

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

April 24, 2001

3:05 p.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

**OTHER LEGISLATORS PRESENT**

Representative Drew Scalzi

**COMMITTEE CALENDAR**

NEW MARICULTURE REGULATIONS  
REVIEW OF UPDATED INFORMATION FROM DEPT ON PIONEERS' HOMES

**PREVIOUS ACTION**

No previous action to record

**WITNESS REGISTER**

DOUG MECUM, Director  
Division of Commercial Fisheries (DCF)  
Alaska Department of Fish & Game (ADF&G)  
PO Box 25526  
Juneau, Alaska 99802-5526

POSITION STATEMENT: Testified to clarify issues regarding mariculture regulations.

SHANNON O'FALLON, Assistant Attorney General  
Natural Resources Section  
Civil Division (Juneau)  
Department of Law (DOL)  
PO Box 110300  
Juneau, Alaska 99811-0300

POSITION STATEMENT: Testified on behalf of DOL.

STEVEN LaCROIX  
PO Box 5322  
Ketchikan, Alaska 99901

POSITION STATEMENT: Testified as one of the appellants in the case of ATS & Zaugg et al. v. Alaska et al. as well as a geoduck farmer.

SCOTT THOMAS, Managing Member  
Alaska Trademark Shellfish (ATS)  
Ketchikan, Alaska 99901

POSITION STATEMENT: Testified that the changes in policy brought about by the new regulations would have kept him out of "aqua-farming", had he known of them prior.

BRUCE WEYHRAUCH, Attorney  
Law Office of Bruce B. Weyhrauch, LLC  
114 South Franklin Street, Suite 200  
Juneau, Alaska 99801

POSITION STATEMENT: Testified on behalf of his clients and their suit against the state.

ROBERT HARTLEY, Shellfish Farmer  
(No address provided)  
Homer, Alaska 99603

POSITION STATEMENT: Thanked the committee for helping in the process and being more fair than the department.

MELANIE DOUGLAS Aquatic Farmer  
(No address provided)  
Kenai, Alaska 99611

POSITION STATEMENT: Voiced concerns about the regulations.

JULIE DECKER, Executive Director  
Southeast Alaska Regional Dive Fisheries Association (SARDFA)  
(No address provided)

POSITION STATEMENT: Testified on behalf of SARDFA.

RODGER PAINTER

Alaska Shellfish Growers Association  
(No address provided)

POSITION STATEMENT: Testified on behalf of the Alaska Shellfish Growers Association.

JOHN AGOSTI, President  
Alaska Shellfish Growers  
(No address provided)  
Seward, Alaska 99664

POSITION STATEMENT: Testified on behalf of the Alaska Shellfish Growers.

RON LONG  
Qutekcak Shellfish Hatchery  
Seward, Alaska 99664

POSITION STATEMENT: Testified on behalf of the Qutekcak Shellfish Hatchery.

#### **ACTION NARRATIVE**

TAPE 01-10, SIDE A  
Number 0001

CHAIR LESIL McGUIRE called the Joint Committee on Administrative Regulation Review to order at 3:05 p.m. Representatives McGuire, James, and Hayes were present at the call to order. Senators Taylor and Lincoln arrived as the meeting was in progress. Chair McGuire related her understanding that the mariculture regulations would be sent to Department of Law by approximately May 8, 2001.

#### NEW MARICULTURE REGULATIONS

Number 0121

DOUG MECUM, Director, Division of Commercial Fisheries (DCF), Alaska Department of Fish & Game (ADF&G), referred to a handout given to the committee, which included a chronological listing of the events regarding the revision of the aquatic farm Act, aquatic farming regulations, and a summary of the revisions to the aquatic farming regulations that were implemented from public workshops held over the past several months.

MR. MECUM explained that between 1996 and 1998 there had been a moratorium on aquatic farm permit applications, caused by a

challenge to DNR's [Department of Natural Resources'] procedures. He indicated that there was a four-year period when no applications were submitted, which created a considerable backlog in applications. In 1999, when the application period reopened, [DCF] received over 40 permit applications for aquatic farming, many of which were for "on-bottom" farming, while others were for littleneck clams or geoduck clams.

MR. MECUM noted that [DCF] believed these applications raised some constitutional and operational issues. To address these concerns, Mr. Mecum said [DCF] decided to meet with the aquatic farm applicants to develop permit stipulations, so the permits could be processed. Simultaneously, [DCF] responded to the requests of the farmers by redrafting its regulations to address some of these issues. Following the application period, [DCF] issued 11 aquatic farming permits, most of the suspended culture permits, and all of the littleneck clam farming permits outside of Kachemak Bay, Mr. Mecum said, although he noted that the latter was a "different issue." All but one of the geoduck permit applications were approved; however, they were rejected by the applicants because of their opposition to certain conditions. Mr. Mecum explained that those applicants have filed a judicial appeal of the conditions in those permits, and that appeal is currently under litigation.

Number 0384

CHAIR MCGUIRE asked Mr. Mecum if he could confirm for the record whether [DCF] had asked the applicants to agree not to challenge final versions of the regulations.

Number 0411

SHANNON O'FALLON, Assistant Attorney General, Natural Resources Section, Civil Division (Juneau), Department of Law (DOL), asked Chair McGuire to clarify if she was asking whether "we" require, as part of the permit, that applicants not challenge draft regulations.

CHAIR MCGUIRE clarified that she did not want the response to be narrowed to the point of not answering the fundamental part of the question. She said she had been told one of the conditions was that [the applicants] would agree to file [regulations] and agree not to challenge regulations "at some point in that process."

MS. O'FALLON answered that had not been part of it at any point.

MR. MECUM stated his recollection that one of the conditions [the applicants] objected to was the condition that they must continue to allow access to the common property resources on the site. He added that there would be no problem if the applicant had no common property resources on the site, and, in some cases, the applicants stated on their applications that there were none.

Number 0528

MR. MECUM continued, noting that in 2001, as part of its regulatory project, [DCF] did the following: held public hearings in Ketchikan, Juneau, and Anchorage on these regulations; established a mariculture advisory panel, with industry representatives and stakeholder groups; revised its draft regulations based on public comments; released [the draft regulations] for public review and comment on February 26 (the second 30-day public comment period); requested that DNR extend the application for aquatic farm sites; reconvened the panel in March to attempt to resolve the remaining issues; held a second public comment period, which closed on March 27; and completed a third revision of the regulations, which were sent to DOL and will become effective in early June.

Number 0602

REPRESENTATIVE JAMES asked if the final draft of those regulations had been made public.

MR. MECUM said no.

REPRESENTATIVE JAMES commented, "So, we don't really know what we're talking about today."

MR. MECUM replied that he could assure Representative James that [DCF] had addressed approximately 95 percent of the concerns that people have had. The remaining 5 percent of the concerns deal with the disposition of the common property resources, and he explained that those concerns would be more difficult to address. He added DCF's belief that it would not be able to resolve that 5 percent because of constitutional questions raised.

Number 0683

SENATOR TAYLOR asked if the department would apply the new regulations to applications that were made in 1999, before these regulations were even contemplated.

MS. O'FALLON answered that all the applications that were submitted in 1999 would have already been "adjudicated, for lack of a better word"; therefore, the new regulations would not apply to them.

Number 0739

SENATOR TAYLOR stated his understanding that, in ongoing litigation, the department had maintained before the court that there were unconstitutional provisions within the existing statute. He asked if that was a fair statement.

MS. O'FALLON answered no. She clarified that her argument to the court is that if the aquatic farm Act is read the way the appellant read it, it would be unconstitutional. The aquatic farm Act itself is not unconstitutional, she added.

Number 0809

MR. MECUM added that there are questions of interpretation on this issue. He continued:

What we've tried to do with the (indisc.) additions we've established is come up with things that we believe comport with the aquatic farm Act and that comport with the other provisions of state law and the constitution. We've tried to do our best to implement this in a constitutional manner.

SENATOR TAYLOR asked the witnesses to clarify whether the reason the regulations would not pertain to those people who had applied before was because those [applications] would be adjudicated by the time the regulations took effect.

MS. O'FALLON's answer was twofold. First, she said one of the arguments that the appellants are making in the litigation is that policies were applied which weren't in regulation; therefore, any of those policies applied would be invalid. She explained "our" argument to the court: to the extent the court believes that's true and that "we" should have adopted those policies and regulations, the court could remand the applications back to the department for review under the new [policies and] regulations. Second, there is a new application

period coming up, and regulations need to be in place to govern the next application process.

Number 0934

SENATOR TAYLOR asked Ms. O'Fallon to confirm that the department told the court that if it should find for it, then the court should remand the old applications back to the department, at which point the old applications would have to comply with the new regulations.

MS. O'FALLON responded that if the court were to remand the applications back to the department, she would consider that a ruling adverse to the state. She noted that DOL's position was that if the decision made by the department were found to be invalid, because it applied policies that weren't in regulation, the remedy would not be to grant the appellant's permit, but would be to remand the applications back to the department for review, under the new regulations.

Number 1007

CHAIR McGUIRE said the concern of the committee was that the department would be applying policies that were not based in regulation, but that appear to be based upon an interpretation of the statutes and then be playing "catch-up," rapidly getting regulations into place, so that the regulations are in place by the time the court ruling is made.

Number 1058

MR. MECUM said, from his perspective, the primary reason to have the regulations and do the work is because the department did publicly state its commitment to try to develop some policies and regulations for aquatic farming and was criticized by the legislature for not doing so in a timely manner. He added if the department is playing "catch-up" at all, it is to catch up to the commitment and responsibility to do this in the first place.

Number 1107

CHAIR McGUIRE added, "It still doesn't make it wrong..., in my opinion, that you didn't do it prior."

Number 1122

REPRESENTATIVE JAMES pointed to Mr. Mecum's Regulatory Review Committee handout [available in committee packet] and read the following line:

Moratorium on aquatic farm permits resulting from legal challenge to DNR procedures.

She asked exactly what the status of that issue was and when the aquatic farm legislation was passed. Representative James explained that she wanted to get an understanding of the history of this issue, since she had not been involved until now.

MR. MECUM responded that the legal challenge to DNR didn't have anything to do with ADF&G and that he was not involved at that time; however, he said he understood that it had something to do with access in Peterson Bay and Kachemak Bay. He noted that some of the fishing groups filed suit over the location of some of the farms and over the issue of denied access, and then questioned the public process and DNR's procedures in establishing the location of the farms. Subsequently, DNR changed its procedures, based on that lawsuit, then reopened the application period, he said.

Number 1235

REPRESENTATIVE JAMES asked Mr. Mecum to clarify whether the lawsuit was from other than farm applicants.

MR. MECUM replied that it was from commercial fishing groups. He added his belief that the aquatic farm Act was passed in 1986.

Number 1306

SENATOR TAYLOR asked Mr. Mecum to clarify his previous statement that regulations were not in place when the applications came in, and were now pending in court.

MR. MECUM confirmed that was correct, stating that what regulations were in place did not address the issue of "on-bottom" clam farming.

SENATOR TAYLOR continued:

But we had passed a law that authorized it. You didn't have any regulations in place, but you said you had policies, because you've made an interpretation of

policy at some point in time, without any regulations, which, apparently, you've now argued that as a policy of the department, even before the court. Can you tell me how myself or any other citizen in Alaska would have been able to discern what your department's policy was, say, six, eight months ago? It certainly wasn't in writing; it wasn't in regulations any place. How would I know what your policy was?

MR. MECUM answered, "You wouldn't." He explained that it was the reason that the department set out the regulations for public review, to seek a conclusion.

SENATOR TAYLOR said he understood that is what happened [as a result of having no policy]. He stated his assumption that when there was no policy, people would turn to members of the department for assistance, and those members of the department would work with them to find a solution.

MR. MECUM confirmed that was true.

SENATOR TAYLOR asked if Steve McGee and Bob Piorkowski still worked for the department.

MR. MECUM said yes.

SENATOR TAYLOR told Mr. Mecum it was his understanding that the chair had asked the department to have both of those employees attend this meeting. He asked Mr. Mecum if he was aware of that request.

MR. MECUM said he was not aware that the chair had requested that. He explained that Mr. McGee and Mr. Piorkowski had come to him the day before this meeting and expressed that they were feeling uncomfortable about coming to the meeting without knowing what they were being asked to address; Mr. Mecum said he told those individuals that he had been asked to provide the testimony on behalf of the department [and therefore] had told Mr. McGee and Mr. Piorkowski not to appear at the meeting.

SENATOR TAYLOR told Mr. Mecum that that troubled him, because the reason those people were asked to appear at the meeting is that they are the people who worked with the applicants and who supported, within the department, "on-bottom" farming. As "offer of proof" to the committee, he said it was his understanding that they were informed that they would have testified that they encouraged the applicants, worked with them,

and interpreted the current policy of the department. Consequently, those applicants have invested hundreds of thousands of dollars, trying to get a permit from the department. Senator Taylor submitted that the only reason those individuals were not here today is because it would be very embarrassing for the department to "have you give that testimony."

SENATOR TAYLOR added that, if it were necessary, he would ask the chair to recess, rather than to adjourn the committee meeting, to allow sufficient time to secure subpoenas from the Speaker of the House and through the Administrative Regulation Review Committee, so that those individuals would be given an opportunity to testify. He continued:

And this committee may be able to find out what your, quote, "policy" was and what were you informing people of six [to] nine months ago, until somebody over there figured out, "Oh, my god, these guys might make a lot of money off this; let's figure out how we can stop it."

Number 1525

MR. MECUM responded that subpoenas were not necessary; if he had known that the chair wanted those people to be at the meeting, they would have been there. He reiterated that he had not been contacted.

Number 1537

CHAIR MCGUIRE told Mr. Mecum that her staff had conducted several conversations with his department, all throughout the previous day, in an attempt to secure testimony of those Mr. McGee and Mr. Piorkowski, either through teleconference or in person. She stated it was the committee's understanding that those individuals came to Mr. Mecum and were advised that he would be the sole department spokesperson.

MR. MECUM told the chair that this was a communication problem and that it would not be a problem having those individuals before the committee. In response to a question by the chair, Mr. Mecum told the committee he had no objection to Chair McGuire's [continuing the hearings] in an effort to elicit the testimony of the above-named individuals.

CHAIR MCGUIRE concluded that this had indeed been a misunderstanding and that the committee should move on.

Number 1583

REPRESENTATIVE JAMES stated her understanding that aquatic farm permits dealt with that which is under water, while mariculture dealt with that which is not only under water, but also in the soils of the water. She asked if that was correct.

MR. MECUM explained that the two kinds of aquatic farming are "on-bottom" farming, which is in its infancy in Alaska, and suspended culture. He said geoducks and littleneck clams are naturally occurring wild stock that people in the state are asking to farm. The suspended cultures, he explained, include oysters and mussels. He said there are over 150 oyster farms in Alaska. Mr. Mecum explained that it was not until more recently that people have begun asking to start farming the wild stocks.

Number 1680

REPRESENTATIVE JAMES mentioned aquatic farming and said, "It would lead me to believe that we're doing all those kinds of things." She noted that perhaps "the suspended culture is what you're talking about." She stated her belief that the State of Alaska has a very good opportunity to pursue this type of resource development. She noted that her position on the issue was that these products are valuable and that it would benefit [the state] to do whatever it could "to make this work." Representative James said she understands that there are parameters in which to work. She stated for the record that she would be watching carefully and would like to see some of these operations so she can speak about something with firsthand knowledge. She asked Mr. Mecum to clarify that he was not complaining about the suspended culture, only the on-bottom farming.

MR. MECUM answered that the concerns regarding on-bottom clam farming - the disposition of the wild stocks and the purpose of use in transfers of ownership to private individuals - don't exist with suspended culture. He said suspended-culture spat is purchased and raised, and therefore is not a wild stock.

Number 1776

REPRESENTATIVE JAMES asked for clarification regarding methods of seeding and growing.

MR. MECUM explained that some spat is purchased from a hatchery in Seward, while the oyster spat is purchased elsewhere. Littleneck clam spat can be purchased from the hatchery and the seed stock can be raised, whereas he believes that the hatchery has not yet been successful in raising geoducks. Mr. Mecum noted the success of raising geoducks and producing spat in hatcheries in the Lower 48 has been inconsistent and intermittent.

REPRESENTATIVE JAMES asked Mr. Mecum about littleneck clams [in the Lower 48].

MR. MECUM answered that [the Lower 48] seemed to be able to raise them and produce the seed stock. In response to further questioning from Representative James, Mr. Mecum said Alaska has wild stocks and wouldn't want any importation from [the Lower 48] for native stocks. Oysters are allowed in from [the Lower 48] because they don't reproduce in Alaskan waters, so there is no concern about genetic impact, he added.

Number 1857

REPRESENTATIVE JAMES mentioned the disappearance of "other fish" from Alaskan waters. She said "we" came to the rescue, by putting in hatcheries and raising "com" fish. She continued:

It seems to me ... that when we're talking about these geoducks and these littleneck clams, ... that we have a disappearance of those, as well, with the current harvesting of these things. And so, it seems to me ... that there might be a way, at least if we're even in a trial period, to find some real good evidence that we could go in this direction for resource development.

REPRESENTATIVE JAMES expressed her hope that everybody shared her interest in [resource development].

Number 1909

MR. MECUM concurred with Representative James' statement. He told the committee that the conditions placed on the geoduck applicants would have allowed them to farm if they wanted to purchase seed stock from the hatchery. Mr. Mecum continued:

The conditions that they objected to was our belief that we couldn't transfer the ownership of the existing stock to them for the purposes of financing their operation. And that's the provision that we don't believe exists.

Number 1947

CHAIR MCGUIRE asked Mr. Mecum to walk the committee through what the future of aquatic farming will be in Alaska under the proposed regulations, including the following details: what does the future look like; who are the people who can participate; what do those people have to do to "get it going"; and what does the economic development look like for Alaska.

MR. MECUM responded that the suspended-culture operations would not look much different than they do now, although he stated his belief that the department has relaxed some of the requirements for farmers. In the public-panel workshop that took place, Mr. Mecum said, an agreement was made to change a five-year permit to a ten-year permit, to coincide with DNR's ten-year lease. He expressed his belief that that change would make it easier for people to get financing and reduce the amount of paper work necessary for the applicant. Mr. Mecum noted a change made to the proposed regulations, which was the deletion of a requirement to provide proof of financing.

CHAIR MCGUIRE asked Mr. Mecum to clarify that he was talking about suspended culture.

MR. MECUM said, "Well, this would actually apply to all of them." He referred to his previous comment, repeating that he did not see a lot of differences in terms of suspended culture.

CHAIR MCGUIRE asked Mr. Mecum to make a distinction between suspended culture and on-bottom farming, to clarify for the committee how each of those areas is developing and what changes have been made to the regulations.

Number 2066

MR. MECUM, in respect to the on-bottom farming, said the department did issue permits during the last application, including at least three permits issued for littleneck clam farms. In response to a question from Chair McGuire, Mr. Mecum said that [geoduck] permits were issued, but the applicants rejected them as unfeasible; therefore, the department had to

deny their applications. He said those applications are now under appeal. He stressed that the conditions to which the applicants objected concerned wild stocks.

MR. MECUM noted that in the case of the littleneck clams, the department was able to come up with a provision that essentially allows removal of the existing standing stock by commercial fishing, which isn't an "exclusive right of fishery." He said:

We have regulatory authority to issue permits for people to harvest miscellaneous shellfish - littleneck clams come under that. Permits are issued for people to remove those clams, sell those clams, to get rid of the existing standing stock. So, you don't run afoul of this exclusive right of fishery.

CHAIR MCGUIRE asked Mr. Mecum if, in his opinion, geoducks do not fall under miscellaneous shellfish.

MR. MECUM explained that a geoduck fishery already exists and is a limited-entry fishery, whereas there is no significant commercial fishery on littleneck clams. Littleneck clams are very widespread and (indisc.) and significant removals of them on a three-or-four acre site don't pose any threat to the sustained yield of the stocks in that area. He noted that geoducks occur in very limited locations in very isolated beds. Whereas littleneck clams are, say, five years when they mature and may be eight or nine years old [at harvest], geoducks may be upwards of a hundred years old. He added, "So, there's some questions of sustainability if you're going to allow large-scale removals like that."

CHAIR MCGUIRE offered that there is a future in suspended culture and, perhaps, in littleneck farming, but asked Mr. Mecum if he anticipated that Alaska would ever have a future in geoduck farming.

MR. MECUM explained that there are areas that "we" would never anticipate going commercial fishing, because there are so few geoducks. He told the committee that during the last round of permit applications and based on the public input received, he had proposed establishing a threshold density whereby below a certain level would be designated for farming and above that level would be designated for commercial fishing. Mr. Mecum said the department was told it would be sued, however, because "you couldn't tell one person that they could do it and another that they couldn't."

CHAIR MCGUIRE asked Mr. Mecum to explain how he planned to deal with geoducks in the regulations, in a way that is meaningful and allows for geoduck farming in Alaska.

MR. MECUM replied that it may be that the department needs the legislature's help on this issue.

Number 2272

SENATOR TAYLOR, in an effort to clarify the issue at hand, outlined points previously discussed, as follows: there was a spoken policy within the department; people were encouraged by the department to file applications and to "try and get off the ground with these things"; and a set of regulations now exists, but has not been seen yet. He then asked Mr. Mecum if it is true that the department is currently permitting farmers for littleneck clams to harvest and sell the natural stocks of clams from those farms.

MR. MECUM said yes, under commercial fishing regulations.

SENATOR TAYLOR noted that according to the department's new policy, clams that occur naturally at a farm site can only be used for the limited purposes of brood stock and not for commercial harvest. He asked Mr. Mecum, "How do they get around that one?"

Number 2319

MR. MECUM offered the following example: An applicant would come to the department with an area in mind that he/she wants to farm. The department would then give the applicant a permit to harvest and sell the clams, under commercial regulations. Anyone who wanted to harvest those clams could do so.

SENATOR TAYLOR clarified that he was talking about a farm site.

MR. MECUM explained that there is no exclusive use for harvesting; therefore, the farmer or anyone else could harvest any particular site.

SENATOR TAYLOR asked Mr. Mecum if the department intended to have two different management schemes for the same species: one for the farmed product and one for the standing stock.

MR. MECUM said yes. In response to a follow-up question from Senator Taylor, he said, although that system is complicated, it is working. He noted that presently there are three such cases.

SENATOR TAYLOR postulated that there is one regimen for the farmed product and one regimen for standing stocks. He asked, "How do I know, when that clam comes to the surface, whether he was a farmed clam or a happy little natural clam?"

MR. MECUM answered that it is difficult, but the department has come up with conditions that deal with the issue. For example, all the legal-size, marketable product is removed, leaving behind the small, juvenile clams. Then, he said, through the efforts of laying down predator netting, removing inhospitable substrate, and thinning down the clams, the productivity of the beds is increased. He defined farming for on-bottom species, like littleneck clams, as "increasing the productivity, or increasing the biomass, through some sort of enhancement effort, as opposed to just going out and harvesting, which is just commercial fishing."

SENATOR TAYLOR told Mr. Mecum that he was having difficulty telling the difference, because, in commercial fishing, clams that are harvested must meet a certain size requirement, or they can't legally be taken. He said it is known, in the case of littleneck clams, that those clams that fall back - as natural clams, not farmed clams - enhance the stock because there are fewer clams left to compete for food, so they grow bigger. Senator Taylor pointed out what was really being talked about was a natural stock that's being harvested, then harvested again. He said the discussion was not about identifying and separately managing a farmed species as opposed to a natural stock, yet the regulations have been set up in two different categories: farmed and natural stocks. Senator Taylor asked Mr. Mecum if he could understand why the issue was confusing.

MR. MECUM concurred that this is a very difficult issue and that the aquatic farm Act did not provide any guidance. He said the department has been attempting to find a solution for several years. He told the committee that the confusion could have been avoided if, in the aquatic farm Act, the legislature had stated that stock acquisition permits - which give the farmer the right to harvest wild stocks - could be issued for purposes of blue stock, (indisc.) propagation, and for financing the farmer's operation. Mr. Mecum noted that the constitution states there shall be no exclusive right of fishery. He said giving one

farmer, on one site, ownership of all these resources is most exclusive.

SENATOR TAYLOR asked if a person could get a permit to get littleneck clams from someone else's farm site.

MR. MECUM said yes.

Number 2562

REPRESENTATIVE JAMES asked Mr. Mecum to confirm that he had stated that the aquatic farm [Act] had passed in 1986.

MR. MECUM concurred.

REPRESENTATIVE JAMES inquired whether, during the 15 years since then, [the department] had ever suggested to the legislature that changes needed to be made to the legislation.

MR. MECUM said, "Not yet."

REPRESENTATIVE JAMES told Mr. Mecum she was concerned about that. She said the legislature is here to help, but can't help if it doesn't know what needs to be done.

Number 2609

MR. MECUM said the first time the issue had been contemplated was when an oyster farmer with a low income approached him and asked if he could get a permit to harvest the clams that were on his farm site, in order to make more money. Mr. Mecum indicated he had given the man a commercial fishing permit, with the caveat that this could be done, unless it got "out of control." He explained that there is no way for him to limit access; if anyone else approached him, he would have to give that person the same opportunity. Mr. Mecum told the committee that was exactly what happened: All the oyster farmers who had littleneck clams on their site wanted a permit to harvest the clams. Mr. Mecum said, "I'm probably the cause of all of this."

MR. MECUM said people eventually weren't satisfied with the small operations and wanted to make hundreds of thousands of dollars [farming clams]. People's efforts to expand have resulted in sustained yield problems, problems with other users, and public conflicts. He noted that the [aquatic farming] Act itself is very vague and "wide open." The department has been

trying to implement this to the best of its ability, but it has been a difficult task.

Number 2703

SENATOR TAYLOR asked if Mr. Mecum had sent anyone out to conduct studies before granting the permit to that first oyster farmer who had asked for the littleneck clam permit.

MR. MECUM said no.

SENATOR TAYLOR asked if the process was the same for the permits that followed.

MR. MECUM said the department gave permits to about six farmers, allowing for the harvesting of 100 pounds of clams per week, for 52 weeks.

SENATOR TAYLOR asked if the department had, during any part of this process, gone out to conduct any surveys.

MR. MECUM said some surveying was done by the department. In answer to a follow up questions by Senator Taylor, he highlighted that the department had worked with a surveyor named Rodger Painter.

SENATOR TAYLOR posited: "So, out of the six, you went and looked at one." He stated his understanding that the objections and concerns that Mr. Mecum had expressed, regarding harvesting of native stocks, were based upon his concerns about sustainability. He also expressed his understanding, from the testimony given by Mr. Mecum, that the department has no idea what the volume of littleneck clams is in Southeast Alaska, Homer, or anywhere else, or where a person could go to find geoducks. He asked Mr. Mecum if he could confirm that.

MR. MECUM replied that the department had actually done surveys in many areas on geoducks. He said the department surveyed all of the littleneck clam sites where the applications were made during the recent round of applications. He emphasized the abundance of littleneck clams by telling the committee that "a house-sized lot ... has a tremendous number of littleneck clams on it."

SENATOR TAYLOR asked the witness if he had limited the new permittees to 5,200 pounds per year.

MR. MECUM answered, "On the farm sites, the way it works is we remove all of the legal-size standing stock and then they get into a farming operation."

SENATOR TAYLOR asked if removing the standing stock gave a better picture of the volume in the area, and if the farmer was then limited to taking no more or less than a certain percentage of that volume.

MR. MECUM responded that once the farmers are in place, sustained yield really isn't a question. He explained: "These organisms that are there, that are their farmed product, are theirs to sell and do with as they wish." He added there are conditions that the department puts on farmers: They have to return the lot back to its original condition, as part of the program; when they leave, the balance must be restored.

SENATOR TAYLOR said the department has no idea what the biomass is, until it is harvested by the farmer. He detailed this idea:

So, ... he could harvest just a little bit his first year, establishing the background biomass. Then he's now, quote, "farming," so he harvests a greater amount - significantly greater - from there on out, all the way through his operation. He gets done with the operation and all he has to [do] is leave you with ground that's got that amount that he chose to take out the first time, because, you don't have divers down there and you don't know what that biomass is.

SENATOR TAYLOR continued:

What I really think is kind of incredulous is that we're attempting to draft regulations, based upon that type of absentee ... management, where we sit in an office and he turns in a report to us for how many clams he took, and maybe once a year somebody goes out and looks at the site. I mean, I have a hard time understanding that, I really do, as a method or means for which managements (indisc.) take place, especially when you're looking at the same species on the same ground, and part of it is background and original and part of it is somehow farmed, and that somehow they change character, but you're going to manage for those two different species at the same time. I find that very difficult to understand, or enforce.

Number 2930

But my main concern, I guess, with this whole process is: We're looking at probably over 3,000 miles of coastline, minimum, right here in Southeast Alaska, and I know you've only surveyed a very, very small portion of that mass. And to tell the committee that we have large amounts of littleneck clams out there and, gee, just one little area produces a whole bunch. ... And, unless I'm mistaken - I do want to give you a chance to comment on this - I heard in your voice a real concern that somebody might make hundreds of thousands of dollars. Why in the world shouldn't we have 5,000 of them out there making hundreds of thousands of dollars a year, just on littlenecks now, before we get to ... [tape ends midspeck].

TAPE 01-10, SIDE B

Number 2970

MR. MECUM responded he did not know why Senator Taylor heard reluctance in his voice. He told the committee he manages fisheries statewide, where people make great amounts of money. He said the department manages fish, not money; he couldn't care less how much money the farmers make and hoped they made lots of money.

SENATOR TAYLOR reminded Mr. Mecum of his previous testimony. In it, Senator Taylor indicated that Mr. Mecum expressed a concern that if the farmers began to harvest more than 5,200 pounds a year, he would have to firm up the regulations. He told Mr. Mecum that he did not mean to suggest this, but he had heard it in his voice and it concerned him.

Number 2930

MR. MECUM responded that his intention had been to say that in the department's efforts to help these people out, it created "a little bit of a monster." He said the primary issue is dissolution of the standing stocks. He told the committee that nowhere in the law is it stated that people can go out and get exclusive ownership of common-property resources for financing their operations. He added, "If it did, I'd be the National Bank Of Geoduck and I'd start writing checks today."

SENATOR TAYLOR inquired what the department would do if it lost the suit; if the judge were to decide that the department was not using the right policies, was inventing policies, and did not write anything down, and that the people had complied with the law and should be granted their permits.

Number 2864

MR. MECUM suggested there may be an appeal to consider. However, if ultimately the court hands the decision down that the issue has been contemplated by the legislature, that it is not unconstitutional, and that the permits should be granted, then that is what the department would do. He added that he "wouldn't bat an eye."

SENATOR TAYLOR asked if Mr. Mecum would then go back and restructure the regulations to provide the same opportunity for other people.

MR. MECUM said Senator Taylor was delving too far into "the realm of the hypothetical" at this point, and that he would prefer to not answer that question.

Number 2835

CHAIR MCGUIRE stated that many members of the committee were concerned about rushing through regulations now, when the department has not done so since 1986. She described the current push as getting something on the books that justifies policies that were being applied on a questionable basis. Chair McGuire stated her belief that there may be a logical reason for a judge to decide that the department is wrong and, therefore, grant the permits. There is a possibility that the department may find itself with a set of regulations on the books which are inconsistent not only with the original statute, but also with the judge's finding. She suggested that the department wait to see what the judge has to say, [then] let the legislature go back to the table and send a clear directive on the issue, and then put a set of comprehensive regulations into place.

Number 2780

MS. O'FALLON said there is another round of applications that the department will have to act on. She added, "The rush is not the litigation; the rush is to get regulations in place." She said that if the Alaska Supreme Court agrees with the

appellant's interpretation of the "aquatic farm Act" then the regulations will have to be changed.

Number 2731

SENATOR LINCOLN asked Mr. Mecum if, after hearing the concerns and questions raised, he could come back before the committee and make a different set of recommendations that would satisfy both parties.

MR. MECUM answered that the regulations the department was prepared to file with the lieutenant governor were "a very good product." He said that two industry stakeholder panel groups participated in "negotiated rule-making" in drafting them. He said the department addressed all of the concerns with the regulations from a practical perspective. Mr. Mecum said he had "forced [his] staff to spend days, considerable amounts of time, to get these things done." Mr. Mecum expressed his pride in the process he and his staff went through. He said some people will not be happy with some of the provisions but added, "That's life." He said his department has done everything it possibly could, "bending over backwards" to try to come up with a good product, and he thinks it has achieved its goal.

MR. MECUM said he does not know what he would have done differently. He said that at some point the department will be working with the legislature. Mr. Mecum stated that Senator Torgerson introduced a bill that addressed some of the issues in question and that over the interim, the Senator wanted to continue working on the bill. He said some improvements could be made, but he did not see what could be done differently in relation to the regulations.

Number 2602

REPRESENTATIVE JAMES stated her sympathy for Mr. Mecum's position on the issue, but added that the committee and others, were at a disadvantage because he knew what was in the regulations "and we don't." Representative James said it was hard to know if the committee would be satisfied with the changes until they have a chance to look at them. She asked if the regulations, as drafted, provide opportunity for littleneck clam and geoduck farming.

MR. MECUM answered that they did.

Number 2552

SENATOR TAYLOR asked if, as a requirement of the regulations, the proposed farm would be located in an area that has been surveyed by the department and "excluded as an area that could support a commercial fishery," why anyone would want to farm geoducks where they do not occur naturally.

MR. MECUM said that the majority of geoduck farm permit applications submitted during the last round would meet the criteria outlined in 5 AAC 41.240. He said that in the public hearings he had referenced, many people stated a lack of need for "standing stocks" of geoducks. Mr. Mecum pointed out that there was a need for "suitable substrate." He pointed to an example of experimental geoduck farming in British Columbia and Washington, where the most successful yields come from areas without large amounts of wild geoducks.

SENATOR TAYLOR said that the regulations would set up a pattern by which all of the commercially viable geoduck areas in the state will be excluded from farming and left to other commercial users.

MR. MECUM disagreed.

Number 2382

STEVEN LaCROIX said he "made geoduck applications in Southeast Alaska" and that he was "involved in an appeal of the department's - what [he] considered - denial." He said that he and his co-plaintiffs refuse to accept the permits that the department issued because of two reasons. The first was that they would be "forced to accept these regulations that were coming down the road." He said he thought it better to obtain permits based on current law. He said his second complaint was that he and his co-plaintiffs do not feel that they can farm under two management systems.

MR. LaCROIX said he agreed with Mr. Mecum on most points and that the department has done a thorough job of trying to address problems. Mr. LaCroix said, "We went into these applications thinking, and were advised by the department, that we could do what we proposed to do."

MR. LaCROIX said that the regulations will make it hard to get a good farm site because there will be two different management structures: a commercial fisheries structure for the standing stock, and a farming structure for what is planted. Mr. LaCroix

said that the requirement to distinguish between farmed and wild stocks will be impossible to satisfy. He said that he and his group made six applications and that to his knowledge, none of them were in places where there was a commercial fishing interest. He said that he tried to do it right and that he deserved a permit.

Number 2208

CHAIR McGUIRE asked Mr. LaCroix to clarify what type of on-bottom farming he was looking at doing and how far along he was in it. She also asked where he would be left if the proposed regulations were filed.

MR. LaCROIX said that what he had applied for was "the five acre lease." He then claimed that he wanted to plant one acre of clams per year at each five acre site. He estimated it will take five years for these clams to grow. He said that would allow an ongoing supply of geoducks "by planting and harvesting rotationally, one acre of ground at each site." He said his estimates were that the farms could produce 100,000 pounds of geoducks per acre. He was not sure how long it would be before this figure would be realized.

MR. LaCROIX agreed with Mr. Mecum and his statement that some people intentionally applied for areas without wild geoducks because they were considered a "liability." He raised the issue of wild geoducks not passing tests for Paralytic Shellfish Poisoning (PSP). Mr. LaCroix said that "there's a lot of gambling that we're taking," and that if he is forced to make all applications in areas that don't have standing stocks, that risk is beyond what he can afford to take.

MR. LaCROIX said that there must be some indication that clams might be able to grow in the ground that has been applied for. Mr. LaCroix indicated that clean sand and good substrate are needed to grow valuable geoducks. He defined a valuable geoduck as one with white flesh and said that is the result of sandy substrate and plenty of food and current. He indicated that [a requirement to farm around the standing stock would mean that the best ground of these sites would be out of bounds. Mr. LaCroix said he did not think the solution was to try to "farm around the individual animals." He said the solution would be found at the "site selection level."

Number 1935

SENATOR TAYLOR asked what the average length of time required for a geoduck to mature to marketable size is.

MR. LaCROIX said it depends on the area. He said the best area, in "South Sound," Washington, produced two pound geoducks in three and a half years. He said that geoducks larger than two pounds are of lesser value, and he indicated larger geoducks as one of the problems with standing stock.

SENATOR TAYLOR said that he was concerned about not having enough information on the life cycle of shellfish. He spoke of the decline in the abalone and rock cod fisheries. He attributed this to a poor understanding of the time it takes for these species to mature. He called for "firm science" on the time it takes for a geoduck to mature. He asked Mr. LaCroix if he knew Steve McGee and Bob Piorkowski.

MR. LaCROIX said he met Steve McGee during an application process with the Alaska Coastal Management Program. He said he met Robert Piorkowski and various others when he was in Ketchikan, promoting aquatic farming. In response to one of Senator Taylor's questions, Mr. LaCroix said Mr. Piorkowski encouraged him to begin aquatic farming.

CHAIR MCGUIRE asked Mr. LaCroix what would happen to his geoduck farm if the regulations were to go into affect on May 8.

Number 1725

MR. LaCROIX answered that that he would only be affected if the regulations apply to him. He surmised that he would be able to obtain a permit and seed. He said he had a problem with the proposed regulations and how he would have to farm around the standing stocks because of them. He said he could not meet the requirement to identify and protect the standing stock. Mr. LaCroix said he would have to take the standing stock "out of an acre this year [and] plant it, and [he] would propose that the department doesn't allow [him] to do that to the second acre until [he] demonstrated that he planted the first acre." He said that it would be a good policy for the department to make sure that farmers are doing what they say they are going to.

SENATOR LINCOLN asked if it was an "insurmountable" problem to work things out with the department.

MR. LaCROIX answered that he did not think so.

SENATOR LINCOLN asked how Bob Piorkowski encouraged him to get into the business.

MR. LaCROIX said that he had been shown videos of the hatchery that was built in Seward, and that his impression was that it was a "sales pitch" for the new hatchery. He said there was a major presentation on how to identify littleneck clam sites. Mr. LaCroix said that he had been harvesting geoduck clams and "just substituted geoducks for littleneck clams" in his applications. In response to a question from Senator Lincoln, he said that he was proposing to farm geoducks.

SENATOR LINCOLN asked how Mr. Piorkowski's presentation encouraged him to farm geoducks.

MR. LaCROIX answered that the key factor that encouraged him was the advent of a hatchery that could produce geoduck seed. He said without a hatchery there is no reason to farm geoducks.

SENATOR LINCOLN asked if there was a discussion of negative impacts at the presentation.

MR. LaCROIX told the committee that he was given books by those at the presentation that said the negative impact would be "if you didn't get enough clams." He added that they were not talking about geoducks but rather a "different species of clams."

Number 1482

SCOTT THOMAS, Managing Member, Alaska Trademark Shellfish, a newly formed, limited liability company (LLC) based in Ketchikan with six partners, testified that he is developing commercial-scale aquatic farming. He said his company has been in the process for two and a half years. He said there has been a lack of communication between the department and his company on the issue of geoducks.

MR. THOMAS said in 1999, his company relied on the department's existing policies. He said that the department's policy was "if you passed all these hurdles" and there were no conflicts, the standing stocks on a proposed site became the applicant's property. He said since 1999 the department has changed that policy. Mr. Thomas quoted Frank Rue as saying that "the department believes that standing stocks of the permitted species pass to the permittee as property of the permittee." He said that his company relied on Mr. Rue's statement to develop

its business plan. He said that like Steve LaCroix, he was encouraged by department workshops put on by Bob Piorkowski, to secure areas with large standing stocks and thin them out if need be.

Number 1364

MR. THOMAS said the department "got scared" when applicants intentionally selected sites with standing stocks. He claimed that he would not encourage anyone to select an area where the particular specie of shellfish to be farmed did not exist naturally. He said he relied heavily on the policy that he understood the department to hold on standing stocks. He said he'd sold his commercial seining business in order start shellfish farming, and he is "just about bankrupt." Mr. Thomas said that the changing policies are "discriminately applied." He claimed that under Alaska Department of Fish and Game management, he was getting \$1.10 per pound for geoducks and those farming littleneck clams were receiving \$3.00 per pound.

Number 1212

MR. THOMAS showed the committee images relating to the process of shellfish farming. He said geoduck farming is "exciting and it works." He said one-tenth of the resource can produce a hundred times the results due to the technology. He said that if the regulations are passed, "there is no new on-bottom aquaculture in the state of Alaska." He said that if someone farms in areas where the crop does not exist naturally, as the regulations require, that person would not stand a good chance of success. He said that he would never have taken the risk of starting up in the business if he had known the department would change its policies. Mr. Thomas said that there is no reason to change the policies.

MR. THOMAS referred to a chart of Southeast Alaska and said there are 10,000 miles of coastline. He said that "our clean, fresh water" is a huge resource and one of the greatest untapped natural resources in the state. He said Alaskan shellfish are of premium quality and could lead to a strong industry for the state. He showed the committee the location of his farm by Long Island. Mr. Thomas said he chose his site 45 miles away from the nearest conflicting use. On the map he showed a comparison of the size of his operation in relation to the rest of the harvest areas in Southeast Alaska. He showed the committee the areas that were open to geoduck harvest, and he listed areas by

Biorka Island, Goddard Hot Springs, the Craig area, Noyes Island, the Gravina area, and Kah Shakes.

SENATOR LINCOLN asked Mr. Mecum if he agreed with the areas indicated by Mr. Thomas.

MR. THOMAS said that generally, he did.

Number 0773

MR. THOMAS said the department has claimed that they are trying to work with geoduck farmers and alleviate conflict; in the year prior, however, it opened a commercial dive fishery for geoducks next to his farm. He said that there is 50 miles in either direction from his farm to develop a commercial fishery, but the department has chosen to locate one right next to his operation. Mr. Thomas said there is a provision in the state constitution for aquatic farming. Mr. Thomas added, "Bottom line, if these regulations are put in place, I think it puts an end to the industry." In response to Senator Lincoln, Mr. Thomas said that it would be decided in his lawsuit, but he didn't think the regulations would apply to his company.

Number 0544

SENATOR LINCOLN asked if Mr. Thomas had an attorney throughout the life of his business.

MR. THOMAS replied that two and a half years before, his business hired Bruce Weyhrauch to research and review statutes to make sure [the business] could utilize the standing stock. He said the department does have legitimate concerns about people coming to utilize a resource and "taking it and running." Mr. Thomas said his company was against this type of activity and that his company agreed to post a restoration bond with the Department of Natural Resources (DNR). He said his company agreed to post a performance bond whereby they would be required to plant an acre to receive the next acre. He said they agreed to pay for an on-board observer to ensure compliance. He said the department refused all of his company's offers. In response to Senator Lincoln's question, Mr. Thomas said his market was in Hong Kong. He said he believed that his company could market purple-edged rock scallops and oysters domestically. He said China is doing a great deal of aquatic farming and said that it is the fastest-growing food-producing market in the world, growing by 9.6 percent since 1984. He claimed that Alaska could

be part of that market and clarified that he meant "only shellfish and sea plants."

SENATOR LINCOLN asked how large of an area Mr. Thomas was referring to on the map he provided.

MR. THOMAS said the total area his company had applied for was 33 acres; he added that it would be the largest aquatic farm in Southeast Alaska. Responding to Senator Lincoln, he said it was right on the shore, just outside of the intertidal zone. Mr. Thomas said that one of the reasons for the selection of the areas was to offset development costs by utilizing standing stocks. Another reason for the site's selection was the warm water of the Japanese Current, according to Mr. Thomas. He said the nutrients brought by it, hopefully, would give his farm an advantage. He conveyed the difficulty of getting a "live product" from the bottom, onto a plane, and into Hong Kong, as well as the difficulties brought by PSP.

Number 0100

BRUCE WEYHRAUCH, Attorney, Law Office of Bruce B. Weyhrauch, LLC, testified that he was representing the appellants in ATS & Zaugg et al. v. State et al. He said that when Mr. Thomas hired him he started working with Mr. Mecum and the Department of Law, attempting to reach an out-of-court resolution. He said he had been working on the case since 1999.

TAPE 01-11, SIDE A

Number 0072

MR. WEYHRAUCH said, having worked with the department on commercial fisheries, he had never seen it act so aggressively to stop an industry. He cited AS 16.40.105 and said it outlined four specific criteria, drafted by the legislature, concerning issuance of aquatic permits. He said the statute allows the standing stock to pass to the aquatic farmer for sale. He said there are e-mails from the Department of Law saying that it has reviewed the statute and agrees farmers are entitled to sell standing stock.

MR. WEYHRAUCH said that the suit was an attempt to work with the state on an ordered, natural resource development project that the state has a legitimate interest in as a public resource. Mr. Weyhrauch said, with that as a background, that it is critical that aquatic farmers recognize the state's interest and allow the state absolute access to their farms and business

plans, so they can prevent the "'rape, ruin, and run' kind of attitude" previously mentioned. He noted that every time a set of conditions was proposed, "someone stopped it from happening."

Number 0244

MR. WEYHRAUCH said he thinks that there is a way to "work this with industry and the parties" and "that it should be worked so that industry can go forward." He said that rather than take it to court, the state should attempt to work things out with the industry. Perhaps a joint resolution would be a good solution, said Mr. Weyhrauch.

REPRESENTATIVE HAYES wondered if the parties were too far along in the process, and if a lawsuit decision was required to "set some sort of precedent."

MR. WEYHRAUCH answered that the state and appellants would have to agree on a request to stay any decision, pending some sort of resolution. He said he thinks the appellants want some sort of decision, "adverse or not," to get a sense of certainty in their business affairs.

REPRESENTATIVE HAYES said his question was if it would be prudent public policy to let this continue on, or if it would be prudent to end it.

Number 0460

MR. WEYHRAUCH responded that the state and industry must have a set of criteria that they can live with, and at this point they don't. Until they have a set of criteria, both the state and the farm industry will not be able to reach a stay.

Number 0553

CHAIR MCGUIRE asked Mr. Weyhrauch if he had gone back to look at the legislative intent in hearings surrounding the aquatic farming Act, and if it was his impression that the Act was passed because of a desire to see aquatic farming in the state.

MR. WEYHRAUCH said that it was. He qualified his statement by adding that there was a definite public policy against finfish farming, and no aquatic farmer he knows, or would work for, favors finfish farming. But he said that there was a set of regulations in place before the aquatic farm Act was adopted which tells of the legislature's intent as part of AS 16.40.105.

Most of the debate centered on fin-fish farming and its prohibition, and he could not find the word "geoducks" in the legislative history.

Number 0636

SENATOR TAYLOR said he found it incredible that the department has argued that the policy under which Mr. Weyhrauch's clients applied was an unconstitutional interpretation. He pointed out that the law can be made constitutional by passing another set of regulations.

MR. WEYHRAUCH said the state believes that the interpretation which the appellants have on how stocks should be handled is unconstitutional because it violates the exclusive-use clause of the constitution. He said he disagrees with the state's interpretation because the state has already approved his clients' actions as a viable form of aquaculture allowed under the constitution. He added that when the Department of Law did the review of the Act, there were no legal issues, only policy ones; that is in the record.

Number 0781

SENATOR TAYLOR said he was having a hard time understanding how the state could be saying a law is unconstitutional on one hand, while using the same law to justify the implementation of other regulations. He said if what the department led the applicants to believe was based on an unconstitutional law, "we have a totally contradictory philosophy coming out of the same department in about a two-year period."

MR. WEYHRAUCH said the problem with aquatic farming is that its policies and conditions have changed over time; arguments change the policies yet again. Mr. Weyhrauch claimed that people must be ever vigilant of the department for its next set of new standards, and added that this makes business decisions impossible. Answering Senator Taylor's question, Mr. Weyhrauch said in order to know the department's policies prior to drafting of regulations, "bits and pieces dribbled out" as a draft proposal.

Number 0923

REPRESENTATIVE McGUIRE asked for Mr. Weyhrauch's opinion on what the committee and legislature should be doing on the issue.

MR. WEYHRAUCH answered that the legislature must make a strong statement that the law it passed in the 1980s is the law that should apply to the department now. The department should be held to the interpretation of the statute. He said that statements made to the public had changed. Mr. Weyhrauch said he feels if the legislature adopts regulations that make it impossible for an aquatic farmer to exist, or that change the rules, it will be bad. He put forth his belief that the legislature should make sure that the regulations "pass muster" with the aquatic farm industry in "a more unanimous way than they do now."

Number 1024

SENATOR LINCOLN stated she was "a little nervous" about litigation. She said if the legislature steps in and makes a strong statement about the interpretation of legislation, it will be "stepping into the courtroom." She said she was not sure that the Department of Law would make the same interpretations as the legislature. Senator Lincoln said that she would like to see the issue resolved in a manner that is beneficial to both parties, but she did not want the legislature to "interject" in an ongoing case.

Number 1108

MR. WEYHRAUCH claimed that the legislature would never be named in his lawsuit. The legislature is the policy arm of the government; that the court is bound to interpret what it does, consistent with the constitution. Mr. Weyhrauch said, "If the legislature finds a majority will to step in and clarify something, that what the court is going to do with that policy statement, just as it would do with these regulations, and determine whether the policy statement now can be applied to the issues in front of the court." He said he could not foresee how the legislature's Acts might work in court.

REPRESENTATIVE HAYES asked Mr. Mecum how much consensus the department had for the new regulations.

Number 1222

MR. MECUM replied that he could not put a number to it, but said that 160 changes were made to the regulations. He said the changes addressed 95 percent of the problems people had with the new regulations. Mr. Mecum said the regulations covered a great

variety of issues beyond just the issue of "who gets the geoducks."

REPRESENTATIVE McGUIRE made the point that "just saying that the regulations were changed 160 times doesn't give [the committee] any indication about whether they're good regulations or not."

MR. MECUM clarified that the changes were made to accommodate the industry. He said that 95 percent of the changes people wanted were made.

SENATOR TAYLOR stated that there is no industry or aquatic farmer constituency base. He said there are only a small number of littleneck clams, while there are quite a few people doing suspended aquaculture with oysters and mussels, practically no one doing on-bottom aquaculture, and a competing group. He said that those in the dive fisheries are concerned about their access to resources. Senator Taylor pointed out that the legislature and the department had done nothing on the issue.

SENATOR TAYLOR said the first geoduck surveys were done by the department, by request of himself and Representative John Sund in 1986. He conveyed that the money for the survey was given by Silver Lining Seafoods to the department to gain information on an area near Ketchikan. Senator Taylor said that the survey made way for the first dive fishery on geoducks and that the area in question was exploited until it was depleted. He said that people must pay money to have the department survey any new area. He claimed that it is the "exclusive decision of the department where even to look" for new geoduck areas.

SENATOR TAYLOR suggested that it would be nice if the department were to go out and survey 2000 acres or 200 acres in an ongoing program, to gain a good understanding of the organisms and their environment.

Number 1602

ROBERT HARTLEY, Shellfish Farmer, testified via teleconference. He thanked the committee for addressing concerns with the process the department used in developing aquatic farming regulations. He thanked the committee for hearing objections to the development of regulations banning clam farming in Kachemak Bay, and added that he felt those regulations were based on "faulty science." He thanked the committee for hearing his request for equity, where "the Department of Fish and Game did not."

MR. HARTLEY said that on the matter of the proposed regulations, a lot of progress had been made as far as making the regulations workable, but added that there was a lot of work to do on the issue of standing stocks. He claimed that it affects both on-bottom farmers and suspended aquaculture farmers.

Number 1723

MELANIE DOUGLAS (ph), Aquatic Farmer, who testified via teleconference, echoed Mr. Hartley's comments that the committee's intervention "got things underway in a reasonable fashion." She said her main concern was that there be a final draft of the regulations remitted to the Department of Law. She said she was concerned about what the "5 percent" entailed. Ms. Douglas said that the standing-stock issue was significant to her as a mussel farmer.

JULIE DECKER, Executive Director, Southeast Alaska Regional Dive Fisheries Association (SARDFA), testified via teleconference that she empathized with the frustrations she heard from committee members. She said the farmers are not the only ones to have spent time and resources on this issue. Ms. Decker said SARDFA has been involved since 1999, when geoduck farmers applied for sites, saying they contained marginal wild stocks or no stocks, but that were later found with a large number of [wild] geoducks on their sites.

MS. DECKER said that SARDFA is interested in commercially viable stocks in Southeast. She said it seemed to her that it is possible for geoduck farmers and dive fishers to coexist peacefully. She claimed the problem with the aquatic farm Act is that it is not specific about species.

MS. DECKER said from what she had heard from divers, geoducks do not grow all over Southeast Alaska, but rather they grow in pockets. She claimed that there is more area with substrate that is accommodating to geoducks than actual areas of geoduck occurrence. Ms. Decker added that in British Columbia and Washington State, geoducks are being farmed intertidally, a manner that is not naturally occurring. Ms. Decker drew the conclusion that the only two areas outside of Alaska where geoducks are being farmed in places that do not have standing stock.

MS. DECKER said lack of funding was holding back the dive fisheries in Alaska. She said her organization has lobbied the legislature for funding for the mariculture industry.

Number 2063

RODGER PAINTER, Alaska Shellfish Growers Association, testified via teleconference that he was happy with the committee's "highlighting the situation with the regulations." Mr. Painter said the industry is convinced that the process it had with the department is a result of the attention the legislature paid to the issue.

MR. PAINTER thanked the department and the efforts of Doug Mecum to try reaching a resolution to the regulation problems. He said he is hopeful that the regulations will come through in such a manner that he and his industry "can live with them." He pointed out that he was unsure how the department would interpret and carry out the new regulations. He added that he did not know what the outcome of the lawsuit would be. Mr. Painter said he hoped that the committee would work on the issue over the interim.

SENATOR TAYLOR directed a question to the department. He asked if prior to submitting for final signature, the department could submit the new regulations to the committee over the interim for one last public process.

MS. O'FALLON answered that the draft regulations from the department are available to the public to look at. She said that the final proposed regulations that are to be submitted to the lieutenant governor's office were still being reviewed by the Department of Law. Ms. O'Fallon said if the department were to send those regulations out for public comment again, there would be no regulations in place to deal with the next round of applications.

SENATOR TAYLOR gave an example of how he had helped to work out some other contentious committee issue. He asked if "before the final hammer drops" and there is another lawsuit, perhaps the department could give the committee some "breathing room."

Number 2429

MS. O'FALLON answered that the Department of Law's advice to the Alaska Department of Fish and Game was, "You're going to get yourself in just as much trouble without having [regulations],

with this next application period, even though there are some unresolved questions of law." She said she felt as much risk of getting sued if the department does not submit the regulations.

SENATOR TAYLOR said that he understood the risk but added that "we went 15 years without [regulations]." He said that the "confrontational wall" was not hit until about a year prior. He said that a little delay would not be too much to ask. He also asked if the committee could have a copy of the actual regulations that have been approved by the Department of Law before they are submitted to the lieutenant governor.

MS. O'FALLON said she believes the new regulations are part of the public record.

SENATOR TAYLOR voiced his concern that the regulations will be signed when the legislature is out of session.

Number 2648

MR. MECUM said people came to him saying that the application process should not be opened up because of all the problems. He said that he disagreed because of his belief that not opening it up would be bad public policy. He said that one can delay forever but people have the right to submit applications for permits. He said that the Department of Law's advice to him on the issue of implementing regulations was, "Suck it up and get going." He expressed his appreciation of the committee's work on the issue, but he added that he committed to a public process and panel before the committee began addressing the issue. Mr. Mecum said he and the department have really tried to gather public input and incorporate it into the regulations.

MR. MECUM brought up the "moving target" issue. He said "bureaucrats making up stuff as they go along is not the way for an industry to get developed." He claimed his department "decided to take the bull by the horns" to develop "rules of the road."

Number 2758

REPRESENTATIVE HAYES asked if all those involved in the suit had an opportunity to see the changes to the most current regulations. He said that the uncertainty did not make the committee comfortable.

MR. MECUM said the first version of the regulations did not please many people, including himself. He claimed that the second version saw more acceptance, but there were still points of contention. He described how a third revision was steered by a third public panel meeting. Mr. Mecum said that he "made commitments" at these public panel meetings. He called for people's trust in the commitments he and his department made. He said that he did not know of another option.

SENATOR TAYLOR told Mr. Mecum that there is another option: "show us what you did." Senator Taylor asked if the new regulations would be made available to the public before their being finalized. He asked what the problem was with letting all of those farmers who had testified see the new regulations.

Number 2887

MR. MECUM said that letting people see finished regulations "is not a problem." He said that a further delay in implementing the regulations was "a bridge we have already crossed." He said "if we were going to delay, we should not have had this application period." In response to a question from Senator Taylor, Mr. Mecum said that the application period started on the first of January. He mentioned that the Department of Natural Resources responded "somewhat grudging" when asked for an extension of the application deadline. He said the whole process was "shifting" and that it was "incredibly bureaucratic." He said the department's request had been "shifted back a couple months already," and stated his concern about what an additional delay would do to the entire process. Mr. Mecum said the regulations are changeable and if something is wrong with them, they will be changed.

TAPE 01-11, SIDE B

Number 2954

SENATOR TAYLOR said there will be a better idea about things when the court decision is made, as well as when the final regulations are released. He called for at least a brief period of reflection on "where we're going from here." He said that the department's claim to appeal the case if it loses is frustrating.

MR. MECUM said, "We are at the end of the line for this particular process." He said the new regulations would be made available to the public upon the completion of the Department of

Law's review. He claimed he will change the regulations again to accommodate legitimate concerns. Mr. Mecum described the court case as a very unfortunate circumstance.

Number 2918

MR. MECUM made reference to SB 141 and said Senator Torgerson had the idea of a "lease-track system" to get around difficult issues. Mr. Mecum said that in a meeting with Senator Torgerson and a legislative attorney, the attorney said the bill "was not going to cut it." According to Mr. Mecum, the attorney told him that transferring "these resources to these individuals" would require a constitutional amendment. He said he had to follow his attorney's advice.

Number 2859

SENATOR LINCOLN asked what the period of time between the final regulations' approval by the Department of Law and the time the lieutenant governor gets them on her desk would be.

MS. O'FALLON said draft regulations are adopted by the department; they are then sent to Department of Law and are reviewed. Small changes are made and the regulations usually make it to the lieutenant governor's desk within the same day.

Number 2780

SENATOR LINCOLN said she inferred that when the public gets a copy of the final version, the regulations are ready to be signed into law and that they are signed very quickly thereafter. She said that she did not want to give those who had testified against the regulations false hope. She said she did not see the legislature as having the ability to make changes to the regulations at that point. Senator Lincoln reminded Ms. O'Fallon of her claim that she did not see the regulations in need of any change. She wanted it made clear to those with concerns about the regulations that it would not be easy to get the department to recognize a "legitimate concern," if it were satisfied with the version it was submitting for passage.

Number 2690

MR. MECUM agreed with Senator Lincoln that it was not an easy process to change regulations, and that he did not want people to assume that changes would be made overnight. He said that

"we're not always right," and that there are farmers with legitimate concerns. He said the public panels and meetings have addressed all of the contentious issues except those of standing stocks' transfer of ownership.

SENATOR LINCOLN asked if the issue of standing stocks was not a "legitimate concern" that would warrant a closer look before the regulations are signed.

MR. MECUM said that the department felt the transfer-of-standing-stock issue had been taken care of, and that "it passes muster with the constitution."

SENATOR LINCOLN then asked how the department had taken care of the problem.

MR. MECUM answered that in the case of clam farmers, the department said: "If you want to have this site, you can have it. If you want to plant seed and harvest that seed, you can do that. If you want to get wild stock, the only way you can do it is get a stock-acquisition permit." He clarified that a stock-acquisition permit is for "bringing about culture and propagation, and not for, in essence, doing your cost recovery of your facility upfront." Mr. Mecum said that in the case of a farmer with no standing stocks, there is no problem, but for a farmer with "lots and lots and lots," it is going to be more difficult. He said that there would have to be some way to differentiate between farmed and wild stocks. Mr. Mecum stated that all of these points have been reviewed and approved by the Department of Law.

Number 2566

SENATOR LINCOLN made the statement that those with complaints would still look at all of the department's provisions and considerations of their problems, and once again not be satisfied. She asked Mr. Mecum if the department's response to these people would be: "That's not a legitimate concern. We've taken care of that. I'll see you in court."

MR. MECUM responded that "this is our interpretation and yes, court is one route, coming back to the legislature...." Those kinds of issues can't be dealt with by regulation by the department, he said.

CHAIR McGUIRE countered, "Yet at the same time, you fully admitted you treat littleneck clams in an entirely different manner."

MR. MECUM responded by saying that littleneck clam farms must get a stock-acquisition permit for the "cultivated product." He said that the only way for them to get exclusive ownership is if it is the stock that they have grown.

SENATOR TAYLOR asked how Mr. Painter's selling of littleneck clams that he has not grown is not "treating one clam guy a heck of a lot different than you're treating the other clam guy."

Number 2474

MR. MECUM said there are longstanding regulations on the books that allow the department to issue permits for the harvest of miscellaneous shellfish.

SENATOR TAYLOR added that "you could do that with geoducks today."

MR. MECUM answered that geoducks are a limited entry fishery; therefore, the department could not issue special permits. He said that the regulations are adopted by the Board of Fisheries.

CHAIR McGUIRE asked if one could apply for a limited entry permit for geoducks on his/her property.

MR. MECUM replied that if one wanted to participate in a commercial geoduck fishery, one would have to obtain a limited entry permit.

Number 2422

CHAIR McGUIRE emphasized that she does not think the aquatic farmers are trying to participate in a commercial fishery; rather, they are trying to access their stocks, or not have to differentiate between wild and farmed stock.

Number 2400

JOHN AGOSTI, President, Alaska Shellfish Growers, testified via teleconference. He asked if it was appropriate for the Alaska Department of Fish and Game to reserve all of Alaska's geoduck resource to one commercial user group. He pointed out that Alaska's other fishery resources are allocated among many user

groups. He said it is a matter of fundamental fairness that access to a common-property resource be spread to more than one user group. He urged the committee to reconsider and follow through on Representatives McGuire and Scalzi's bill on aquatic farming. Mr. Agosti seconded Mr. Weyhrauch's recommendation for some sort of legislative resolution to some of the problems.

Number 2268

RON LONG, Qutekcak Shellfish Hatchery, said that he had heard the number of 150 farms in the state in previous testimony, but assured the committee that there were only 56 permitted farms in the state presently. He said that his hatchery is successfully growing geoducks and that he hopes to be able to supply a market demand, "if it becomes a reality." He said that the talk about 95-percent comfort level was not correct. He claimed that his comfort level was approximately "75 to 80 percent of the portion of the regulations that we could talk about." He noted that portions in litigation could not be talked about, and some of those are critical issues. He said quantifying comfort levels regarding the regulations is difficult because of a poor idea of what the final changes to the regulations will be. Mr. Long said that this is not a time to sit back and relax, but rather a time for those concerned to remain engaged and in communication.

Number 2160

MR. LONG thanked the committee for their rush to action, and the department for "a pretty responsive job of engaging the stakeholders." He said that the earlier reference to growing geoducks in intertidal zones, as in Washington, was off the mark in terms of the Alaskan context, due to the possibility of intertidal freezing in the winter. Mr. Long added that there were specific application issues that needed dealing with, more operational than regulatory.

MR. LONG said he was concerned that if the appellants win their case, the state will appeal and the result will be a protracted period of delay. He said the appeal process will be costly for the farmers concerned, and possibly for his hatchery as well. Mr. Long expressed hope that the legislature and the department will work together to take care of everyone's interests.

Number 2005

SENATOR TAYLOR brought up the subject of "off-limits" regulations once again. He noted that they were the "biggest

crunch part of these regs." He asked, "Is there any reason that the department can't provide this committee with a copy of those regs after they've come back from [the Department of] Law, and give us a reasonable period of time to review those regs before they're submitted to the lieutenant governor for signature?"

Mr. MECUM answered that he did not think there was time. He said the deadlines were extended and there was just not enough time.

Number 1917

CHAIR McGUIRE asked how many applicants the department had. She said, "your stated reason is that you have to rush because you have an application period that opened in January, so your concern apparently is for the applicants." She asked who was the rush for. Chair McGuire asked if the rush was for the applicants and if so, how many there were.

MR. MECUM told the committee that he did not know how many applicants, because the department was in the middle of the application process at the time. Mr. Mecum said he would expect quite a few. He conveyed the Department of Law's advice that failure to draft regulations would only increase the pool of litigants.

Number 1855

SENATOR TAYLOR said he did not see how two extra weeks spent in having the regulations move from the Department of Law to [Lieutenant Governor] Fran Ulmer's desk was so crucial that it could not be spared to ensure good regulations. He made it clear that he believed rushing the regulations was a "recipe for litigation." He said he was disappointed in the department for not providing enough time to review the new regulations before they became law.

CHAIR McGUIRE asked Mr. Mecum if he had answered the question of how many applications had been received to date.

MR. MECUM said that his department does not get the applications; the Department of Natural Resources gets them. He said that his department has been working hard to facilitate the completion of the regulations.

CHAIR McGUIRE said that she would call Department of Natural Resources for the names of concerned applicants, and ask

[applicants] whether it would be more desirable to wait another few months for "sound, solid regs" or to have them overnight.

Number 1719

MR. MECUM asked what a "rush job" is. He said the Administrative Procedure Act talks about a 30-day comment period. He said it is fairly subjective, but he did not believe it to be a "rush job."

CHAIR McGUIRE answered that the department had 15 years to deal with these issues.

MR. MECUM said that when he came to his job two years prior, he "got an earful" from the legislature, from "legislative audit," and from the industry that the department has to develop regulations and establish "rules of the road." He said that the department has made commitments to come up with good regulations, but now some people are not happy with them. He said he has tried to live up to the department's commitments and make a "good product."

#### **ADJOURNMENT**

There being no further business before the committee, the Joint Committee on Administrative Regulation Review meeting was adjourned at 5:57 p.m.