

**ALASKA STATE LEGISLATURE
JOINT COMMITTEE ON
ADMINISTRATIVE REGULATION REVIEW**

February 1, 2001
9:43 a.m.

HOUSE MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Jeannette James
Representative Joe Hayes

HOUSE MEMBERS ABSENT

All House members present

SENATE MEMBERS PRESENT

Senator Robin Taylor, Vice Chair
Senator Georgianna Lincoln

SENATE MEMBERS ABSENT

Senator Lyda Green

COMMITTEE CALENDAR

Review of January 8, 2001, Fish & Game Public Hearing on
Shellfish Regulations

PREVIOUS ACTION

No previous action to record

WITNESS REGISTER

DOUG MECUM, Director
Division of Commercial Fisheries
Alaska Department of Fish & Game
PO Box 25526
Juneau, Alaska 99802-5526
POSITION STATEMENT: Testified on the mariculture regulations.

KEN IMAMURA, Mariculture Coordinator
Division of Commercial Fisheries
Alaska Department of Fish & Game

PO Box 25526
Juneau, Alaska 99802-5526
POSITION STATEMENT: Reviewed the access questions regarding the
January 8, 2001, hearing.

MARIE BADER
Kachemak Shellfish Growers Cooperative
1319 Bay Avenue
Homer, Alaska 99603
POSITION STATEMENT: Testified on the mariculture regulations
and the January 8, 2001, hearing.

GARY SEIMS, President
Kachemak Shellfish Growers Cooperative
PO Box 4213
Homer, Alaska 99603
POSITION STATEMENT: Testified on the December 1999 mariculture
meeting.

DEBBIE SEIMS
Kachemak Shellfish Growers Cooperative
PO Box 4213
Homer, Alaska 99603
POSITION STATEMENT: Expressed the need to develop a more user-
friendly process.

JOHN AGOSTI
PO Box 3475
Seward, Alaska 99664
POSITION STATEMENT: Expressed the need to slow the process.

PETER HUYCKE
2815 Glacier Street
Anchorage, Alaska 99508
POSITION STATEMENT: Recommended that Mr. Walsh's [former
director of the Division of Insurance] approach be followed.

ANDY KITTAMS
PO Box 1544
Petersburg, Alaska 99833
POSITION STATEMENT: Testified on the history of the regulations
process.

BRIAN MATTSON
PO Box 1168
Petersburg, Alaska 99833

POSITION STATEMENT: Indicated support of Senator Taylor's suggestion [to extend the process].

GARY ZAUGG

(No address provided.)

POSITION STATEMENT: Indicated support of Senator Taylor's suggestion [to extend the process].

SCOTT THOMAS, Founder and Managing Member,
Alaska Trademark Shellfish, LLC

945 Lincoln Street
Ketchikan, Alaska 99901

POSITION STATEMENT: Recommended starting over with the regulations.

RAY RaLONDE, Aquaculture Specialist

Marine Advisory Program

University of Alaska

2221 E. Northern Lights Boulevard, Number 110

Anchorage, Alaska 99508

POSITION STATEMENT: Testified on the process that led to the rewrite of these regulations.

DENNIS WATSON, Mayor

City of Craig

Box 725

Craig, Alaska

POSITION STATEMENT: Testified on the process.

BOB HARTLEY, Homer Oyster Grower

PO Box 2284

Homer, Alaska 99603

POSITION STATEMENT: Testified on the process.

RODGER PAINTER, Vice President

Alaskan Shellfish Growers Association

Box 20704

Juneau, Alaska 99801

POSITION STATEMENT: Testified on the process.

SHANNON O'FALLON, Assistant Attorney General

Natural Resources Section

Civil Division (Juneau)

Department of Law

PO Box 110300

Juneau, Alaska 99811-0300

POSITION STATEMENT: Testified on the Department of Law's part in these regulations and the lawsuit.

RON LONG
Quetekcak Shellfish Hatchery
Box 2464
Seward, Alaska

POSITION STATEMENT: Testified on the process and hope for an extension.

ARTHUR TILGNER, M.D.
222 W. 7th Street, Number 14
Anchorage, Alaska 99508

POSITION STATEMENT: Testified on the lack of dialogue from ADF&G.

JIM REEVES, Attorney
1031 W. 4th Avenue
Anchorage, Alaska 99517

POSITION STATEMENT: Testified that [ADF&G] already has the necessary guidance to do what is necessary for these regulations.

ACTION NARRATIVE

TAPE 01-3, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the Joint Committee on Administrative Regulation Review to order at 9:43 a.m. Representatives McGuire, James, and Hayes and Senator Lincoln were present at the call to order. Senator Taylor arrived as the meeting was in progress. Representatives Kerttula, Scalzi, and Stevens and Senator Elton were also in attendance.

Review of January 8, 2001, Fish & Game Public Hearing on Shellfish Regulations

Number 0072

CHAIR McGUIRE explained that following the January 8, 2001, public hearing by the Alaska Department of Fish & Game (ADF&G) there were complaints centered around access to the hearing. Specifically, the doors were locked for a period of time in Anchorage and thus some people were not able to testify. Furthermore, several legislative information offices (LIOs) were not permitted to testify at the hearing. Also there were

complaints regarding the notification process. Therefore, Chair McGuire announced that this hearing would be an opportunity for the public to voice its concerns, which the committee believes to be important. She hoped that at the conclusion of the hearing, a better system could be developed and carried through the next year.

Number 0147

DOUG MECUM, Director, Division of Commercial Fisheries, Alaska Department of Fish & Game, deferred questions regarding access to the January 8, 2001, hearing to Ken Imamura.

Number 0226

KEN IMAMURA, Mariculture Coordinator, Division of Commercial Fisheries, Alaska Department of Fish & Game, turned to the questions regarding the doors being locked during the January 8, 2001, hearing. He informed the committee that the Anchorage office has had security problems in the past and thus a policy of locked doors after business hours, 5:00 p.m., was adopted. Typically, there is staff in the lobby and exiting the office through 6:00 p.m. The January 8, 2001, hearing was scheduled to begin at 6:30 p.m. Therefore, prior to the hearing he made arrangements with Pinkerton Security to have a guard at the front door in order to open the door after the close of business so that there would be access to the meeting. However, the guard did not arrive and after calling Pinkerton Security someone else was assigned. He said that he did not know when the replacement guard arrived because he was chairing the meeting. He noted that Ellen Simpson, staff for ADF&G, was also in attendance at the January 8, 2001, hearing. Ms. Simpson was taking notes and checking the door periodically. Furthermore, another staff person arrived at this meeting approximately 30 minutes after the meeting began and her son watched the door until a replacement guard arrived. Mr. Imamura stated, "I believe that we took those steps that we could. And in the absence of the assigned security person, I think we did what we could in order to allow people into the building."

Number 0460

REPRESENTATIVE JAMES said that she understood Mr. Imamura's dilemma. However, it seems that the meeting shouldn't have started if the doors were locked. She related her understanding that Mr. Imamura knew the doors were locked when the meeting began.

MR. IMAMURA affirmed that he knew the doors were locked. He reiterated that the building has a security policy under which the doors remain locked after business hours. Therefore, arrangements were made with Pinkerton Security [to have a guard present after hours].

REPRESENTATIVE JAMES asked if Mr. Imamura believed, when he began the meeting, that someone was present to let people into the building. She inquired as to when Mr. Imamura realized that no one was present to let people in the building. Representative James related her belief that the meeting should not have started until [someone was present to let people into the building].

MR. MECUM said, "Looking back, from what I know of it, that probably is what we should've done. I just wanted to clarify that that time was no more than 15 minutes and there were people checking within that 15 minute period."

Number 0615

SENATOR TAYLOR remarked that the department and the applicants have been going through a difficult struggle in order to develop a meaningful set of regulations. He said:

I think what has happened is that because of the litigation that is pending and because of an attempt by the department to move with some dispatch to resolve some of the ongoing questions, that what has happened is that this entire question of this wonderful resource and how it's going to be handled has been sort of pressure cooked down into a very short timeframe The applicants were anxious to get started in their businesses and they feel certain economic pressures and time constraints. The department, not being adequately prepared to move forward, felt certain concerns also. And these two forces are now clashing in a way that, I think, is really counterproductive both to the resource and, certainly, to the normal processes that we would expect to go on - as far as public processes in developing these things. I guess those are my concerns.

SENATOR TAYLOR continued:

I would hope that one of the results of this meeting could be that the department would forestall further action on these regulations until extensive additional public input can be received, especially from those people directly impacted. ...maybe we need to put these regs off for a period of say three months during which the legislature can look at these things and we can have a few more hearings because there are way more people to testify today than we are going to have time for.

SENATOR LINCOLN requested that the department speak to Senator Taylor's comments.

Number 0814

MR. MECUM explained that every two years people submit applications for leases for mariculture farming. The recent application period started on January 1st. At that time, the department had to make the decision regarding whether or not to accept applications for on-bottom clam farming since there were not regulations in place [for on-bottom clam farming]. He noted that the Shellfish Growers Association didn't believe it was appropriate to not accept applications, to which Mr. Mecum agreed. This resulted in the pressure to develop these regulations being placed on the department and thus the department was under a tight timeline. However, the department didn't want to have a situation in which regulations would come out after people had submitted their applications, because that could result in some farms being inconsistent with those regulations. Therefore, under the consultation of the Department of Law (DOL), a schedule was developed such that draft regulations would be available for public review by approximately December 15. There would be a 30-day public review period for those regulations. Those regulations, [after] DOL's review, would eventually be submitted to the Lieutenant Governor and in place by approximately March 15 or April 1. He noted that the application period closes on April 30. He also noted that people were notified in advance of the application period.

MR. MECUM noted that the department went beyond the written public comment during the 30-day period and set up two public hearings that were held in Anchorage and Ketchikan. Prior to the two hearings, the Shellfish Growers Association requested that the deadline for public comment be extended and that an

additional hearing be held in Juneau, to which Mr. Mecum agreed. Therefore, the public comment deadline was extended by an additional 24 days and there was an additional public hearing in Juneau, which was teleconferenced. Since that time, Mr. Mecum received a request from [the Shellfish Growers Association] to have an informal dialogue in order to find common ground as well as identify points of disagreement. Mr. Mecum agreed to hold a public panel workshop, which will also be teleconferenced, to be held on February 7. He explained that the panel will consist of three people selected by the Shellfish Growers Association and the industry, one person representing the United Fisherman of Alaska, one person representing the Southeast Alaska Regional Dive Fishery Association, and Mr. Mecum.

Number 1071

CHAIR McGUIRE asked if the department has a policy for how public hearings are conducted. She asked if the hearings in Anchorage, Juneau, and Ketchikan followed the same practices and procedures in each hearing. She noted that her constituents have informed her of inconsistencies between those hearings.

MR. MECUM answered that there is not a strict policy, but the department attempts to make [public hearings] as open as possible. He remarked that he was not sure what inconsistencies had been pointed out.

CHAIR McGUIRE specified that there were inconsistencies with regard to which Legislative Information Offices (LIOs) had access to call in and which sites were listen-only.

MR. MECUM agreed that there were differences between the [Anchorage and Ketchikan] meetings and therefore, the Juneau meeting was held in order to maximize the opportunity for people to call in.

CHAIR McGUIRE asked, "In that hearing [in Juneau], did you teleconference it to all the other sites that had expressed concerns in the past?"

MR. MECUM deferred to Mr. Imamura.

MR. IMAMURA informed the committee that for the January 30 meeting the LIOs for Kodiak, Homer, Seward, Cordova, Wrangell, Petersburg, and Ketchikan were tied in. A second supplemental public notice was issued, prior to the meeting, in order to include the Anchorage and Kenai LIOs. The Anchorage and Kenai

LIOs were added due to requests by the department and people in Anchorage. Mr. Imamura said, "Having experienced the Ketchikan office getting hooked up into the Anchorage meeting, I wanted to avoid, as much as possible, the recurrence of that." He pointed out that the aforementioned sites include about all of the LIOs on the standard list between Kodiak and Ketchikan.

Number 1224

REPRESENTATIVE JAMES related her understanding that the rushing of the process was due to timing and people wanting to make applications that weren't defined in regulations. Therefore, she asked whether it would be allowable by law for the department to accept applications without the written regulations. She acknowledged that the regulation-writing process takes time and can be cumbersome. However, she said that she didn't believe shortcuts should be taken.

MR. MECUM pointed out that throughout this process the department has consulted with DOL regarding the timeline, public access, and decisions with respect to whether applications should be received and modified. The latter was also discussed with the Department of Natural Resources (DNR) as well as with DOL. He said that the advice he received was that [the process followed] was appropriate.

Number 1309

REPRESENTATIVE JAMES related her understanding that one of the primary reasons for regulations is to ensure stability and equal treatment so that everyone follows the same rules. However, she said that she wasn't convinced that people in qualified positions can't make those same decisions based on the information present. Representative James remarked that she believes there is an understanding of what is fair, even without a written law.

MR. MECUM agreed. He pointed out that prior to the application period these issues came up and people in qualified positions approached [the applications] from a policy standpoint and were attaching permit conditions that [the department] thought were consistent with the constitution and the Aquatic Farming Act as well as existing regulations. When those permit conditions were provided to the applicants, some didn't agree with them. In fact, [the department] is under litigation because those folks believe the permit conditions applied as policy were inappropriate and against the law. Mr. Mecum said, "You can't

tell the public that they can't do something ... just because someone in a policy level position said that they couldn't. ... The laws of the state require us to go through the Administrative Procedure Act (APA) and go to the public to develop these regulations that ... create this level playing field." Mr. Mecum related his belief that [the department] has been rightly criticized, over the course of the past four or five years, regarding not moving quickly enough to develop the regulations. Therefore, the department tried to respond by moving forward on these regulations and now, there are questions regarding whether the department is moving too quickly.

Number 1475

SENATOR TAYLOR turned to Senator Lincoln's question and inquired as to the problem with delaying [the regulation process] for about 90 days in order to issue the next draft of regulations and provide the public and affected people plenty of time to comment. He pointed out that he and Representative James had worked on the regulator process with the Department of Transportation & Public Facilities regarding airport hangars for about eight years. Senator Taylor remarked that he didn't care whether it took six months to a year to develop these regulations so long as the regulations are good and workable within the industry and the department.

MR. MECUM said that is a good suggestion and that is an option. He remarked that [the department] has done what it could to meet the April 30 deadline because that is a DNR regulation. However, he indicated that extending [DNR's] regulation is an option. Mr. Mecum pointed out that once people submit an application that is ultimately approved, it takes some time and [the department] has been criticized in the past for not acting quickly enough on these applications in order that the applicant can get their farm operating by the next spring. Therefore, extension of the process would be a consideration for the industry also. Mr. Mecum said, "I guess, at this point, I'm open to that ... option if we get to the point where we can't resolve some of these things and we need more time."

SENATOR LINCOLN indicated the need to [take up the possibility of extending this process] during the February 7 meeting. She expressed her hope that the department would not put these regulations in place if there wouldn't be any damage to the farmers during that time.

MR. MECUM reiterated that extension of the process is a good suggestion and will be reviewed at the panel meeting.

SENATOR TAYLOR stated the concern that at the panel meeting, only [five] other people will be heard. Therefore, those impacted have only had three opportunities to have their voices heard and will have no other opportunity for such. Senator Taylor encouraged having the panel hearing and producing a final set of regulations to be put out for a full public hearing process. He didn't believe that the department's regulations precluded it from doing such.

MR. MECUM reiterated that Senator Taylor's suggestion is good. However, he noted that the department would have to consult with DOL and DNR as well as the industry [in regard to whether such action would be appropriate].

Number 1773

MARIE BADER, Kachemak Shellfish Growers Cooperative (KSGC), testified via teleconference. She complimented Senator Taylor on his remarks, especially those remarks regarding the short timeframe. Ms. Bader informed the committee that it has taken six or seven years of those in the industry approaching the department for clarification of these regulations. Therefore, the short timeframe is self-imposed by the department.

MS. BADER turned to the January 8 ADF&G meeting in Anchorage and remarked that a note on the door would have helped. She informed the committee that at the meeting she had a congenial talk with one of the regulators whom she told that no one from the industry had ever been invited to a work session on these regulations. This regulator said that those in the industry weren't invited due to the pending lawsuits. She pointed out to the regulator that these lawsuits occurred fairly recently while [the industry] has waited for these regulations for many years, which seemed to be news to the regulator.

Number 1926

GARY SEIMS, President, Kachemak Shellfish Growers Cooperative, testified via teleconference. He addressed the hearing process for those in the mariculture industry. He reviewed a December 1999 hearing in which public comment was taken in regard to on-bottom mariculture in Kachemak Bay. This hearing was scheduled to coincide with the controversial jet ski issue, and therefore he felt that the mariculture industry was set up for failure by

the department. He said that the negative input [regarding the mariculture issue] was secondary to the jet ski topic. Therefore, Mr. Seims related his belief that ADF&G should make the hearings fair and unbiased and not set up either side of an issue for failure. He noted that the comment period regarding [the on-bottom mariculture in Kachemak Bay] also occurred during the holidays. [The Kachemak Shellfish Growers Cooperative] requested that be "broken up," but [the department] wasn't willing to do so. Mr. Seims expressed the need to clean this up such that the regulations can be developed.

DEBBIE SEIMS testified via teleconference. She expressed the need for the process to be more user-friendly because after many meetings she feels as if she is getting nowhere fast.

Number 2031

JOHN AGOSTI testified via teleconference. Mr. Agosti said that applications can and should be accepted by DNR and ADF&G. Those applications can be processed under the existing regulations while the on-bottom regulations are developed over the coming months. Therefore, public comment can occur. Mr. Agosti echoed earlier remarks that the department has had many opportunities over the years to work on this and thus would have avoided the rush. He indicated the need for the department to follow the recommendation to slow the process.

PETER HUYCKE testified via teleconference. He informed the committee that he has nothing to do with shellfish farming nor does he intend to. Mr. Huycke informed the committee that when David Walsh was appointed the Director of Insurance, he determined that the entire insurance code was obsolete and should be redone. Mr. Walsh's staff found almost 150 pages of changes. At that point, Mr. Walsh requested that the insurance industry [be part of] a task force with him in order to work out differences. This task force met once a week for almost four months. Mr. Huycke informed the committee that a satisfactory consensus was reached and many of the impracticalities of the regulations were eliminated. Therefore, Mr. Huycke recommended that Mr. Walsh's approach be followed.

Number 2175

ANDY KITTAMS testified via teleconference. Mr. Kittams said that he thinks Mr. Mecum is misleading the committee by insinuating that this is a new issue. He informed the committee that there have been clam farms in Alaska for over 10 years

during which time ADF&G has had regulations in place. Two years ago, the department accepted over 20 clam farm applications under the current regulations. Furthermore, there was a special hearing by the House Resources Standing Committee (HRES) in order to address concerns that ADF&G was hampering the efforts [of clam farmers]. Mr. Duffy(ph) worked for Mr. Mecum at that time and he assured the HRES committee that user-friendly regulations would be in effect by the end of that application period, April 30, 1999. The regulations never manifested and thus the department has hampered [the industry] by putting the applications on hold.

MR. KITTAMS informed the committee that the department didn't inform those involved of the new regulations. He noted that Mr. Mecum and Mr. Imamura both have his e-mail address and home address. Furthermore, the information was not put "in our newspaper or on our radio." Now, the department is expressing the need to get these new regulations approved by the upcoming April 30, 2001, deadline; however, there are still 20 applications on hold from the last application period. Mr. Kittams explained that if these regulations are approved as is by the April 30, 2001, deadline, it won't matter because there won't be any clam farm operating in the state due to the regulations. He concluded by saying that [the industry] has tried to work with the department and it looks forward to doing so in the future in order to develop some comprehensive regulations that the industry can work with.

Number 2281

BRIAN MATTSON testified via teleconference. Mr. Mattson echoed Mr. Kittams testimony in regard to the lack of announcements and advertisements for these regulations. He also echoed earlier comments that this situation is practically the same as two years ago. Mr. Mattson indicated support of Senator Taylor's suggestion [to extend the process].

GARY ZAUGG testified via teleconference. He noted his agreement with Senator Taylor's suggestion [to extend the process]. He informed the committee that he has been to all of the meetings so far and all of them have been different. Mr. Zaugg turned to the pending lawsuits that are addressing a good percentage of what is in these codes. These lawsuits will make some decisions regarding what will and will not be allowed. He remarked that the department just can't write code when we're addressing statutory and constitutional issues. He noted that he mentioned this at the Ketchikan meeting.

TAPE 01-3, SIDE B

MR. ZAUGG said that he didn't understand how code could be written "when those issues are on the table and this code is all going to get thrown out." He noted that he attended all three of the meetings and he only heard two people say something favorable about these regulations. He also noted that Mr. Mecum has not attended any of these meetings and thus he didn't believe that Mr. Mecum has listened to anything except through Mr. Imamura, who "has tried." Mr. Zaugg emphasized, "This is totally out of line. These regulations need to be looked at in depth and not by just six people, but by everybody that's involved in this industry. And they [the regulations] shouldn't even be looked at until this lawsuit is concluded." He predicted that the lawsuit would be concluded within the next 90 days.

Number 2322

SCOTT THOMAS, Founder and Managing Member, Alaska Trademark Shellfish (ATS), LLC, testified via teleconference. He informed the committee that ATS is a newly formed LLC involving commercial scale aquatic farming in the Ketchikan area. He also informed the committee that ATS has been intimately involved with this issue and is currently involved in the litigation. Mr. Thomas turned to the process, which he believes has some serious flaws. At the January 4th meeting in Ketchikan, five people showed up. At the end of that meeting Mr. Thomas said that he asked Mr. Imamura why the department didn't send out notices to the aquatic farmers. Although Mr. Imamura said that notices had been sent out, none of those in Ketchikan with pending applications had received any notices. Mr. Thomas said, "I think there was some intent by the Department of Fish & Game, in the process, to get things through in a hurry - to sneak it by. Hopefully, we put an end to that and we can have a little more democratic process."

MR. THOMAS turned to the regulations. He related his belief that most people have been gracious when saying that the regulations need work. Mr. Thomas remarked that, in his opinion, there is nothing salvageable in the current draft regulations. Therefore, he suggested starting over. The current draft regulations completely circumvent the Aquatic Farm Act and do not allow for aquatic farming in the state. He addressed the earlier question regarding whether there would be any damage to aquatic farmers if the process moved forward. If

these regulations are enacted, Mr. Thomas suggested that the industry should approach the legislature for an appropriation to buy back the hatchery and offer aquatic farmers a buyback program. Such an initiative would be consistent with those involving the closure of Glacier Bay, the Tongass National Forest, and the Roadless Initiative.

Number 2181

RAY RaLONDE, Aquaculture Specialist, Marine Advisory Program, University of Alaska, testified via teleconference. He informed the committee that he has been involved in the shellfish aquaculture industry, education, applied research, and technical assistance since 1978. He also informed the committee that he has been very involved with ADF&G over those 20 years. Although his past experience with the department has been rewarding, he could not say that for the past couple of years. Therefore, Mr. RaLonde said that he is probably one of the most ardent critics of the way the department is handling the mariculture problems. He explained that in 1978 he was asked by the Mariculture Coordinator of ADF&G to assemble a meeting of experts in order to share information and develop guidelines for use in formulating more specific regulations for on-bottom aquaculture. That conference was held in March of 1996 and focused on public issues involved with developing on-bottom aquaculture species. From that conference, Mr. RaLonde expected the regulations to be forthcoming. However, it has been five years and only a few months ago did something materialize. He pointed out that ADF&G has been before the legislature three times promising draft regulations. In 1999 aquatic farmers applied for permits and because there were no regulations in place, the permitting process was thrown into chaos. In the Fall of 2000 Mr. RaLonde said that he was informed by industry representatives that ADF&G was finally getting serious about developing regulations and thus he again expected a minor document addressing the issues of the 1996 conference. Mr. RaLonde emphasized that he didn't expect a 25-page rewrite of the regulations.

MR. RaLONDE pointed out that even now, without new regulations, the original regulations provide more scrutiny of aquatic farming than nearly any other marine activity. From that rewrite comes that significant process that "we" think is on the fast track. He noted that he was informed of the draft regulations when he was going out the door for the holidays. At the first hearing, held on December 8, hardly anyone was prepared to comment.

CHAIR McGUIRE noted that the committee packet includes a letter from Mr. RaLonde.

Number 2033

DENNIS WATSON, Mayor, City of Craig, focused on the process that has taken place with these regulations. He informed the committee that he has been mayor for six terms and has been to many legislative and departmental hearings and has seen "every screw up possible." Mr. Watson said that he has been locked out and had meetings that didn't exist or had changes to the agenda. Therefore, he understood the frustration with this situation. "But the legislature has to take a good look at itself, first, before it starts pointing the finger at anybody else about ... the way hearings are operated," he said. He informed the committee that he has sat in hours of legislative hearings on matters that are important to his community and has not been able to testify. Therefore, he indicated the need to review the entire process. Mr. Watson acknowledged that there is a lot of disagreement about this issue from both sides and thus he indicated the need to move this issue into a situation in which this could be discussed. Furthermore, those issues that can't be agreed upon are in the court system and perhaps the courts will provide some direction. In conclusion, Mr. Watson expressed the hope that if [the committee] is going to address the process, then he hoped that it would begin [with legislative meetings] and move down through the departments.

REPRESENTATIVE JAMES said that people from all over the nation have reported to her that Alaska has the best public process system. Although Alaska's system is flawed as is the democratic [system] in the U.S., it is the best system in the world. She recognized that there will always be times when it just doesn't work and thus the legislature and the administration needs to work harder to do a better job.

MR. WATSON agreed.

REPRESENTATIVE JAMES commented that the goal is to continue to improve.

CHAIR McGUIRE pointed out that the point of this hearing is to learn and find out the concerns of the public and how the department might better address those concerns. She said, "That's not to say that the legislature doesn't have its own problems."

Number 1878

BOB HARTLEY, Homer Oyster Grower, addressed the process. He informed the committee that Kachemak Bay is a critical habitat area. In 1999 three farmers submitted applications for on-bottom aquaculture in Kachemak Bay. The regulations regarding critical habitat areas have no specific prohibition to on-bottom aquaculture, which was permitted in Kachemak Bay. A hearing was held [on on-bottom aquaculture in Kachemak Bay] in conjunction with the jet ski issue. There was also literature research by someone in the Habitat Division, ADF&G, in order to determine what the effects of on-bottom aquaculture in Kachemak Bay. Mr. Hartley noted that he requested that paper, which had no firm conclusions on the effect. Then the department decided that on-bottom aquaculture in Kachemak Bay would be illegal and thus would amend the regulations. The department provided a few days for comment. Again, this occurred during the holidays at which time he also received notification and a copy of the regulations. Mr. Hartley informed the committee, "After that we found out that unilaterally the Director of Habitat had put Kachemak Bay, in fact, all critical habitat areas, game refuges, and other things off limits to mariculture, stating that they were incompatible with the goals and objectives of critical habitat areas." Therefore, Mr. Hartley related his belief that the present farmers in Kachemak Bay face a good chance of being denied the ability to renew their permits. He said, "This was done without any public hearing or any notification to anyone and it was done through the Department of Natural Resources." The Department of Natural Resources and ADF&G are co-managers of critical habitat areas. Therefore, ADF&G directed DNR that it would not accept anymore applications for aquatic farms in any critical habitat areas. He concluded by saying that the farmers in Kachemak Bay don't know what their status will be.

Number 1714

RODGER PAINTER, Vice President, Alaskan Shellfish Growers Association (ASGA), informed the committee that it should have a letter [from the association] that covers what it believes to be the flaws in the public involvement process. He pointed out that although aquatic farmers were notified of the regulations via mail, the notification was sent during the holiday rush when the post office is extremely busy. Furthermore, these notifications are being sent to people that are in extremely remote locations in Alaska, some of which may only receive mail once a week and this doesn't take into account the problems weather can create. Mr. Painter said that he spoke with several

farmers who received the notifications after the hearings. Mr. Painter related his belief that there are significant problems with the notification process. Mr. Painter provided the committee with a chronology of the efforts of [aquatic farmers] over the last 10 years to convince the department to develop regulations and policies regarding on-bottom aquaculture. He said this chronology will highlight how many times the department has made promises to the industry as well as the legislature and has not followed through.

MR. PAINTER directed the committee's attention to an e-mail he wrote to Ken Imamura, which is included in the committee packet. From Mr. Imamura's e-mail he read the following: "Comments on the draft regulations should be submitted by February 12 and the final proposed wording forwarded to the Department of Law by the following Monday, February 19." Mr. Painter alluded to the notion that the aforementioned timeframe doesn't allow for much consideration of the public comments. Furthermore, he estimated that it would take at least a week for [ADF&G] to comply with APA requirements, which wouldn't allow time to change even a word in the proposed regulations. Mr. Painter said that he would like to provide the committee with draft comments from ASGA regarding the proposed regulations in order that the committee could see why ASGA is concerned. Clearly, these regulations will stop any future farms and place all those currently in the [on-bottom mariculture] business out of business. He pointed out that these regulations are retroactive and don't contain any grandfather provisions. When current shellfish growers' permits are renewed, the new regulations will be applied; these are regulations that the shellfish growers know they can't comply with.

MR. PAINTER noted that he has been trying to work with the state in order to provide additional time to work on these regulations. He also noted that he has had contact with Bob Loeffler, Director, Division of Mining, Land and Water, Department of Natural Resources. Mr. Loeffler assured Mr. Painter that the department [DNR] is willing to extend the application process for as long as it takes to ensure that there are workable regulations. Mr. Painter informed the committee that [ASGA] is, at this point, interested in at least a two month extension for the time allotted for working on these regulations. Furthermore, [ASGA] is interested in obtaining some assurances from ADF&G that it will engage in a meaningful dialogue with the public over these proposed regulations.

MR. PAINTER then turned to the response he has received from the Department of Law regarding the efforts to address the substance of the regulations. Mr. Painter said that Shannon O'Fallon, Assistant Attorney General, Department of Law, said that ADF&G couldn't engage in any meaningful dialogue on these regulations during the public comment period due to constraints of the APA. He expressed his surprise with Ms. O'Fallon's comment because in his experience with departments over the past 20 years, the departments have always been willing to engage in dialogue during the public process. Furthermore, he understood that to be the very purpose of this process: to have a public dialogue over proposed rules. Therefore, Mr. Painter asked Ms. O'Fallon to direct him to specific provisions in the APA that would constrain the agency. Ms. O'Fallon clarified that it wasn't a specific provision in the APA but rather the [Department of Law's] interpretation of the APA. Ms. O'Fallon offered to arrange conversation with herself and the department's chief regulations specialist in order to discuss the issue. To date, Mr. Painter had not heard from Ms. O'Fallon. In conclusion, Mr. Painter noted his appreciation of ADF&G's offer to have a stakeholder panel in order to initiate dialogue over these regulations. However, he admitted to some skepticism considering the history of the situation.

Number 1335

REPRESENTATIVE HAYES inquired as to the number of members ASGA represents.

MR. PAINTER estimated that there are 40 members.

REPRESENTATIVE HAYES asked if there are any competing interests in this industry, between ASGA and any other group.

MR. PAINTER answered, "In a stakeholder process, for instance, we would envision that there would be commercial fisherman involved, maybe other users of the marine waterways, such as local communities or subsistence users in addition to the farmers. So, there would be some competing industries."

Number 1288

REPRESENTATIVE JAMES reminded everyone that a couple of years ago [the legislature] passed a negotiated rule-making process. Although she agreed that public hearings are not dialogues but rather monologues, the negotiated rule making allows the department to negotiate with the stakeholders before the

regulations are drafted and that doesn't comply with the APA process after a draft has been determined. She pointed out that over time it has been recognized that writing the regulations from an administrative viewpoint doesn't always get the job done in reality. Furthermore, those affected need to be able to contribute [to the process] and that can only occur, per the current APA rules, prior to the public process outlined in the APA.

MR. PAINTER informed the committee that he had proposed that [ADF&G] engage in a negotiated rule-making process. In fact, ASGA worked very hard with ADF&G to obtain a \$100,000 for a capital improvement project (CIP) in order to develop these regulations. The CIP mentions a negotiated rule-making process that ASGA suggested. Although ASGA still likes the negotiated rule-making process, it is willing to accept ADF&G's proposed process.

Number 1185

REPRESENTATIVE KERTTULA inquired as to what happens to the permits and the farms if there is a delay with the regulations.

MR. PAINTER pointed out that most of the farms have been operating without current operating permits because ADF&G hasn't been able to address these. Therefore, the operating permits [of the shellfish growers] have been extended. He reiterated that most permits have already lapsed.

Number 1122

SHANNON O'FALLON, Assistant Attorney General, Natural Resources Section, Civil Division (Juneau), Department of Law, first addressed Mr. Painter's comments. She affirmed that she did have a conversation with Mr. Painter several weeks ago. Ms. O'Fallon said that during that conversation she told Mr. Painter that it is often common for the Department of Law to advise agency personnel to not engage in discussions regarding the particulars of regulations with individuals that call because then the problem of not everyone in the public having the same access to the same information arises. Ms. O'Fallon stated that she has advised ADF&G to take public comment as the APA allows.

CHAIR McGUIRE turned to the pending lawsuit and inquired as to Ms. O'Fallon's opinion regarding the nature of public comment with a pending lawsuit.

MS. O'FALLON answered, "As an attorney that's representing the department in this litigation, I've advised them to be extremely careful with statements that they make, especially since the people that are commenting on the regulations are also involved in litigation." Ms. O'Fallon said that she did promise to return Mr. Painter's call and when she attempted to do so, the number was disconnected. After looking up his phone number in the phone book, she left a message for him to call her back at what she assumed was his home number.

Number 0999

CHAIR McGUIRE asked if Ms. O'Fallon saw any problem with waiting for the outcome of the litigation prior to enacting these regulations.

MS. O'FALLON replied, "The department is in a bit of a catch 22." She explained that one of the issues in the litigation is that the appellants allege that policies that weren't in regulation were applied and thus were in violation of the APA. However, there is a DNR regulation that requires an application period from January 1 to the end of April every other year. She said, "We didn't want to get into a position where we are accepting applications and having to review those applications again without the benefit of regulations to help us implement our policies."

Number 0920

RON LONG, Quetekcak Shellfish Hatchery, informed the committee that he is a supplier of seed to most of the farmers in Alaska. Mr. Long pointed out that there are laws on the books and thus these regulations are proposed revisions to existing regulations. He mentioned that the first he heard of these revisions was from the legislative information officer in Seward. Notice of the proposed regulations had been published in the Homer newspaper and initially, the only LIO slated for participation was the Homer office. Although this is a statewide issue, he related his belief that the revision of the regulations was based on issues specific to on-bottom culture, which would involve Southeast Alaska. Therefore, Mr. Long was puzzled as to the reasoning behind having Homer as the only site listed. Upon contacting the mariculture coordinator and requesting the inclusion of other sites, the Homer and Cordova LIOs were included for the January 8 hearing. He noted that there were other communities that wished to join and some communities were added and others were not. In his limited

experience, Mr. Long had seen LIOs added 15 minutes prior to a hearing. He said, "I think the citation given was that it violated the Open Meetings Act and that also seemed incongruous to me." Under the original timeline, the comment period would've ended on January 18. He informed the committee that there was a legislative audit that was conducted regarding [ADF&G's] activities involving mariculture over the past few years. If the original timeline had been followed, the findings of the audit wouldn't have been made public. Therefore, it was fortunate that the department postponed the timeline until February 12 so that the audit findings could be reviewed by the farmers. Mr. Long said, "So, that's a step in the right direction."

MR. LONG related his belief that there probably wouldn't be any "heartburn" in the industry if this process is prolonged because the industry requested an extension. He ventured to say that Mr. Loeffler would probably agree [with an extension]. In conclusion, Mr. Long commented, "It's really easy for those of us in the industry or in the departments charged with administering the public trust and the resource to become focused and narrow in our attention and tends to (indisc.) our process. And we tend to exclude some of the valuable comments that Senator Taylor alluded to that come from out of the blue." Therefore, Mr. Long hoped that the panel discussion offered by the department could be accepted as a good beginning.

Number 0691

ARTHUR TILGNER, M.D., testified via teleconference. He informed the committee that he is a new entrant to the shellfish industry in Kachemak Bay. He noted his amazement with the lack of dialogue from ADF&G. Although after hearing Ms. O'Fallon's comments he could understand the restrictions, he maintained that it has been counterproductive to the process. Dr. Tilgner expressed his hope that the February 7 meeting will be an opportunity to begin some meaningful dialogue, which he deemed to be absolutely essential to the process. Furthermore, Dr. Tilgner hoped to see a commitment to such dialogue from Mr. Mecum as well as an inclusive stakeholder process.

Number 0587

JIM REEVES, Attorney, testified via teleconference. He informed the committee that he has been working with those in Kachemak Bay. In Mr. Reeves experience with working with state agencies, he is very familiar [with situations such as this]. He

explained that legislators make policy decisions and pass laws to express those policies and then the legislators rely on the agencies to administer the laws. Often, the agencies disagree with the legislators. When there is disagreement, sometimes the agency expresses its disagreement with the legislature by denying applications and fronting appeals. Therefore, the next step would be that the agency could change the regulations during the pendency of the litigation in order to trump the legal process and add another layer to the legal dispute. Mr. Reeves said, "On behalf of all lawyers, I applaud what the department is doing here. I think it's a great idea to be changing regulations at this stage, against a backdrop of controversy when there is already plenty of guidance in the statute and the existing regulations for the agencies to do what they're supposed to do."

MR. MECUM thanked the committee for hearing this issue today. He noted his desire to have this be a good process. He expressed the hope that the February 7, 2001, meeting will go towards fixing the easy parts and clarifying the difficult parts of this. Mr. Mecum announced that the February 7, 2001, meeting will be held in the State Office Building in Juneau. The meeting has been publicly noticed and will occur all day and there is the opportunity for public comment and teleconference before and after, he believed. Furthermore, [ADF&G] offices throughout the state have been set up to provide people the ability to sit in and listen to the meeting. In response to Chair McGuire, Mr. Mecum said that the meeting has not been set up to teleconference to all the LIOs because there was concern regarding the legislature "trumping" the use of those offices.

Number 0299

REPRESENTATIVE JAMES asked if Mr. Mecum believes the panel discussion is a "stand-in" for negotiated rule making or will people on the panel be chosen because they support the department's position. She clarified that she was interested in the real purpose of the panel discussion and the anticipated outcome.

MR. MECUM answered that the panel discussion was something he "dreamed up" because he merely wanted to hear the problems and the specific reasoning that would lead people to conclude that the industry would dry up due to the regulations. He pointed out that the three members from the industry could be whoever the industry wanted, which he said would be Mr. Long, Mr. Painter, and Mr. RaLonde.

REPRESENTATIVE JAMES remarked that such would lend itself to the intent of a negotiated rule-making process. She noted her observation that those who administer the law and those that follow the law don't have the same interest. Therefore, she emphasized the importance of listening to those that will have to implement the regulations and whose business will be impacted. She said, "As a state, our obligation is not to curtail business but to make it happen in an environmentally sound and economic way and that should be our goal on all of these regulations."

CHAIR McGUIRE inquired as to the department's plan.

MR. MECUM said that he couldn't make any commitments without consulting with the Department of Law, DNR, and the industry. However, he reiterated that he is open to the suggestion of an extension. The decision regarding whether or not to extend should be determined after the panel meeting.

ADJOURNMENT

There being no further business before the committee, the Joint Committee on Administrative Regulation Review meeting was adjourned at 11:17 a.m.