

MEMORANDUM OF LEGAL BASIS AND FISHERY MANAGEMENT PURPOSES  
FOR STATISTICAL AREA REPORTING IN NUSHAGAK BAY

To: Sam Cotten, Commissioner, Alaska Department of Fish and Game

From: James T. Brennan, Attorney for City of Manokotak

Subject: Compliance with Requirement of Statistical Area Reporting by Fish Buyers  
in Nushagak Bay

Date: November 9, 2015

The City of Manokotak has requested that the Department of Fish and Game modify current practice so as to require fish ticket reporting of the statistical area or areas in which salmon and other species are harvested in Bristol Bay, specifically in the Nushagak District.

LEGAL BASIS FOR REQUEST

The Legislature, in A.S. 16.05.690(a), has required<sup>1</sup> that fish buyers maintain accurate records, and report to the department, as to the "statistical area in which the fish were taken". The department's own regulation (5 AAC 39.130(c)) also states that fish tickets "must include", under subsection (7),

the ADF&G statistical area, district, and subdistrict, and  
the nearest headland or bay in which the fish were taken. .

Both the statute and regulation are mandatory; they do not provide that the department "may" require such reporting or has any discretion to waive it.

<sup>1</sup> The statute provides that the buyer "shall" keep the statistical area records and "shall" report them to the department. Violation subjects the buyer to criminal penalties under A.S. 16.05.772 and .723, underscoring the importance of the reporting requirement.

Yet statistical area reporting is *not* now required in Bristol Bay, including in the Nushagak District though, as discussed below, equivalent reporting is required in most other districts within Bristol Bay, e.g., Togiak and Naknek-Kvichak. Statistical area reporting is required in all Alaskan waters outside of Bristol Bay, including but not limited to Prince William Sound and Southeast Alaska. It appears that the only state waters in which statistical area reporting is not required are in Bristol Bay, primarily in Nushagak Bay. This begs the question: **Why does the Department adhere to the statutory/regulatory requirement everywhere else, but not in some areas of Bristol Bay?**

Manokotak, through its counsel, has raised this matter with the Area Manager and with Assistant AG Seth Beausang, without resolution. The explanation Manokotak has received is that it would be difficult if not impossible to require statistical area reporting in Nushagak Bay, because the drift net boats often fish in more than one statistical area in a day, before delivering to the buyer. But this circumstance occurs in many other areas around the state, and is in fact addressed in the department's standard fish ticket form (Series "A"), used everywhere except Bristol Bay, wherein the percentage of catch from each section is required to be reported, when a fisherman harvests in multiple sections. There is no reason the standard fish ticket reporting cannot also be used in Bristol Bay.

Nevertheless, the Department uses a special, Series "B" fish ticket form for Bristol Bay which, unlike the Series "A" fish tickets, requires only reporting of the "District Caught" and the not "Statistical Area" where caught. Attached hereto are



copies of ADF&G's fish ticket form "A", the "General Salmon Ticket" and form "B", the "Bristol Bay Salmon Ticket", along with the "Definitions and Codes" instructions for each. The Series "A" instruction regarding "Statistical Area" reporting requires entry of

[t]he five-digit statistical area(s) where harvest occurred. Please refer to the appropriate ADF&G salmon statistical area chart. If catch occurred in more than one statistical area, indicate the percentage of harvest from each statistical area.

The "A" fish ticket's box for Statistical Area contains a column for designating the percentage caught from each statistical area listed.

The Series "B" Definitions and Code contain no references to statistical areas<sup>2</sup>, but instead contains a list of abbreviations to be used for the "district" in which the fish were caught. Oddly, however, most of the "districts" listed therein actually are not districts, but correspond to ADF&G's "statistical areas" in some of the Bristol Bay management districts. There are abbreviations for three of the sections, corresponding to statistical areas, in the Togiak District (Osviak, Kulukak and Matogak sections); and reporting abbreviations for both of the sections (statistical areas) in the Naknek-Kvichak District (Kvichak and Naknek sections). In Nushagak Bay, however, the "B" ticket provides "district" abbreviations for both "Nushagak" and "Igushik Section". Again, department representatives have confirmed that, during all commercial fishing openings except those in which *only*

---

<sup>2</sup> The "B" ticket does refer to "Stat. Chart No.", but the accompanying box states "DO NOT WRITE IN THIS SPACE", presumably reserving this box for agency use.

the Igushik Section is open, the buyers are required only to report that the fish were caught in the "Nushagak" District, without specifying whether they were harvested in the Igushik Section or one of the 6 other statistical areas in the Nushagak District.

The rationale for this practice, as given by the department's representative and its counsel, is that whether or not the Igushik Section is regarded as a statistical area "depends"; sometimes it is regarded as a statistical area, but at most other times, e.g., when all of Nushagak Bay is open, then the entire Nushagak District, and not the Igushik Section, is regarded as the "statistical area".<sup>3</sup>

This interpretation is contrary to the department's own regulation, 5 AAC 06.370(I), which defines the "Igushik Statistical Area" in subsection (1) as all waters described in a separate regulation, 5 AAC 06.200(1). That description corresponds to the Department's map depicting the Igushik Section, statistical area 325-10, in the Nushagak Commercial Salmon District Boundary map on the Department's website<sup>4</sup>, and in the attachment to this letter. 5 AAC 06.370(I) also lists and describes the other six statistical areas (Snake River, Coffee Point, Ekuk, Clark's Point, Queen's and Nushagak/Combine) depicted in the department's Nushagak

---

<sup>3</sup> Again, such practice appears to be limited to Nushagak Bay, and perhaps to some other Bristol Bay fishing districts. It is not used in Prince William Sound or Southeast Alaska, where ADF&G area management offices in Cordova and Petersburg verify that even where an entire district is open to fishing, fish tickets must report the actual statistical area or areas, as previously identified by ADF&G, where the delivered fish were caught.

<sup>4</sup> The five-digit codes for the Igushik Section 325-10 and each of the other six sections shown on the Department's Nushagak District map are used to designate statistical areas. The Department's website refers to the "Salmon Statistical Area Chart".



Commercial Salmon District Boundary map. Nowhere do the regulations specify that the entire Nushagak *District* is a statistical area. The assertion that the Igushik Statistical Area is "sometimes" a statistical area, but at other times it is not, is contrary to the statutory reporting mandate and its purposes, contrary to the reporting requirements of the department's own regulations, and contrary to the department's regulation defining the Igushik Statistical Area.<sup>5</sup>

There are limits to the extent to which an agency can avoid mandatory language of statute and the agency's own regulations, in the name of "administrative interpretation", particularly when the interpretation is contrary to the plain meaning of the statute and regulation. If the department intended to adopt special rules for Bristol Bay, inapplicable elsewhere in Alaska, it would be required to promulgate a new regulation providing for such different and distinct treatment. Such regulatory rule-making is required by the Administrative Procedures Act, A.S. 44.62.640, as interpreted by the Alaska Supreme Court in Messerli vs. Dept. of Natural Resources, 768 P.2d 1112, 1117-18 (Alaska 1989). Even were such a regulation adopted, however, it would be invalid, because it would be contrary to the statutory requirement of reporting by statistical area. The statutory requirement cannot reasonably accommodate either a non-uniform agency exception for Bristol Bay or

---

<sup>5</sup> It is noteworthy that the online 2013-2016 Bristol Bay Area Commercial Salmon Fishing Regulations contain the regulations requiring reporting by ADF&G statistical area, and identifying the Igushik Section as a statistical area; with no provision in even this regional publication for sometimes regarding the entire Nushagak District as the statistical area.

an interpretation which allows an identified Statistical Area to be treated as a statistical area only in some cases, but not in others.

### FISHERY MANAGEMENT PURPOSES

Apart from the legal arguments necessarily asserted above, it seems apparent that the fisheries management purposes of the statute and the department's regulations would be better served by adherence to statistical area reporting.

The Nushagak Management District includes the drainages of the Wood, Nushagak-Mulchatna and Igushik rivers. While there is obviously much mixing of these runs in the Bay (as typically occurs in most Alaska salmon waters), it would nevertheless appear quite helpful to have ongoing, daily reporting of the catches occurring within each statistical area; presumably, this was why separate statistical areas have been identified within the Nushagak District by ADF&G. A study<sup>6</sup> co-authored by ADF&G biologists, including Area Manager Tim Sands, notes the usefulness of catch data, even where not broken down within a district:

Managers also use catch measures from the fishery to provide additional estimates of the relative run strength of sockeye salmon within a district. Catch per unit effort (CPUE) information often provides indications of the abundance of fish within a district. The use of CPUE as a run strength indicator is dependent upon the accurate and timely inseason reporting of the catch by the commercial salmon processors. The ADF&G has developed an inseason catch and escapement database (called

---

<sup>6</sup> "Management of the Nushagak District Sockeye Salmon Fishery, How 50 Years of Data Helps", (American Fisheries Society Symposium 70, 2009), referred to herein as "Report."



"Mariner"). Processors are required to report daily catches that occurred in Bristol Bay. . . . Managers have access to all the information in the Mariner database during the season.

Report, p. 11. Obviously, this tool would be more useful if the catch reports were by statistical area, as the statute and ADF&G practice elsewhere requires, rather than District-wide. Inability to track statistical area catch data limits the department's ability to create accurate ongoing "stock specific" catch estimates. The Report notes, at pp. 9-10, that it would be preferable to have a "Biological Escapement Goal" (BEG) for each river in Nushagak Bay, which would provide the "greatest potential for maximum sustained yield"; but that the escapement goals with the Wood, Nushagak and Igushik rivers must instead utilize the less reliable parameters of what are defined as "SEGs" - - "Sustainable Escapement Goals" - - because of the "concern about the quality of the stock-specific estimates of harvest for each of these rivers." Absent statistical area catch data, the department has had to resort to methods based largely on age composition to estimate the allocation of the harvest among the three Nushagak Bay rivers. The Report notes that this can be problematic:

The effect of incorrectly allocating the harvest can have large impacts on the total run size estimates in brood tables. . . .the impacts of misallocation to the Nushagak and Igushik rivers are probably much larger than to the Wood River due to their smaller relative production.

Report, p. 5. Judging whether escapement needs of the smaller run to the Igushik River are being met is made more difficult where there are no catch statistics for drift net harvests in the Igushik Statistical Area.

The shortcomings of district-wide, as opposed to section-by-section, harvest data was also noted in "Reconstruction of Bristol Bay Sockeye Salmon Returns Using Age and Genetic Composition of Catch" (Cunningham, et. al., December, 2012). This Report notes the contrast in available data between western Bristol Bay (the Nushagak District) and eastern Bristol Bay:

The final set of parameters to be estimated were the availability of each stock to harvest within each commercial fishing district. . . .As the western Bristol Bay reconstruction deals with a single commercial fishing district, these availability parameters describe variation in the catchability of the three stocks within the Nushagak District only.

Report, p. 4. By contrast,

[F]or the reconstruction of eastern Bristol Bay which comprises three discrete commercial fishing districts, availability parameters represent. . . the relative catchability of stocks within the fishing district associated with their natal river system (i.e., Kvichak River, Alagnak River and Naknek River stocks within the Naknek-Kvichak commercial fishing district). . . .

Report, pp. 4-5. The lack of statistical area reporting clearly injects a greater uncertainty into the "reconstruction" of the returns to each of the three Nushagak Bay rivers.

Certainly, the Department has a "tricky management challenge" in Nushagak Bay, as described in a recent (November 4, 2015) article in [seafoodnews.com](http://seafoodnews.com).



Sorting out the ultimate destination of harvested fish in order to make real-time closure/escapement management decisions is a challenge in many areas of coastal Alaska. This is presumably the reason that the statute and regulation require that statistical area catch reporting be done, to provide the best information available to inform managers' ongoing evaluations of the returns to specific spawning rivers. Because of a fair amount of stock mixing in Nushagak Bay, catch reporting by a statistical area will obviously never render a "perfect" evaluation of the returns to each of the three respective rivers, but, as is the case elsewhere in Alaska, this important data combined with other information available to biologists and managers would strengthen the basis for good management decision-making.

Manokotak is hopeful that the department will view the City's interests in this matter as coinciding with those of ADF&G. Manokotak's current primary interest is in effective fish taxation in the Igushik District. However, Manokotak residents are the predominant fishermen harvesting<sup>7</sup> the Igushik Statistical Area and the Igushik River stocks. As such, they have an interest in sound management of the fishery by ADF&G to maximize annual harvests while protecting the long term health of the fishery.

---

<sup>7</sup> Manokotak residents dominate the Igushik Section set net fishery adjacent to their summer village of Igushik, on the western shore of Nushagak Bay, and also participate in the drift net fishery in the Igushik Section.

### SUMMARY AND REQUEST

Apart from the legal requirements of statute and regulation, whether or not to require statistical area reporting is ultimately a fishery management issue. Why should the department forego acquisition of useful data as to the statistical area where fish are harvested? The reporting requirement itself imposes no additional costs upon the department; it merely requires the private fish buyers to determine from delivering boats the statistical area where they caught their fish - - as they are required to do elsewhere in Alaska. The cost to the department of resulting data analysis would seem to be outweighed by the benefits of improved management decisions. Whatever minor inconvenience the reporting requirement would impose upon fishermen and buyers, they have a greater interest in improved ADF&G management decisions, to both preserve the health of the Igushik salmon fishery and to avoid needless surplus escapement.

In any case, statistical area reporting is required by law. The City of Manokotak respectfully requests that, prior to the 2016 Bristol Bay salmon season, you direct the department to utilize statistical area reporting in the Bay, which would presumably result in uniform use of the Series "A" fish ticket form and instructions in the Nushagak District and the other districts in Bristol Bay.

JTB;mb  
3854/017

cc: Melvin Andrew, Mayor, City of Manokotak  
Manokotak City Council Members  
Seth Beausang, Department of Law  
Tim Sands, ADF&G Bristol Bay Area Manager

EXHIBIT C  
PAGE 10 OF 15



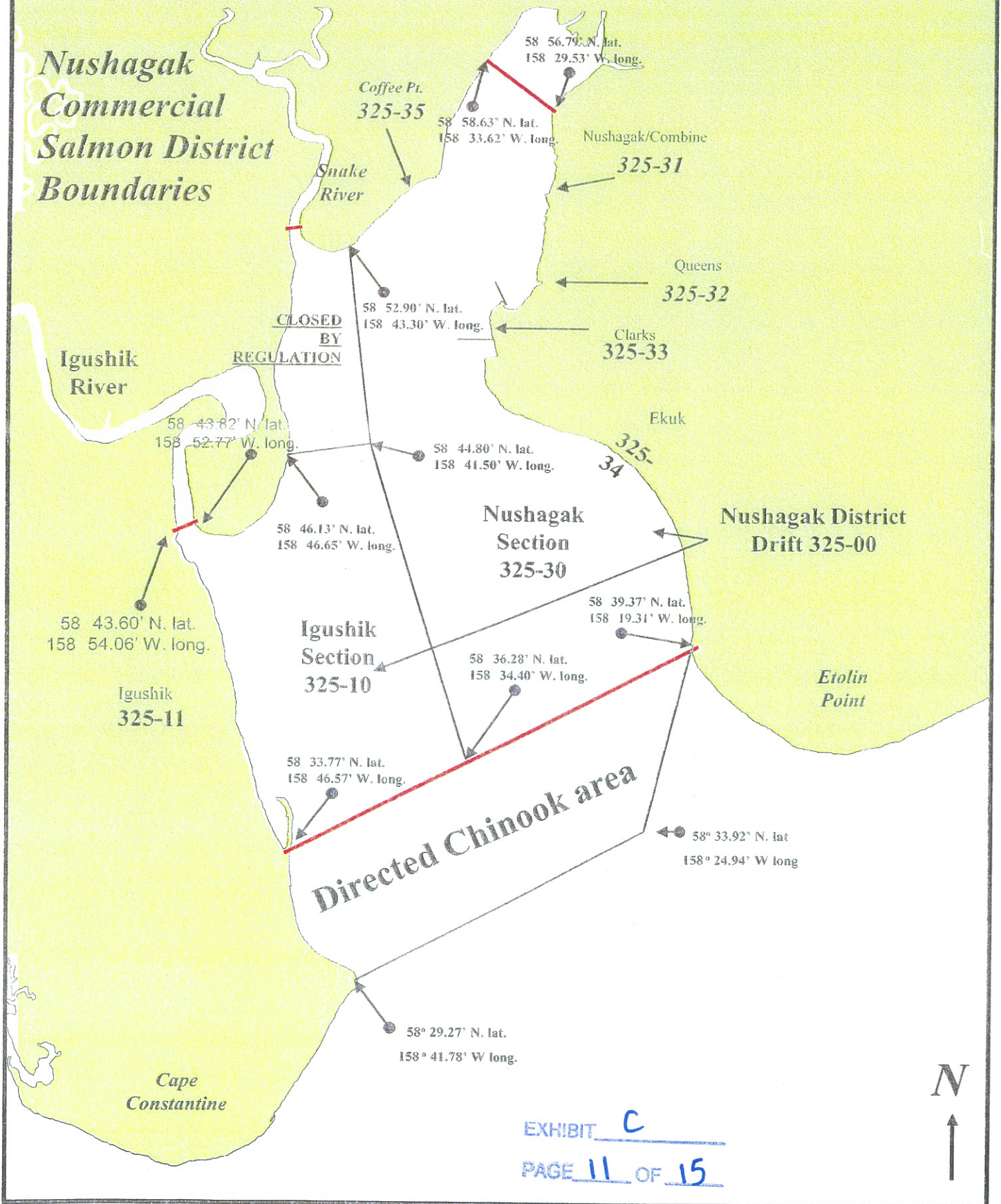
# Alaska Department of Fish and Game

Division of Commercial Fisheries

(For Illustration Purposes Only)

BBSAL325.PPT. Revised 04/22/2011

## Nushagak Commercial Salmon District Boundaries





# SERIES **A** FISH TICKETS General Salmon

## DEFINITIONS AND CODES

### DATE CAUGHT:

The date of permit holder's first harvest for this delivery.

### DATE LANDED:

#### FOR A CATCHER VESSEL -

The date the catch off-load is completed to a land-based processor or floating processor.

#### FOR A CATCHER PROCESSOR -

The last date the product is caught and brought on board for the fish ticket.

#### FOR A CATCHER SELLER VESSEL -

The date the product is initially brought into port.

### STATISTICAL AREA:

The five-digit statistical area(s) where harvest occurred. Please refer to the appropriate ADF&G salmon statistical area chart. If catch occurred in more than one statistical area, indicate the percentage of harvest from each statistical area.

### PARTIAL DELIVERY (SPLIT TICKET):

If a portion of the harvest from the fishing trip was documented on another fish ticket or delivered to another processor(s), then note the other processor's name and the associated salmon fish ticket number in the box provided on the fish ticket. The fish ticket number begins with the letter "A" followed by 8 numbers and is located in the upper right-hand corner of the ticket.

### DUAL PERMIT:

Dual permit information is required on the fish ticket when two permit holders jointly operate gear while both are present on the same vessel. Check the dual permit box and on the first line write in the CFEC permit information including all 10 figures as they appear on the card (ex: S03N99999X). On the second line, write in the information that appears on the last line of your permit card, which includes the two digit year, two-digit sequence number and alpha check figure (ex: 1301X).

### ITEMIZING YOUR CATCH ON THE FISH TICKET:

Harvest must be itemized and recorded individually for each species by delivery condition code. If salmon roe is extracted before sale, that roe must also be included on a fish ticket in addition to the carcasses. If the roe is intended for the bait market, handwrite "bait" on the line for that item.

#### DELIVERY CONDITION CODE (DELIV. CODE):

A code utilized by ADF&G that describes the condition of the fish at the time it is delivered or recorded on the fish ticket. Common codes utilized for salmon are listed below. See ADF&G code sheets for additional codes.

Whole	01
Gutted, head-on	04
Headed and Gutted	07
Roe only	14
Carcass, Roe-removed (for female only)	25*
Personal use (no sale)	95

\* 25 Code used for female carcass where roe has been removed but guts/viscera remain.

#### OTHER SPECIES CODES

(common to salmon fisheries):

Arctic Char	521
Steelhead	540
Lingcod	130

#### PRICE:

The amount paid per pound of fish for a line item (species by delivery condition code).

#### AMOUNT:

The pounds of fish multiplied by the price per pound for a particular species by delivery condition code.

EXHIBIT

C

PAGE 12 OF 15



PLACE WRAPAROUND COVER UNDER GREEN COPY

WHITE - PURCHASER

YELLOW - FISH & GAME

PINK - SELLER

GREEN - PURCHASER

FISH & GAME

**ALASKA DEPARTMENT OF FISH & GAME  
GENERAL SALMON TICKET**

**Vessel  
Name**

Fishery

Name

Permit  
Number

**Proc.  
Code**

Company

ADF&G Amended Ticket

Initial or Sign

DO NOT WRITE IN THIS SPACE

**A14**

ADF&G NO.

Tender ADF&G No.

Date Caught

**STATISTICAL AREA**

Stat. Area %

☐ Dual Permit No.

Permit Card info (Required.  
Instructions on cover.)

Date  
Landed

Area  
Caught

(Nearest bay or headland)

**Salmon - Deliv. Code is required. See Ticket Book Cover for instructions.**

SPECIES	CODE	DELIV. CODE	NO. OF FISH	POUNDS	PRICE	AMOUNT
Kings	410					
Reds	420					
Cohos	430					
Pinks	440					
Chums	450					

**Salmon Roe and Other Species - Species Code and Deliv. Code required.**

Subtotal						
Less Salmon Enhancement Tax @						
<b>TOTAL</b>						

NOT SOLD/PERSONAL USE - 95		NOT SOLD/PERSONAL USE - 95		PARTIAL DELIVERY
SPECIES	NUMBER	SPECIES	NUMBER	Ticket No.
				Processor

Cash Advance

Fish Received by

Permit Holder's Signature

I HEREBY ATTEST THAT THESE FISH WERE CAUGHT IN COMPLIANCE WITH ADF&G REGULATIONS.

EXHIBIT

**C**

PAGE **13** OF **15**

# SERIES **B** FISH TICKETS Bristol Bay Salmon

## DEFINITIONS AND CODES

**DATE CAUGHT:**

The date of permit holder's first harvest for this delivery.

**DATE LANDED:**

The date the catch off-load is completed to a land-based processor or floating processor.

**DISTRICT CAUGHT:**

Abbreviations to be used for district caught:

Togiak	TOG
Osviak Section	OSV
Kulukak Section	KUL
Matogak Section	MAT
Ugashik	UGA
Kvichak	KVI
Naknek Section	NAK
Egegik	EGK
Nushagak	NUS
Igushik Section	IGUS

**DUAL PERMIT:**

Dual permit information is required on the fish ticket when two permit holders jointly operate gear while both are present on the same vessel. On the Dual Permit No. line write in the CFEC permit information including all 10 figures as they appear on the card (ex: S03N99999X). On the second line, write in the information that appears on the last line of your permit card, which includes the two digit year, two-digit sequence number and alpha check figure (ex: 1301X).

EXHIBIT C

PAGE 14 OF 15



GREEN - PURCHASER

FISH &amp; GAME

**ALASKA DEPARTMENT OF FISH & GAME**  
**BRISTOL BAY SALMON TICKET**Vessel  
Name

Fishery

Name \_\_\_\_\_

Permit  
Number

ADF&amp;G Amended Ticket

Initial or Sign

DO NOT WRITE IN THIS SPACE

B15

**Delivery** ☐ Bled ☐ Whole

Dual Permit No.

Permit Card Info. Required.  
(Instructions on cover)

Date Caught

Proc.  
Code

Company

Date/Time  
LandedStat.  
Char  
No.

DO NOT WRITE IN THIS SPACE

District Caught ▶

[illegible]

Cash Advance

Fish Received by

Permit Holder's Signature

I HEREBY ATTEST THAT THESE FISH WERE CAUGHT IN COMPLIANCE WITH ADF&G REGULATIONS.

### Optional

Temps \_\_\_\_\_

Quality ☐ RSW  
☐ Ice

EXHIBIT

PAGE 15 OF 15