volumes of news releases to show its reasoning behind its subsection (a) implementation determinations.[43] Upon a review of these documents, it appears they provide some data to support its in-season determinations of whether to open the commercial fishery in Sitka Sound. For example, the news releases describe the observed locations of herring, the assessed quantity and density of the herring and the assessed quality of the herring on a given day, among other features.

However, the news releases lack essential features that would adequately explain the reason for ADFG's implementation decisions of 5 AAC 27.195(a). The news releases do not explain whether ADFG determined, before opening the commercial fishery, whether a reasonable opportunity exists for the subsistence harvest. Nor do they make an articulated connection—whether explicitly or by logical inference—between the herring data, the decision to open the commercial fishery during a particular time and within a particular location, and whether doing so is necessary or sufficient to ensure a reasonable opportunity for the subsistence harvest.

5 AAC 27.195(a) determinations are important; they have the potential of directly altering the allocation of the fishery between the subsistence and commercial harvests. The difficulty of making determinations and then expressing the reasoning behind those determinations in the record, while not inconsequential, is not outweighed by the value of reasoned explanations.[44] This is not to

---

[40] *Id.*; *Unibelli Coal Mine, Inc. v. State, Dep't of Nat. Res.*, 921 P.2d 1134, 1149 (Alaska 1996) ("as long as the record clearly reflects the reasoning underlying the agency's decisions.").

[41] Neither party advocates for a conclusion that 5 AAC 27.195(a)(2) implementation determinations are either adjudicative or non-adjudicative in nature.

[42] *Id.* ("agencies often make discretionary decisions not requiring formal procedures") ("we have described an agency's discretionary decision that does not require formal procedures as 'quasi-executive'") ("we review such decisions only for an abuse of discretion") (internal citations omitted).

[43] ADFG Record, 1–467 (ADFG News Releases; Subsistence Herring Egg Harvest Surveys).

[44] *But cf. Ship Creek*, 685 P.2d at 717 (Alaska 1984) ("Some decisions are relatively unimportant, and the trouble of explaining them in writing could possibly outweigh any value a written explanation would have.").

say that ADFG's news releases, or any other particular document, must explicitly explain ADFG's determinations. Although explicit explanations in a uniform decisional document, like the news releases, may be advisable, they are not required under Alaska law. As long as ADFG's record as a whole clearly reflects ADFG's determinations and the reasoning behind them for every season that ADFG opens the commercial fishery, the requirement that ADFG explains its important quasi-executive actions, pursuant to its duties under 5 AAC 27.195(a), is satisfied.

In short, ADFG's news releases, and indeed the State's record as a whole, fails to clearly reflect—either explicitly or implicitly—the determinations, and reasoning underlying ADFG's determinations, that ADFG is required to make before opening the commercial fishery under 5 AAC 27.195(a). If adequate explanations for ADFG's determinations do exist in the record, the State's record does not clearly reflect them. Because ADFG has failed to adequately explain its determinations in the record, the court does not defer to the agency's implementation determinations, to the extent they exist. For this reason, ADFG's application of its mandates under 5 AAC 27.195(a) is arbitrary, unreasonable, and an abuse of discretion. In other words, based on the undisputed record before the court, ADFG's implementation of 5 AAC 27.195(a) is unlawful.

For the foregoing reasons the parties' cross motions for partial summary judgment on Count One are (1) all **DENIED** as to the claims relating to 5 AAC 27.195(b); (2) the State's and the Alliance's motions are **DENIED** as to claims relating to 5AAC 27.195(a); and (3) STA's motion is **GRANTED** as to the claim relating to 5 AAC 27.195(a).

Entered at Juneau, Alaska this 31st day of March 2020.

SEAL OF THE TRIAL COURTS STATE OF ALASKA FIRST JUDICIAL DISTRICT

Daniel Schally
Superior Court Judge

CERTIFICATION
I certify that on 31 day of March 2020
a true copy of this do was placed
in attorney's box/mailed to the following:
J. Stavkey; A. Erickson; J. Pickett
M. Stavkey; Jon Tillinghast
By