IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT SITKA

SITKA TRIBE OF ALASKA,

Plaintiff,

v.

STATE OF ALASKA, ALASKA DEPARTMENT OF FISH AND GAME, and ALASKA BOARD OF FISHERIES,

Defendants,

and

SOUTHEAST HERRING CONSERVATION ALLIANCE,

Defendant-Intervenor.

Case No. 1SI-18-212CI

ORDER GRANTING RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT[1]

Presently before the court is the Sitka Tribe of Alaska's ("STA") June 3, 2020 renewed motion for partial summary judgment on Count I, relating to the State of Alaska Department of Fish & Game's ("ADF&G" or "State") interpretation and implementation of 5 AAC 27.195(b). The Southeast Herring Conservation Alliance ("Alliance") filed its opposition to STA's motion on June 9[2] and filed an erratum on June 19. ADF&G filed its response to STA's motion on June 10. STA filed its reply to ADF&G on June 15, and its response to the Alliance on June 19.

On March 31, 2020 the court denied partial summary judgment for all parties on the claim under Count I that the State has unlawfully interpreted and

[1] Case Motion #25.

[2] *Southeast Herring Conservation Alliance Reply in Support of Motion to Renew Review of Summary Judgment Motions*, June 9, 2020.

implemented 5 AAC 27.195(b).[3] The March 31 order reasoned that the Alliance had submitted sufficient evidence from the Board of Fisheries' ("BOF") record to raise a genuine issue of material fact as to whether (b) as codified reflects what the BOF adopted and is thus enforceable. This conclusion relates to AS 44.62.110, which says in its entirety:

> (a) The publication of a regulation in the Alaska Administrative Code or register raises a rebuttable presumption that the text of the regulation as so published is the text of the regulation adopted.
> (b) The courts shall take judicial notice of the contents of each regulation or notice of the repeal of a regulation printed in the Alaska Administrative Code or Alaska Administrative Register.

To overcome the presumption referenced in subsection (a), a challenger must show a substantial failure to comply with the Administrative Procedure Act ("APA").[4] It is a challenger's burden to show this inconsistency.[5]

With its original pleadings the Alliance attached a BOF draft plan of subsection (b), which appeared to provide a more permissive standard than does the regulation as codified:

> In managing the Sitka Sound commercial sac roe herring fishery the department shall
> . . .
> (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.[6]

The regulation, effective April 14, 2002 (and never amended), reads:

> (b) In addition to the provisions of (a) of this section, the

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[3] *See, Order Re: Cross Motions for Partial Summary Judgment on Count One* (denying Case Motions #19, 21, and 22 as they related to 5 AAC 27.195(b)), entered March 31, 2020.
[4] *Mech. Contractors of Alaska, Inc. v. State, Dep't of Pub. Safety*, 91 P.3d 240, 251 (Alaska 2004).
[5] *City of Valdez v. State*, 372 P.3d 240, 246 (Alaska 2016).
[6] BOF Record, 70.

> 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.[7]

The Alliance also submitted with its original pleadings the BOF Summary of Actions for January 7–14, 2002, which implied that the adopted language was the (3) language rather than the (b)[8] language.

On May 1, 2020 the State filed a supplement to the administrative record. The Alliance's Case Motion #23 and the State's Case Motion #26, which were both filed shortly after the supplement, asked the court to renew consideration of partial summary judgment as to the claim in Count I pertaining to (b), in light of the supplement to the record.

The supplementary materials filed on May 1 contain several documents of interest. The first of these is a memo dated March 11, 2002 to the State's Regulations Attorney, Deborah Behr, from Assistant Attorney General Steve White.[9] This memo provides that the attached regulations include the "subsistence part of the January 2002" BOF regulation package.[10] It also says that White had edited the regulations: "[t]he draft regulations, showing my edits, should meet all requirements."[11] The language of one of the attached regulations (at Page 24 of the attachments) is identical to the language of (3), above, and is labeled 5 AAC 27.195(3).[12] The language of another one of the

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[7] 5 AAC 27.195(b)
[8] For the sake of brevity the court refers to the different versions of the regulation as (3) or (b).
[9] BOF Record, 5150. The "White memo."
[10] *Id.*
[11] *Id.*
[12] BOF Record, 5140–41, 5149, 5174.

attached regulations (at Page 2 of the attachments) is substantially identical to 5 AAC 27.195(b) as codified (and is labeled the same as codified).[13]

Second is a memo dated March 15, 2002 from Deborah Behr to Lieutenant Governor Fran Ulmer.[14] This memo states, *inter alia,* that the regulations attached to the memo consist of regulations regarding "subsistence herring" in "Sitka Sound;" that the "regulations were adopted by the board after the close of the public comment period;" that the State Department of Law ("DOL") detected no legal problems with the adopted regulations and that they are approved by DOL; and that DOL made technical corrections to the regulations to conform to the regulation drafting manual.[15]

Third is a memo, also dated March 15, 2002, from Deborah Behr to ADF&G Commissioner Frank Rue.[16] This memo is substantially identical to the Behr memo, noting technical corrections were made in accordance with AS 44.62.125.

The fourth document important to note is the 2002 Southeast Alaska Sac Roe Herring Fishery Management Plan. Published in February 2002 by the ADF&G—notably between the date BOF adopted the regulation in January and the date the regulation became effective in April—the management plan states that the BOF adopted 5 AAC 27.195 during its January 2002 meeting, including the provision that the department *shall* "[r]ecognize that quality and quantity of herring roe on branches, kelp, seaweed, and herring sac rose is an important consideration in the management of the subsistence and commercial sac roe fisheries."[17] The management plan went further, explaining what each of the regulation's provisions mean. As part of this description the

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[13] BOF Record, 5145, 5147.
[14] BOF Record, 5142. The "Behr memo."
[15] BOF Record, 5142.
[16] BOF Record, 5143. The "Behr II memo."
[17] *Southeast Alaska Sac Roe Herring Fishery 2002 Management Plan*, ADF&G, Feb. 2002, at 4.

management plan provides that "[t]he third statement (3) is a statement of finding that the quality, not just the quantity is important for both fisheries, and therefore may be factored into management decisions."[18]

In sum, the White, Behr, and Behr II memos show that the language of (3) was adopted by the BOF in January 2002. They also show that either White or Behr, or both, edited (3) to comply with the regulations drafting manual, which yielded the language of (b) as now codified. The Plan confirms that the language of (3) is what was originally adopted by the BOF.

There is no evidence that DOL materially changed the meaning of (3) when drafting subsection (b). The Alliance has not identified any particular facts or legal precedent that would alter the above analysis, instead focusing on the argument that (b) is unenforceable because the two use different language. The fact that the codified version uses slightly different language does not sufficiently rebut the presumption that the two subsections have the same meaning and that (b) is therefore enforceable.[19]

Despite the mandatory nature of the subsections both in text and in regulatory history, the Alliance maintains that the language of (3) is merely an unenforceable "statement of finding" rather than a mandatory command.[20] This argument is unpersuasive in light of the clear language of both (3) and (b).

In Case Motions #23, #25, and #26 all the parties agree that the AS 44.62.110 presumption issue has now been resolved and that partial summary

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[18] *Id.*

[19] *See also* Regulation Drafting Manual, 99, http://law.alaska.gov/pdf/manuals/DraftingManual-AdminRegs.pdf ("AS 44.62.125(b)(6) authorizes the regulations attorney to edit and revise a regulation after filing to make technical corrections similar to those made in statutes by the revisor of statutes. See AS 01.05.031(b). So long as it is done without changing the meaning of the regulation, the regulations attorney may . . ."); *State's Response to Sitka Tribe of Alaska's Renewed Motion for Summary Judgment*, June 10, 2020.

[20] *See, e.g., Southeast Herring Conservation Alliance Opposition to Motion for Summary Judgment*, Dec. 20, 2019, at 13. (the Alliance's reliance on the 2002 Management Plan's commentary to the regulation that mentions the word "may" is unpersuasive when compared with the draft language and codified language.).

judgment is appropriate on the (b) claim. Indeed, the Alliance now agrees with the State that no dispute of material fact remains because (3) "provides definitive legislative history on how the codified version should be interpreted and what the BOF intended in adopting (3)."[21] But the Alliance qualifies this by stating, "[a]s long as the language of a regulation as codified is interpreted consistently with the language of the regulation as adopted, then no issue arises."[22] The State argues similarly.[23] STA agrees that no genuine dispute of material fact remains as to the validity of 5 AAC 27.195(b).

Summary judgment is appropriate when there is no genuine factual dispute and the moving party is entitled to judgment as a matter of law.[24] When factual disputes exist, the non-movant's version of the facts must be accepted as true and capable of proof, and the court makes no attempt to weigh the evidence or evaluate witness credibility.[25] All reasonable inferences to be drawn from the facts presented must be drawn in favor of the non-moving party.[26]

Needless to say, if a particular issue involves a question of fact, it is decided by a jury at trial; if the issue involves a question of law, it is decided by the court.[27] Courts "do not decide factual issues on summary judgment; they 'ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.'"[28] A claim that

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[21] Alliance's Reply in support of its motion to renew review of summary judgment motions at 7.
[22] *Id.*
[23] State's Response to STA's renewed motion for partial summary judgment at 5-6.
[24] Civil Rule 56; *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 757 (Alaska 2008).
[25] *Id.*
[26] *Id.*
[27] *Taylor v. Interior Enterprises, Inc.*, 471 P.2d 405, 406 (Alaska 1970).
[28] *Pederson v. Arctic Slope Reg'l Corp.*, 421 P.3d 58, 67 (Alaska), *cert. denied*, 139 S. Ct. 427, 202 L. Ed. 2d 327 (2018) (citing Civil Rule 56). It's fair to say that in other words, "An issue of fact becomes an issue of law and loses its triable character if the undisputed facts leave no room for a reasonable difference of opinion." § 2A-405:57Questions of law or fact—Questions of law, 4C Anderson U.C.C. § 2A-405:57 (3d. ed.)

consists of material facts which exist without substantial controversy thus can be resolved by the court as a matter of law. Here, all the parties agree that (3) and (b) have the same meaning and that partial summary judgment is now appropriate on this claim. There is no longer a substantial controversy because the regulatory history reveals that (3) and (b) necessarily have the same meaning, and all agree. Because this dispute of material fact is resolved, the Alliance's Case Motion #23 and STA's Case Motion #26 were granted by orders entered on October 4, 2020, rendering the STA's Case Motion #25 (the current partial summary judgment motion, at issue in the instant order) ready for decision.

The task is now to interpret the language of (b) to determine what it means, commensurate with the understanding that the language of (3) necessarily has the same meaning as the language of (b). And the court's interpretation of (b) as codified should be guided by the legislative history provided by the language of (3).

Where an agency interpretation concerns expertise as to complex subject matter or fundamental policy formulations, the court must defer to the agency interpretation if it has a reasonable basis in law and fact.[29] This deferential "reasonable basis" standard is also appropriate where an agency interprets its own regulation.[30] For this standard to apply, the agency must have offered an interpretation and must be a party to the case.[31] 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.[32]

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[29] *Weaver Bros. v. Alaska Transp. Comm'n*, 588 P.2d 819, 821 (Alaska 1978).
[30] *Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982) (stating that this ground for deference is "in addition" to the prior ground).
[31] *See Tea ex rel. A.T.*, 278 P.3d 1262, 1263 (Alaska 2012).
[32] *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 788 (Alaska 2015).

Where no deference is due to an agency interpretation of a regulation, the court must use its independent judgment "seeking to adopt the rule of law that is most persuasive in light of precedent, reason, and policy."[33] Under this standard, when a regulation's interpretation is challenged, the court must apply the same standards that are applied to statutory interpretation.[34] "When construing statutes, [courts] consider three factors: 'the language of the statute, the legislative history, and the legislative purpose behind the statute.' "[35] "'[T]he plainer the language of the statute, the more convincing any contrary legislative history must be . . . to overcome the statute's plain meaning.'"[36]

The subject matter addressed in 5 AAC 27.195(b)—*how* ADF&G considers or recognizes "quality and quantity of herring roe on branches, kelp, seaweed, and herring sac roe"—requires complex expertise and thus ADF&G's interpretation as to the *how* is entitled to deference if reasonable. But *whether* ADF&G must consider it at all when making management decisions to open or close the commercial fishery is not technically a complex or a fundamental policy decision and thus the court should conduct an independent interpretation of (b) in that regard.

As to the *whether* question, the text of (b) and regulatory history contained in (3) is decisive. The regulation, (b), in substance imposes a mandatory "shall" duty on ADF&G to consider the quantity and quality of "herring spawn on branches, kelp, and seaweed, and herring sac roe" when making "management decisions" concerning the commercial fishery and subsistence herring sac roe in Sitka Sound. Subsection (3) also imposed a mandatory "shall" duty on ADF&G: "[i]n managing the Sitka Sound commercial sac roe herring fishery" ADF&G shall "recognize that quantity of

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[33] *Id.*
[34] *Tea ex rel. A.T.*, 278 P.3d 1262, 1265 (Alaska 2012).
[35] *Id.*

herring roe on branches, kelp, seaweed and herring sac roe is an important consideration in the management" of the commercial fishery and subsistence herring sac roe.

There is no difference between the mandatory nature of "shall" in (3) and the "shall" in (b).[37] Nor is there a difference between making "management decisions" in (b) and "in managing" in (3). Both minimally apply to the same thing: ADF&G's mandatory determination under 5 AAC 27.195(a) of whether a reasonable opportunity for subsistence harvesting exists, and if not, ADF&G's distribution by time and area to the extent necessary for a reasonable opportunity to exist.[38] Moreover, there is no real difference between the verb "consider" in (b) and the phrase "recognize" as an "important consideration" in (3).[39]

Despite both the evident mandatory meaning of the regulation from the text and regulatory history, the State insists that the language of (3) is a mere statement of finding, not compulsory on ADF&G. It cites the 2002 Management Plan, which again states that "[t]he third statement (3) is a *statement of finding* that the quality, not just the quantity is important for both

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[36] *Id.*

[37] Regulation Drafting Manual, 51, http://law.alaska.gov/pdf/manuals/DraftingManual-AdminRegs.pdf. ("Use the word 'shall' to impose a duty upon a person or entity. The Alaska Supreme Court has stated use of the word 'shall' denotes a mandatory intent. *Fowler v. City of Anchorage*, 583 P.2d 817 (Alaska 1978).").

[38] 2002 Management Plan at 3 (indicating that the determination to distribute by time and area to the extent necessary for a reasonable opportunity is an in-season management decision: "The 'if necessary' clause in statement (2) emphasizes that management decisions must be made in-season by the department based on the department manager's best judgment concerning the in-season situation.").

[39] *Compare* Dictionary.com, "recognize", https://www.dictionary.com/browse/recognize?s=t ("to acknowledge or accept formally a specified factual or legal situation"), *with* Dictionary.com, "consider", https://www.dictionary.com/browse/consider?s=t ("to think carefully about, especially in order to make a decision; contemplate; reflect on."). *See also* Regulation Drafting Manual, 99, http://law.alaska.gov/pdf/manuals/DraftingManual-AdminRegs.pdf ("AS 44.62.125(b)(6) authorizes the regulations attorney to edit and revise a regulation after filing to make technical corrections similar to those made in statutes by the revisor of statutes. See AS 01.05.031(b). So long as it is done without changing the meaning of the regulation, the regulations attorney may . . .").

fisheries, and therefore may be factored into management decisions."[40] However, as the STA points out, a mere BOF finding is not itself a regulation under the AAPA.[41] The fact that a mere finding is not a regulation is persuasive in reaching the conclusion that the regulation is mandatory; like a statute, a court should give meaning to all parts of a regulation if it does not produce harsh and unrealistic results.[42]

To address this point of contention further, STA correctly points out that in the context of an agency's implementation of the law, "[w]here an agency fails to consider an important factor in making its decision, the decision will be regarded as arbitrary."[43] Here, (3) itself provides that quality and quantity are an "important consideration" in the management of the fishery. Thus, BOF's designation of this factor as important necessarily requires that the regulation have some teeth. But the most important consideration for the court in concluding that the regulation is mandatory—not a mere finding—is the plain language of both (3) and (b): the use of the word "shall" should make it quite clear that this is the correct conclusion. The 2002 Management Plan is mere regulatory history: the clearer the language of the rule, the more convincing the regulatory history must be to overcome it.[44]

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[40] 2002 Management Plan at 3 (emphasis added).

[41] *See* Regulations Drafting Manual, 53, http://law.alaska.gov/pdf/manuals/DraftingManual-AdminRegs.pdf ("At times an agency, especially a board or commission, 'adopts' findings regarding one or more regulation provisions to provide important background information or to document the agency's rationale supporting the provisions. Because these findings are not themselves a regulation under the Administrative Procedure Act, only in extremely rare circumstances may they be included in a regulation. Consult the Legislation and Regulations Section before including findings in a final set of regulations for adoption."); AS 44.62.640(a)(3) ("'regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency . . . ."). A mere finding does not "implement, interpret, or make specific the law." Nor does a mere finding govern an agency's procedure.

[42] *Adamson v. Municipality of Anchorage*, 333 P.3d 5, 13 (Alaska 2014).

[43] *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 790 (Alaska 2015) (internal citations omitted).

[44] *Tea ex rel. A.T.*, 278 P.3d 1262, 1265 (Alaska 2012).

Therefore, 5 AAC 27.195(b) is not a mere BOF finding, it is a mandatory duty imposed on ADF&G, as is subsection (a)(2). In more straightforward language, (b) (as interpreted using (3)) imposes a mandatory duty on ADF&G to consider the important factor of quality and quantity of herring roe on branches, kelp, seaweed, and herring sac roe when making a management decision concerning the subsistence and commercial herring sac roe fisheries, including when making required determinations under 5 AAC 27.195(a)(2).[45]

Next we move on to *how* ADF&G goes about considering this important factor when making such management determinations. In this regard, ADF&G deserves deference in its interpretation. ADF&G interprets the regulation as not requiring ADF&G to conduct an in-season assessment of the quantity and quality of herring roe on branches, kelp, and seaweed, and herring sac roe before making a management decision.[46] The State cites current ADF&G Sitka Area Marine Biologist Eric Coonradt's affidavit for its interpretation:

> The department does not collect or have access to data regarding the quantity and quality of the herring spawn on branches during the season (when herring are spawning). That data is collected by the Sitka Tribe of Alaska and ADF&G Division of Subsistence after the season is over through surveys and is usually not published in a timely manner—sometimes taking years for the information to be published.
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> . . .
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> In 5 AAC 27.195(b), the board has directed the department to "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

[45] The *Order Re: Cross Motions for Partial Summary Judgment on Count One* at 7 held that 5 AAC 27.195(a)(2) requires ADF&G 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 ADF&G 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."

[46] State's motion for partial summary judgment at 36-37.

> sac roe fisheries in" Sitka Sound. Upon information and belief, the department has never interpreted this regulation as requiring the department to assess in-season the quality and quantity of herring spawn on branches in order to make management decisions for the commercial or subsistence fisheries. Information regarding the quality and quantity of herring spawn on branches is typically not available until years after a particular fishing season has concluded.
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> . . .
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> If the court were to also order the department to delay opening the Sitka Sound commercial sac roe herring fishery until after the first spawn and after an in-season assessment of the herring spawn on branches, that would make achieving the guideline harvest level almost impossible. There is a limited window of opportunity for conducting this fishery and adding requirements prior to the opening cuts into that window of opportunity. Any reduction in that opportunity will likely result in decreased harvest, if a harvest can be had at all. Such a requirement would fundamentally change the way this fishery is managed . . . .[47]

Nothing in the court's independent interpretation (the *whether* interpretation), above, cuts against ADF&G's interpretation, as articulated by Coonradt (the *how* interpretation). There is nothing unreasonable about ADF&G's interpretation that the regulation *does not* require ADF&G to conduct an in-season assessment of the quantity and quality before making a determination to open or distribute the commercial fishery in a certain way, thus it is entitled to deference if reasonable. The amount of weight ADF&G gives to this important quantity and quality factor, where it derives the data it uses when considering the factor, and precisely how it considers the factor, are entirely committed to the discretion of ADF&G if reasonable. But ADF&G must meaningfully consider the factor in some reasonable way before making such a management decision. The consideration need not be immediately before the decision is made, but the consideration must have some substance.

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[47] Eric Coonradt's Affidavit (STA's motion for partial summary judgment Ex 16 at p. 3–5).

Having interpreted 5 AAC 27.195(b), the court must now decide whether ADF&G is unlawfully implementing the regulation. Once the interpretation of the regulation is resolved, the agency's application of the regulation to the particular factual circumstances is committed to the agency's sound discretion.[48] 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."[49]

STA argues that ADF&G neither considers the quantity and quality of herring roe on branches, kelp, seaweed, and herring sac roe in-season nor out of season before making such a management decision. It argues that the news releases do not mention consideration of this important factor.[50] STA also cites Eric Coonradt's deposition, which it calls "a smoking gun."[51]

> **Question**
> So there are many factors considered in terms of getting good quality eggs?
> **Answer**
> Yes.
> **Question**
> How do you consider those factors when determining your management of the commercial fishery? Do you factor in those subsistence needs for quality when you are managing a commercial fishery?
> **Answer**
> No, we don't because won't get any information on quality. Its not collected, it's not in any of the documents. We just don't have it.
> **Question**
> So when you – pointing you back to the regulation . . . I want you to, if you don't mind looking at it again. It's 25 – if you don't mind looking at this copy right here. So section (b) of that requires the department to consider the quality and quantity of

[48] *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 788 (Alaska 2015).
[49] *Id.*
[50] STA's motion for partial summary judgment at 55.
[51] STA's Renewed motion for partial summary judgment at 8.

> herring roe on branches when making management decisions about the commercial and subsistence fishery. Are you able to do that?
>
> **Answer**
>
> So you said it requires us, but it says 'shall'. So it does require us, but it is – we don't have any information on quality. So no, we cannot assess quality, at all.[52]

STA thus concludes that Coonradt admitted that ADF&G does not consider quality and quantity of herring spawn on branches "at all" when making management decisions regarding the commercial fishery. The State cites Coonradt's affidavit, set out in block quotations above, in its concession that ADF&G does not consider the important factor of quantity and quality *in-season*.[53]

But the State retorts that ADF&G does consider this important factor *post-season* using the data derived from the harvest survey program implemented by ADF&G's Subsistence Division in cooperation with STA, which is a voluntary survey program that collects data on quantity and quality prior to and during fishing periods.[54] The State cites the 2018 Southeast Alaska Sac Roe Herring Fishery Management Plan at page 7, which states *inter alia*:

> Beginning with the 2002 season, in lieu of using a permit system to estimate the subsistence herring roe harvest, the Sitka Tribe of Alaska and ADF&G Subsistence Division have worked collaboratively to develop a methodology using a household survey to estimate harvest. Following each season, the Sitka Tribe of Alaska conducts a "census" survey whereby all known participants in the subsistence fishery are contacted to determine the results of the subsistence harvest. The list of participants is changed each season to reflect newly identified participants and to remove past participants who have either moved or passed away. The survey information is used to determine the amount and quality of the subsistence harvest and would indicate whether the amount

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[52] Eric Coonradt's Deposition (STA's motion for partial summary judgment Ex 13 at 7–8).
[53] State's Opposition at 22.
[54] *Id.*

> reasonably necessary for subsistence had been successfully harvested. For the period 2002–2016, the subsistence roe harvest estimate has ranged from 71,936 to 381,226 pounds and averaged 150,729 pounds. The results of harvest monitoring for the 2017 season will not be available until later this year. The amount necessary for subsistence is a range of 136,000–227,000 pounds.[55]

Per this 2018 Plan and Coonradt's affidavit, the results of the survey would not be available until years later when it is finally published. What is important of course is whether ADF&G actually considers the survey's results before making its in-season determinations under 5 AAC 27.195(a)(2). The 2018 Plan however does not actually provide any evidence that ADF&G considers results supplied by the survey on the quality of "herring spawn on branches, kelp, and seaweed, and herring sac roe" when making an in-season management decision concerning the fishery. The 2018 Plan does indicate however that ADF&G considers the quantity of herring roe spawn in making management decisions, a fact that STA does not seriously dispute.

Quite a different factor from the quality of "herring spawn on branches, kelp, and seaweed, and herring sac roe" is ADF&G's undisputed consideration of the distribution and roe quality of the herring *before* spawning occurs on the branches and substrates. ADF&G argues that it coordinates with industry vessels to conduct test fishing as necessary to determine roe quality, citing the 2018 Plan:

> Herring distribution and roe quality will be monitored prior to and during the fishing periods. Monitoring methods for 2018 will include aerial surveys, vessel sonar surveys, and test fishing. In 2018, ADF&G will coordinate with industry vessels to conduct test fishing as necessary to determine roe quality. Prior to making test sets, the identified test boats will contact department biologists on the grounds to monitor set locations and to plan for transport

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[55] ADF&G 1940; also at 2018 SE Alaska Sac Roe Herring Fishery Management Plan, 7, http://www.ADF&G.alaska.gov/FedAidPDFs/RIR.1J.2018.02.pdf.

> of herring samples to a central location for analysis by industry technicians. The areas open to fishing will depend on the distribution of herring, the need to provide for a fishery that will harvest good quality herring, and the need to provide a reasonable opportunity for subsistence.[56]

But consideration of the quality of roe before spawning is not consideration of quality of "herring *spawn* on branches, kelp, and seaweed, and herring sac roe." (emphasis added).

The State further insists that ADF&G considers the quality of the herring spawn post-season after it receives the survey results from prior years.[57] For this proposition the State first references Coonradt's deposition at 87. Therein STA's attorney poses questions referencing certain factors (timing, duration, location, and weather)[58] considered in assessing herring spawn quality as provided in a 2017 report authored by Lauren Sill, the ADF&G Subsistence Resource Specialist for Southeast Alaska. But the answers to the questions are not relevant to whether ADF&G considers the quality of herring spawn in making management decisions; if anything they tend to prove that ADF&G does not.[59] The State also references Lauren Sill's deposition at 63–65. Therein Sill, like Coonradt, answers questions concerning her opinion of certain factors that may influence the quality of herring spawn, but the pages cited by the State do not provide testimony relevant to whether ADF&G considers the quality of herring spawn in making management decisions.

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[56] ADF&G 1940; also at 2018 SE Alaska Sac Roe Herring Fishery Management Plan, 7, http://www.ADF&G.alaska.gov/FedAidPDFs/RIR.1J.2018.02.pdf.

[57] State's Opposition at 22.

[58] There is testimony explaining that herring roe spawned on sandy substrates reduces roe quality because of the sand; that longer duration spawns yields higher quality roe because high quality roe requires thick layers of spawn on the substrate; and that other facts can affect quality.

[59] The full report referenced is titled "The Subsistence Harvest of Pacific Herring Spawn in Sitka Sound, Alaska 2016, dated December, 2017, Technical paper No. 435.

STA returns fire by arguing that simply having the Subsistence Division provide a post-season subsistence harvest report does not fulfill the requirement that ADF&G consider the quality and quantity of herring spawn when making management decisions.[60] STA concludes that Coonradt's deposition betrays the State's obfuscation by revealing plainly that ADF&G does not consider herring spawn quality when making management decisions—whether in-season or post-season—"at all."

A sampled review of the voluminous news releases also does not demonstrate that ADF&G considers the quality of herring roe spawn in making management decisions.[61] It is evident though that ADF&G does consider the quantity of herring spawn when making management decisions. For example, in a Sitka Sound Herring Fishery Announcement for December 23, 2019, ADF&G announced that the guidelines harvest level for the 2020 sac roe herring fishery would be 25,824 tons of mature herring. This was based at least partly on ADF&G's forecast of the herring egg abundance:

> To forecast biomass, the department uses an ASA model with a long time series of egg abundance and age composition data from department surveys conducted during and following the spring fishery. Herring egg abundance is estimated using aerial surveys, designed to map the length of shoreline receiving spawn, and dive surveys, which are used to estimate the density of eggs and average width of the spawn. The department mapped 5 5.8 nautical miles (nmi) of herring spawn in the Sitka Sound area during the spring of 2019, compared to the recent 10-year average of 63.7 nmi. Egg deposition observed during dive surveys in 2019 was very high (6th highest recorded since 1976), particularly along the southern shore of Kruzof Island. Estimated age composition by number of spawning herring in 2019 was 76% age-3, 8% age-4, 6% age-5, 1 % age6, 8% age-7, and <1% age-8+.[62]

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[60] STA's Reply to its renewed motion for partial summary judgment at 12.
[61] See ADF&G News Releases (ADF&G 1–0336);
[62] ADF&G 2974.

The State has not cited to any document in the record, and the court has not located one, that engages in an analysis of the quality of the herring spawn.

In important non-adjudicative determinations, "the record should at least explain the reasons for the agency's action."[63] The regulation recognizes that quality and quantity of herring spawn is an important consideration in management decisions. Again, "[w]here an agency fails to consider an important factor in making its decision, the decision will be regarded as arbitrary."[64] Like ADF&G's determinations under 5 AAC 27.195(a)(2), its consideration of this important factor under 5 AAC 27.195(b) in making 5 AAC 27.195(a)(2) management determinations is a non-adjudicative "quasi-executive" action.[65] Because ADF&G's consideration of this factor under the regulation is non-adjudicative, a formal decisional document is not required, but its consideration must be adequately explained in the record. In other words, ADF&G must demonstrate in the record that it, and how it, in some meaningful way, considered the quality of herring spawn in making management determinations under 5 AAC 27.195(a)(2).

There is therefore no genuine dispute of material fact as to whether ADF&G is unlawfully implementing 5 AAC 27.195(b) by failing to consider quality of herring spawn "on branches, kelp, and seaweed, and herring sac roe" before making required management decisions under 5 AAC 27.195(a)(2). If ADF&G does consider quality when making these decisions, its consideration is not clearly or adequately reflected in the record. Although a decisional document is not required, it is advisable that one exist when ADF&G makes

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[63] *Id.*; *Usibelli 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.").

[64] *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 790 (Alaska 2015) (internal citations omitted).

important decisions to open, close, or distribute the herring sac roe fishery in Sitka Sound. Because its decision is not clearly or adequately reflected in the record, its implementation of 5 AAC 27.195(b) is unreasonable and an abuse of discretion. STA is accordingly entitled to partial summary judgment on its 5 AAC 27.195(b) claim contained in Count I as to quality. Accordingly, STA's renewed motion for partial summary judgment is **GRANTED.**[66]

DATED this 27th day of November 2020 at Juneau, Alaska.

Daniel Schally
Superior Court Judge

CERTIFICATION
I certify that on 30 day of NOV 2020
a true copy of this do was placed
in attorney's box/mailed to the following:
A. Erickson; J. Stanley; A. Peterson
A. Peterson; J. Pickett
By: M. Stanley

[65] *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).
[66] To the extent that STA's Count I may consist of claims that go beyond the claim that ADF&G has unlawfully interpreted and implemented 5 AAC 27.195(b), those claims are not affected by this order and remain open to litigation in this case.