

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

March 20, 2001

2:45 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 Lyda Green
Senator Georgianna Lincoln

SENATE MEMBERS ABSENT

All Senate members present

OTHER LEGISLATORS PRESENT

Representative Drew Scalzi

COMMITTEE CALENDAR

KACHEMAK BAY CLOSURE TO BOTTOM MARICULTURE
(continued from 3/8/01)

PREVIOUS ACTION

No previous action to record

WITNESS REGISTER

RODGER PAINTER, Vice President
Alaskan Shellfish Growers Association
PO Box 20704
Juneau, Alaska 99802

POSITION STATEMENT: Testified on the closure of Kachemak Bay to on-bottom mariculture.

BOB HARTLEY
Alaskan Shellfish Growers Association
PO Box 2284
Homer, Alaska 99603

POSITION STATEMENT: Suggested that other management methods for the Kachemak Bay area should be reviewed.

ELLEN FRITTS, Deputy Director
Division of Habitat and Restoration,
Alaska Department of Fish & Game
PO Box 25526
Juneau, Alaska 99802-5526

POSITION STATEMENT: Recounted the process that led to the regulation [to close Kachemak Bay to on-bottom mariculture].

RON LONG
Quetekcak Shellfish Hatchery
Box 2464
Seward, Alaska

POSITION STATEMENT: Expressed concerns.

JOHN AGOSTI, President
Alaskan Shellfish Growers Association
PO Box 2284
Homer, Alaska 99603

POSITION STATEMENT: Expressed concerns.

JEFF PARKER
(No address provided.)

POSITION STATEMENT: Expressed concerns.

GARY SEIMS, President
Kachemak Shellfish Growers Cooperative
PO Box 4213
Homer, Alaska 99603

POSITION STATEMENT: Expressed concerns with the regulations banning clam farming in Kachemak Bay.

DEBBIE SEIMS, Coordinator
Kachemak Shellfish Growers Cooperative
PO Box 4213
Homer, Alaska 99603

POSITION STATEMENT: Expressed concerns with the regulations banning clam farming in Kachemak Bay.

LISA NOLAN, Owner
The Homestead Restaurant
PO Box 15282
Fritz Creek, Alaska 99603

POSITION STATEMENT: Expressed concerns with the regulations banning clam farming in Kachemak Bay.

JIM REEVES, Attorney
for the Clam Farming Industry in Kachemak Bay
1031 W. 4th Avenue
Anchorage, Alaska 99517

POSITION STATEMENT: Testified that the department simply disagrees with the [aquaculture] policy determined by the legislature.

ROBERTA HIGHLAND
Kachemak Bay Conservation Society
(No address provided.)

POSITION STATEMENT: Testified in support of the department's decision to ban on-bottom clam farming in Kachemak Bay.

ACTION NARRATIVE

TAPE 01-8, SIDE A
Number 001

CHAIR LESIL McGUIRE called the Joint Committee on Administrative Regulation Review to order at 2:45 p.m. All members were in attendance at the call to order.

KACHEMAK BAY CLOSURE TO BOTTOM MARICULTURE

CHAIR McGUIRE announced that the committee would continue its March 8, 2001, hearing regarding the closure of bottom mariculture in Kachemak Bay. She noted that on the morning of March 9, 2001, Lieutenant Governor Ulmer signed the regulations [banning on-bottom mariculture in Kachemak Bay] into law. Chair McGuire pointed out that committee members should have a letter from Lieutenant Governor Ulmer regarding the fact that she didn't have any knowledge that the committee intended to have another hearing on this issue.

CHAIR McGUIRE explained that the committee will have to decide whether or not it is the committee's intention to repeal the regulations that have been signed into law. That is the

committee's only recourse. However, in the meantime the committee will continue to hear public testimony on the matter.

Number 0303

RODGER PAINTER, Vice President, Alaskan Shellfish Growers Association, noted that the committee packet should include two letters regarding the status of the littleneck clam resource in Kachemak Bay. The information, which was compiled from [the Alaska Department of] Fish & Game surveys and harvest statistics, clearly [illustrates] there is a serious problem with the littleneck clam resource in Kachemak Bay. He said, "Unfortunately, the banning of aquatic farming in the critical habitat area (CHA) will ensure the elimination of any commercial sources of clams from the bay because I'm quite confident [that] at some point the Board of Fisheries will close the commercial harvest in Kachemak Bay." Mr. Painter remarked that all the beaches on which the department conducted surveys are far beyond commercial levels and should be closed to commercial harvesting. Mr. Painter referred to his March 9, 2001, letter that quotes Mr. James Brady, Central Regional Supervisor, Division of Commercial Fisheries, Alaska Department of Fish & Game (ADF&G), as saying that a productive clam beach has [an average density] of [at least] 65 clams per square meter, clams that are greater than legal size. The department's surveys also show that for a number of years, there have been no beaches with that level of clams.

MR. PAINTER turned to the public comment on the regulations and informed the committee that "we" were told by ADF&G that the basis for the regulations was the literature review prepared by Dr. William Hauser, Division of Habitat and Restoration, ADF&G. Several times [the Alaskan Shellfish Growers Association] requested an explanation in regard to how the department was recommending a ban when [Dr. Hauser's literature review] doesn't "do that." He remarked that it is difficult to see which sections of the literature review support a ban. The only justification from the department was that [the ban occurred] due to the department's analysis of the literature study. Mr. Painter found it interesting that the department's formal response, after the public comment period, was almost void of references to Dr. Hauser's paper. Therefore, he believed that once the study was discredited, the department backed away from that as a justification for the ban. Mr. Painter related his belief that it is unfortunate that this regulation has proceeded in this manner. He hoped that the reason the regulation was signed after the hearing wasn't to avoid this committee's

involvement in the development or final passage of the regulation, because that would be an intolerable act of arrogance.

Number 0691

SENATOR LINCOLN referred to the department's response to the concerns expressed by Dr. RaLonde and that response seems to include numerous references to literature Dr. Hauser has written in other areas.

MR. PAINTER acknowledged that he had that and felt it was a good case of shooting the messenger who is carrying a message that is disliked. Mr. Painter noted that he helped prepare an environmental assessment report regarding the Exxon Valdez littleneck clam restoration project. That report dealt with all the issues raised in [Dr. Hauser's] paper. Dr. Hauser was the lead reviewer of the Exxon Valdez report and he approved the report.

Number 0841

BOB HARTLEY, Alaskan Shellfish Growers Association, informed the committee that he is an oyster farmer and has been involved with mariculture since 1991. Although he doesn't have a clam farm nor does he intend to apply for such, he felt that there should be review of ways that allow responsible development in the Kachemak Bay area. He recalled his first visit to Kachemak Bay in 1968, when practically everyone in that area made their living from Kachemak Bay because there were shrimp, crab, halibut, and salmon. However, today there are no crab or shrimp and the trees are all dead. "As far as the bay is concerned, our stewardship has been terrible," he lamented. Kachemak Bay has been a CHA since 1972. The regulations/plan that the area currently operates under was written in 1992/1993, 21 years after the area was identified as a CHA. Although the current plan recognizes that suspended mariculture is permitted, all new applications have been suspended by ADF&G. Mr. Hartley said, "I think we need to look at our stewardship of this area. We have some distinct problems with the clam populations." Upon review of the statistics provided by ADF&G, one finds that the harvest in 1999 was about one-third of what it was in 1995, which he felt was due to a lack of clams. Furthermore, the surveys done in Kachemak Bay illustrate that the clam populations in the area are in decline. Therefore, the banning of clam farming seems to be a "futile gesture." Clam farming is actually a manner in which to produce clams on a sustained yield basis, which isn't

being done in Kachemak Bay presently. He felt that clam farming would provide a base for repopulating some of the beaches in Kachemak Bay. Returning to ADF&G's statistics, Mr. Hartley pointed out that those statistics show that the sub-legal clams in many of the areas are less numerous than the legal clams, and therefore it indicates that "we're not even replacing what's there." Thus, Mr. Hartley concluded that other management methods for this area should be reviewed.

Number 1195

SENATOR LINCOLN inquired as to what Mr. Hartley felt would have been better stewardship so that the habitat area wouldn't be in such decline. She asked whether farming clams and having them go elsewhere could have a detrimental impact on other areas or the food chain.

MR. HARTLEY replied no. He explained that the clams that will be planted, the brood stock, will be taken from Kachemak Bay within a genetic area that includes Prince William Sound. He informed the committee that the clams stay mobile in the water for about three weeks and thus can spread through great distances. The brood stock in the hatchery came from Kachemak Bay and Prince William Sound. With regard to better stewardship, Mr. Hartley said that more research could have been done. One of the problems with the management of stocks in Kachemak Bay is that things happened which people found out about after the fact. If there had been monitoring of the ecosystem on a more continuous basis, the knowledge that something was wrong would have occurred before [the species was gone].

Number 1436

SENATOR LINCOLN asked whether that is what the department is trying to do now.

MR. HARTLEY pointed out that the department has known about the clam population decline since 1995. However, the department hasn't made a proposal to the Board of Fish to reduce the clam harvest for either sport or commercial use during that time. Furthermore, the clam surveys have been rather reactionary versus being instituted by the department.

Number 1499

REPRESENTATIVE JAMES agreed with Mr. Hartley that there should've been more research. She then turned to Alaska's constitutional mandate to manage resources for common use on a sustained yield basis, which she interpreted to mean that "we" utilize these resources while maintaining them to always be available. However, the research that was done didn't seem to be done to maintain a sustained yield, but rather to not be able to harvest the clams.

MR. HARTLEY related his belief that the department's research was done in order to adjust harvest levels that led to eventually not having anything to harvest.

REPRESENTATIVE JAMES surmised that when research illustrates that there are less than the year before, then the harvest should be reduced or the growing of the crop should be increased. Therefore, both harvest reduction and increased crop are required.

MR. HARTLEY agreed.

Number 1626

CHAIR MCGUIRE turned to the issue of predator netting and explained that the department faces a broad statute that seemingly ties the department's hands in regard to predator netting. However, there is some argument that the statute was meant to limit oil and gas leasing and not address the mariculture industry. She requested that Mr. Hartley discuss some of the reports that have involved Dr. Hauser and discuss the limited impact of predator netting.

MR. HARTLEY noted that Mr. Painter alluded to the Exxon Valdez research that was performed in regard to repopulating beaches, particularly in subsistence areas of Prince William Sound, Nanwalek, and Port Graham. In conducting this project, ADF&G sponsored the project and thus Dr. Hauser and ADF&G officials went through an environmental assessment of the project, which included a discussion of the effects of predator netting on the surrounding areas. Basically, the report says that predator netting is a nonfactor and won't cause any harm to any of the animals. The predators that do utilize clams as part of their food source can utilize clams elsewhere. This report directly contradicts what Dr. Hauser included in his later [literature review].

CHAIR McGUIRE pointed out that [Exxon Valdez research that led to this] report was completed in 1995. Chair McGuire turned the gavel over to Senator Taylor.

Number 1785

REPRESENTATIVE SCALZI expressed the need for the committee to hear a bit of the comments from the Cook Inlet Keeper Program, as well as comments/ findings from the Department of Environmental Conservation (DEC) inspections of mariculture farmers.

MR. HARTLEY explained that the Cook Inlet Keeper Program is sponsored to maintain water quality in the Cook Inlet region and to ensure a very clean environment. He recalled that the program was sponsored by the oil companies as a result of problems that existed in Cook Inlet. The Cook Inlet Keeper Program is in favor of mariculture because mariculture cannot occur without clean water. Once mariculture is in an area, the water standard is established, which was borne out in court cases in the State of Washington in the late 1950s and early 1960s. Mr. Hartley reiterated the need for clean water. He also noted that DEC's PSP (paralytic shellfish poisoning) testing has, perhaps, saved several people from getting ill because products out of Kachemak Bay are tested once a week. Several times the tests have shown PSP is in the water and that results in the business being closed and warnings going out [to the public].

Number 1960

MR. HARTLEY, in response to Vice Chair Taylor, explained that there is a state-of-the-art shellfish hatchery in Seward. This hatchery was built and supported by Exxon Valdez funds, and sponsored by ADF&G. This hatchery provides an in-state source of oyster and clam spat. He thought that this hatchery is the only place in the United States where one could obtain littleneck clam spat. In further response to Vice Chair Taylor, Mr. Hartley agreed that the sale of clam spat is part of the revenue supporting the hatchery. Part of the management plan for the hatchery, as established by ADF&G, was that it had to include littleneck clams, geoducks, and purple-hinged rock scallops within its business plan. Therefore, the hatcheries business plan was predicated on that as well as oyster production. However, the department has made it very difficult for anyone to do on-bottom aquaculture. In response to Vice Chair Taylor, Mr. Hartley said that this regulation [banning on-

bottom mariculture] wouldn't shut down his operation. However, if the hatchery isn't economically viable [due to this regulation], then spat will have to be obtained from out of state again.

VICE CHAIR TAYLOR expressed concern with regard to who would purchase the spat if current and future farms are shut down. Vice Chair Taylor mentioned that he was one of those involved with forcing the money from the Exxon Valdez penalties into projects such as the Sea Life Center and the hatchery.

Number 2141

SENATOR LINCOLN referred to a document regarding the Nanwalek, Port Graham, Tititlek(ph) restoration that said, "The planting of the seed of select beaches would be initiated May of '96, would continue through November '99, and harvest of the planted clams would commence 2001 and would continue through 2004." She inquired as to the progress of this project.

MR. HARTLEY answered that the Port Graham portion of the project is going great and is on schedule. He wasn't aware of any problems with this project.

MR. PAINTER informed the committee that there were a number of test plots that were put up in different areas, some of which were located on stable beaches. Therefore, when the predator netting was put in place and the beaches shifted around, it was found that the predator netting resulted in a higher bed than the rest of the beach because the predator netting was holding the substrate in place.

VICE CHAIR TAYLOR announced that Ms. Fritts, ADF&G, was the next witness.

Number 2343

ELLEN FRITTS, Deputy Director, Division of Habitat and Restoration, Alaska Department of Fish & Game, said that she as well as others on-line were available to answer questions.

VICE CHAIR TAYLOR recalled that at the last hearing the chair made it clear that the hearing would be limited. He felt that the process was going to be ongoing and involve discussions. Therefore, he inquired as to why this is now a "fact de comple."

MS. FRITTS said that the department undertook an extensive 18-month process during which there were public meetings and multi-agency planning team [meetings] that reviewed the regulations, statute, and the state constitution. During the public comment periods, there was no significant difference in the kinds of comments the department received. Furthermore, the department provided a detailed response, dated February 6, 2001, to the committee that listed the 28 different kinds of public comments that were heard. At last week's ARR hearing nothing different was heard. Prior to the committee requesting a hearing on the matter, the regulations had been at the Department of Law for a number of weeks. Ms. Fritts said, "We just did not hear anything new and different and we did not accelerate or decelerate what the Department of Law was doing. This [is] based on a ... very clear law. We didn't stop them from doing their job."

VICE CHAIR TAYLOR remarked that it wasn't a matter of stopping the Department of Law from doing their job, but rather it was a matter of courtesy and commodity between the executive and legislative branches. "Actions that occurred ... since the last hearing, to say that's disappointing is an understatement," he said. He used the Department of Transportation & Public Facilities' struggle with airport leasing regulations as an example of how this committee worked well with a department on difficult regulations. Vice Chair Taylor said, "I was totally shocked when I was informed that those regulations had been taken to the lieutenant governor and the lieutenant governor had expedited them. I can't imagine that there's anything else occurred other than an expediting of that. To suggest that it was a matter of course and well it was going to happen anyhow, is very, very concerning, I think, to all of us."

Number 2522

SENATOR LINCOLN quoted Lieutenant Governor Ulmer's letter dated March 14, 2001, as saying, "At the time, I did not know that a specific date had been set for another hearing on these regulations." Therefore, she didn't believe that there is any fault on behalf of the lieutenant governor.

VICE CHAIR TAYLOR said he wasn't suggesting that there was any fault to be placed on the lieutenant governor's shoulders. However, whomever carried the regulations for the department to the lieutenant governor's office didn't bother to mention [the fact that another meeting on the regulations was pending]. He

reiterated his concern with the speed with which the regulations were signed into law.

Number 2630

RON LONG, Quetekcak Shellfish Hatchery, testified via teleconference. Mr. Long shared the same concerns as Vice Chair Taylor regarding the speed with which these regulations were signed into law. He expressed further concern with the department's [written] responses to Mr. RaLonde's charges. The department's response to the four invasive species found on a farm in Prince William Sound seemed to indicate that the species were introduced by the farming activities. However, that isn't the case because those species could have been introduced by any number of activities. Although Mr. Long agreed with Mr. Hartley that a little better stewardship could have been done, he noted the possibility that the critical habitat area plan may need to be revised because it has conflicting goals. The critical habitat area plan has the goal, on the one hand, of maintaining the sustained yield resource, and, on the other hand, making that resource available to all users, except farmers. Mr. Long was also troubled by the department's response regarding the drift pattern. On one hand, the department seems to say that farming activities won't enhance or seed adjacent beaches because of current patterns within the critical habitat area that will carry those seeds out of the area. However, another part of the document maintains that the [drift pattern] is important in the area so that the resulting larva from adult clams on the farm site will enhance adjacent beaches and be available for common use. Mr. Long pointed out that new information is coming in. As mentioned earlier the EVOS study and beach enhancement project show zero or near zero survival of juvenile clams without predator netting, which has been evidenced in Port Graham. "Again, it seems inconsistent to suggest that ... the fact that predator netting will be excluded in an enhancement project, suggests that the clams are a expendable resource and that again is inconsistent with the sustained yield principle." Mr. Long also pondered the urgency with which these regulations were signed. Mr. Long remarked:

The entire regulatory structure for the rest of the state is under a re-write right now; raising as many questions as it is answers. And to do a thorough analysis and get answers to those questions, is part of the process to wind up with a workable set of regulations that protects all the users, and protects the interests of the farmers as well, and allows for

enhancement project. After that process is complete, would seem to me to be the appropriate time to apply the specifics to areas such as the critical habitat area.

VICE CHAIR TAYLOR asked Mr. Long if he was concerned about the economic viability of the Quetekcak Shellfish Hatchery in light of this closure.

MR. LONG pointed out that there are no permitted littleneck clam farms in the CHA and thus the immediate impact can't be measured. However, over the future, the hatchery and applicants have anticipated being able to conduct on-bottom farming activities within a CHA, and therefore that would be critical to the [hatchery's] viability.

JOHN AGOSTI, President, Alaskan Shellfish Growers Association, testified via teleconference. He read the following testimony:

In December '99 many Alaskans testified in support of on-bottom shellfish farming in Kachemak Bay at several public hearings held by [ADF&G], specifically they were hearings ... on both personal watercraft and on-bottom farming in the Kachemak Critical Habitat Area. At the Homer hearing itself, 50 percent more people spoke in favor of on-bottom farming and ... the favorable testimony highlighted the many rehabilitative and enhancing benefits of aquatic farming. We also pointed out that the present management plan for the critical habitat [area] specifically and repeatedly discusses ... permitting aquatic farming in the bay. This January we've learned that Kachemak Bay oyster farm applicants' applications were summarily denied.

TAPE 01-8, SIDE B

MR. AGOSTI continued:

... department, to date, had involved one form of aquatic farming, that of on-bottom farming, in one specific bay, Kachemak Bay. Now we're learning that suddenly all types of aquatic farming have been banned from all critical habitat [areas] statewide. There was no public explanation or public process and this seems counter [to] the Kachemak Bay plan, which specifically discusses permitting aquatic farming

presently. I would contend that this seems to violate public process requirements of our state administrative code. I would also feel that the statutory mandate to maintain and enhance shellfish populations and their habitats in the bay is not happening. ... The littleneck clam population there experience heavy recreational and natural predation pressure with pronounced depletions or absences on various beaches This is a concern of many people, especially the residences there in the area I would say the department's own data published last summer shows that of 277 beach samples analyzed over two years on 12 different beaches, three-quarters of them had less than ten clams, legal or sub-legal clams, per square foot. And that, ... I would characterize as [a] depleted population. A quarter of those samples had zero or only one clam per square foot, which I would say is virtually nonexistent. These data show that populations are very low on many beaches around the bay Of those 277 samples, only 6 percent had clam density equal to the levels that are commonly reared on clam farms, ... which is, for reference, is about 30 to 75 legal and sub-legal clams per square foot.

MR. AGOSTI concluded:

One other point I'd like to make is that the protection of public access of the shellfish resource in the bay is mandated by the management plan, includes all Alaskans not just the few people who presently manage to get to the beaches to dig them. I think the department's policy is effectively limiting access to the relatively few who can manage to get to the beaches. ... To draw a parallel, the allocation of the majority of our state's fin fisheries operate in recognition of the principle that access for the greater public through the fin fisheries is greatly increased by the commercial fisheries supply of product to the greater public. This is being prevented by the present policy that disallows aquatic farming, which would make shellfish in the bay much more widely available to a great demand.

Finally, I would like to conclude with a comment that the department apparently wants to prevent even specific research in the habitat designed to determine

exactly what effects may occur with aquatic farming in Kachemak Bay. Twice in 1999, an application for a research project was submitted to ... investigate the ecological impacts of clam farming on a small plot of beach in Seldovia Bay that has depleted of all clams. This would have been the first research done in this specific habitat. Instead of merely reviewing literature and other areas, this research would've specifically answered questions on what real effects may happen in Kachemak Bay with clam farming. And the department twice denied that. So, I would interpret that as the department really does not want real knowledge of the effects to occur to be made public.

Number 2747

JEFF PARKER, testifying via teleconference, informed the committee that although he is a member of the Board of Alaska Sport Fishing Association and the Anchorage Fish & Game Advisory Committee, as well as Vice President of the State Council of Trout Unlimited, he is speaking on his own behalf. The aforementioned bodies haven't had an opportunity to consider this issue. On this issue, he felt that there is a difference in the existing mariculture in Kachemak Bay versus what is being proposed. The proposal is to take certain lands, for purposes of on-bottom farming, out of production as a public resource, which is different from the in-water mariculture that exists. From that he has three concerns. [He expressed concern that] the [proposal] is an appropriation of clams from public to private use and thus amounts to an exclusive use issue that could raise constitutional questions that don't arise in other forms of mariculture. Furthermore, there is the issue regarding whether or not [the state's] resources are appropriated to a specific set of people. He also expected that the Anchorage Fish & Game Advisory Committee would have concerns regarding predator nets.

MR. PARKER then turned to the issue of stewardship. He explained that most of the stewardship issues arising in Cook Inlet and Kachemak Bay arise because the resources in those areas are already fully allocated. That is the case with salmon and shellfish in those areas. The problems arising in relation to sustained yield, conservation, and public use and dividing the public use tend to arise when there is too much commercial pressure on a limited resource. In the present situation, there is a combination of commercial and recreational harvest and allocation of a wild resource to those two groups, which is

similar to the situation in the salmon fisheries. However, the proposal is different in that it would allocate certain areas of wild and reared stock to a limited set of users. Therefore, Mr. Parker felt that such a proposal would result in exclusive use. Mr. Parker reiterated that the stewardship issue usually arises when there is too much use, usually too much commercial use and thus he hoped [the committee] would think about understanding the department's actions.

Number 2566

MR. PARKER, in response to Vice Chair Taylor, affirmed that he is familiar with the area being discussed. He then turned to Vice Chair Taylor's question regarding his thoughts as to why clams in the [Kachemak Bay] area have steadily declined over the past six years. Mr. Parker informed the committee that the Board of Fisheries has closed some beaches to commercial harvest.

Number 2488

GARY SEIMS, President, Kachemak Shellfish Growers Cooperative, testified via teleconference. Mr. Seims provided the following testimony:

As the President of Kachemak Shellfish Growers Cooperative, I'm concerned by the current closure for new applications for aquatic farm sites in Kachemak Bay, as well as these regulations closing on-bottom aquatic farming. ... The diversity of product in aquatic farming is important to the success of our industry. Our environmentally friendly industry has created jobs and economic growth where there was none before. The shellfish that our cooperative members provide is the only fresh product harvested year round in Kachemak Bay for wholesale and retail seafood markets. A hundred and twenty-five thousand dollars in cooperative sales last year, is just a small percentage of what the overall potential is. We have 15 members in the cooperative who supplement their annual income with the revenues generated by these aquatic farms. The ability to diversify to allow for the farming of littleneck clams would create a more sustainable industry with the benefit of more year round jobs. Unless [the Alaska Department of] Fish & Game changes the direction they are currently going with the new regulations and closures, our members are

very concerned that the aquatic farming that we have developed over the past 12 years may not be here after the next permitting and lease renewal. The Kachemak Shellfish Growers Cooperative believes that aquatic farming is a benefit to the economic diversity of our coastal community.

Number 2395

DEBBIE SEIMS, Coordinator, Kachemak Shellfish Growers Cooperative, testified via teleconference. Ms. Seims informed the committee that she regularly receives calls from businesses wanting fresh Kachemak Bay clams. She pointed out that most of the local markets and restaurants in the [Kachemak Bay] area are forced to obtain their clams from other areas such as Puget Sound and British Columbia, Canada. Ms. Seims felt that the local markets should be able to obtain what they need year round from Kachemak Bay.

LISA NOLAN, Owner, The Homestead Restaurant, had her letter [included in the committee packet] read to the committee by Ms. Seims. Ms. Nolan's letter reads as follows:

In the nine years that we have owned The Homestead Restaurant, we have had the pleasure [of] serving fresh clams, mussels and oysters from our pristine Kachemak Bay. Our customers travel from Europe, Asia, the lower 48 and the interior of Alaska to dine with us. The well traveled customers tell us repeatedly that the shellfish is the best that they have ever enjoyed anywhere in the world, and the customer from middle American that have grown up eating Mrs. Paul's frozen fish filet take delight in eating the oysters on the half shell. This is no small feat! The Kachemak Bay shellfish are a rare and wonderful product that needs to be nurtured.

I fell that I must address the need to cultivate and support the [mariculture] in Kachemak Bay. Last week, Lieutenant Gov. Fran Ulmer signed a regulation banning clam farming in the bay. To coin an old phrase, this ... feels as though we are throwing the baby out with the bath water. Regulations are needed to keep the fisheries in check. However, banning yet another source of the economic base in our area further rocks this delicate balance. [Mariculture] has no negative impact on the waters and surrounding lands; they use

no fertilizers, pesticides or heavy equipment and the amount of acreage used is minimal.

We have watched while far too many of the other natural resources disappeared from the bay because the regulations came too late. Please, take the time to examine the situation, the area and the wonderful foods that are in our Kachemak Bay and make the regulations that will provide the avenue to keep them and the economic concerns all moving in a positive direction for us all. A reasonable and working compromise can be reached; a ban does not utilize, nor protect this Bay's bounties.

Respectfully,
Lisa S. Nolan

[Punctuation provided.]

Number 2171

JIM REEVES, Attorney for the clam farming industry in Kachemak Bay, testified via teleconference. He informed the committee that the clam farming industry is merely four individuals who reside in the Kachemak Bay area. These four individuals responded to a policy to encourage the development of aquatic farming in Kachemak Bay. That policy was adopted by the legislature, affirmed in a number of statutes, and expressed in some regulations adopted by several different departments. That policy was very clearly expressed in the Kachemak Bay Critical Habitat Area plan. Therefore, these individuals set out, over two years ago, to obtain permission from the state government to do a renewable resource project.

MR. REEVES informed the committee that he didn't believe the timing of the filing of these regulations with the lieutenant governor's office was coincidence. He saw the filing as an "end run" around this committee in the hope that the committee would find it unnecessary to scrutinize what the department had done.

MR. REEVES returned to the applications of the aforementioned four individuals. These individuals waited a year before the department issued decisions on their applications. Mr. Reeves remarked, "We now know that the department disagrees with the legislature's policy and objects to the idea of aquatic farming." After the one year wait, the department denied the

applications. Therefore, these individuals requested a hearing because under the applicable law, these individuals were entitled to a hearing by an independent hearing officer who would objectively scrutinize the situation and decide whether the department was doing what the legislature authorized. These individuals waited another year for a hearing. Now that these individuals have approached the threshold of a hearing, the department has "attempted to pull the rug out of the entire operation by categorically prohibiting an activity that the legislature ..., the state constitution ..., and that the Critical Habitat Management Plan has authorized and encouraged."

MR. REEVES turned to the issue of separation of powers and noted that he has been skeptical of the role of the legislature and this committee, and their oversight of state agencies that are administering state laws and promulgating regulations. However, he said:

This is a classic example of a department that just simply disagrees with what the legislature determined as the policy of the State of Alaska. It just plain disagrees with what the constitution and the statutes say. And rather than doing it the honest way, by coming to the legislature with a proposal to amend the law to prohibit aquatic farming, and giving the legislature the opportunity to make that policy decision, the department tried to preempt the legislature by adopting a regulation that is contrary to the statutes. And they did it a manner that was obviously, flagrantly, shamelessly designed to do an end run around this committee in the hope that they could do it without your scrutiny.

MR. REEVES related his clients' pleasure that they have this committee and its legislators taking the time to determine what happened and whether some action should be taken by the legislature in response.

Number 1841

MR. REEVES, in response to Vice Chair Taylor, affirmed that [he and his clients] are pursuing an appeal of the department's decision of the denial of permit applications under the existing statutes, regulations, and CHA management plan. That appeal is pending. He noted his belief that the department's adoption of the regulation is to "short-circuit" the appeal, in effect terminate the appeal before there is a hearing.

VICE CHAIR TAYLOR related his understanding that if that is the case, then the clients would lose even if they won the appeal because the law would've been changed to prohibit the activity of the appeal.

MR. REEVES agreed.

VICE CHAIR TAYLOR asked if the appeal was moving with some dispatch, and thus could've been a motivating factor for the department to expedite this matter.

MR. REEVES noted that the appeal was assigned to an appeal officer named Roger Dubrock(ph), a former Southeast judge. A pre-hearing conference was held with the hearing officer about three weeks ago. The next step would've been to schedule a hearing. Therefore, "the timing of this is curious," he noted.

VICE CHAIR TAYLOR announced that some committee members had to leave due to other appointments. However, he noted that he, Senator Lincoln, and Representative Scalzi were still in attendance.

Number 1720

ROBERTA HIGHLAND, Kachemak Bay Conservation Society, testified via teleconference. Ms. Highland inquired as to why there is no Homer biologist online to answer some of the questions and comments. She alluded to the notion that commercial clamming probably had something to do with the decline of clam populations. Ms. Highland wondered whether there has been any new information during this hearing process because it seems that this is rehashing things that have already been done in the prior 18 months.

MS. HIGHLAND announced that the Kachemak Bay Conservation Society supports the department's decision to ban on-bottom clam farming in Kachemak Bay for the following reasons:

[Kachemak] Bay is a critical habitat [area] and it does merit special attention. And in my opinion, clam farming flies in the face of a critical habitat designation. Also, [Kachemak] Bay is a very popular destination and is already fully utilized for clamming, fishing, and recreation, including the public beaches which would be literally placed into private ownership. Number three, private clam farms would

place existing publicly owned beaches off limits to all other clambers. The issue has had thorough study and review by [ADF&G] and extensive public review and comment. And I say, let the experts do their job. Last-minute intervention by the legislature in this process seems, to me, unwarranted and poor public process. Number six, there is no limit on how many of these permits will be issued. How much of our private beaches will be privatized for the economic interests of just a few? Who would be responsible for monitoring the impacts of these commercial clam farms? Certainly, there will not be any state money available. And, as we know, asking permit holders to monitor themselves doesn't work. So, at this point, I say that these beaches should remain public for all to use and be allowed to replenish its numbers in a natural way.

VICE CHAIR TAYLOR announced that the committee was out of time and thus he suggested that those who weren't able to provide testimony today could offer written testimony for the record.

Number 1528

SENATOR LINCOLN inquired as to the plan with regard to going forward on this. She recalled that Chair McGuire had mentioned that short of repealing the regulations, the committee can do nothing else but hear testimony.

[Upon Chair McGuire's return, Vice Chair Taylor returned the gavel to her.]

CHAIR MCGUIRE announced that she would leave it up to the committee as to whether there is interest in pursuing this. Short of legislation repealing the regulations, the committee can't do anything. However, she didn't believe that the decision to pursue this or not should be made now but rather another meeting should discuss that option in further detail.

Number 1341

SENATOR TAYLOR agreed with Chair McGuire that this issue has been rendered moot due to the actions of the department. Senator Taylor said:

I believe there's only one appropriate response to that and that's a budget we still have in front of us.

And if this legislature doesn't have the courage to assert its role as the third ... branch of government around here in light of that type of arrogance, then we all ought ... to ... stay home because you're not worth the salt to have you here. Either you're going to stand up for what this legislature is all about and assert the right of the people to have an open hearing and a decent process and have some recourse for giving direction to the executive branch, which is what we do by policy - that's why we pass these laws in the very first place -....

SENATOR LINCOLN said that although she could understand the frustration, she didn't believe that the legislature should look to further punish those that receive the benefit of the ADF&G budget. "I just beg of this committee, let's not punish our Alaskans," she requested.

Number 1197

CHAIR MCGUIRE noted that she has been asked why the Joint Committee on Administrative Regulation Review is spending so much time on mariculture. To that she pointed out that this committee's job is to oversee the regulatory process and ensure that the regulations comport with the legislature's original intent. Therefore, she felt that if legislation to repeal the regulations isn't drafted, then the committee, at the very least, should draft a letter that outlines the department's interpretation of two key statutes. Those statutes being the one dealing with the critical habitat area and the one dealing with the Aquatic Farming Act. Chair McGuire said that she is trying to interject the legislature into the process to review the intention of the aforementioned statutes. Although she understood that a process was in place with these regulations, she was disturbed that the regulations were filed when the committee raised issues. There should've been respect for the legislature to at least finish the hearing and listen to the concerns of those in Kachemak Bay whose livelihoods will be impacted. Therefore, in spite of the fact that this process may have been deemed moot, she wanted to continue the public process.

Number 0975

REPRESENTATIVE JAMES remarked that she has been involved with regulations issues for nine years and it, the [regulation] system, is a flawed system that doesn't meet public input. She

mentioned that the negotiated rulemaking law should have been utilized with this issue. Representative James emphasized that she is present to protect habitat, environment and to have clean water, air, et cetera. However, that doesn't disallow economic development. There have to be jobs to make a living in this state, and it has to be done correctly. That was precluded in this case, which is upsetting. If the committee files legislation to annul these regulations, then there will be discussion regarding [the intent of the CHAs and the Aquatic Farming Act]. She expressed her desire to [file legislation].

REPRESENTATIVE JAMES remarked that the biggest problem with the regulations process is that people testifying don't know whether anyone is listening. There is no response to the witnesses. Although she isn't happy with this situation, she acknowledged that there are always at least two sides to the story. Therefore, she noted her willingness to listen to all sides of the story, which she felt would be accomplished when there is legislation before the committee.

ADJOURNMENT

There being no further business before the committee, the Joint Committee on Administrative Regulation Review meeting was adjourned at 4:15 p.m.