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SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

WILDERNESS ACQUISITIONS, INC.,	)	
an Alaska corporation,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 1 JU 86-2429 Civ.
	)	
ALASKA DEPARTMENT OF NATURAL	)	
RESOURCES,	)	
	)	
Appellee.	)	

BRIEF OF APPELLANT

Appeal from the Decision of the Department
of Natural Resources Denying the Application
of Wilderness Acquisitions, Inc. for a Water
Use Permit

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Text (Summary) of Statutes, Regulations, Etc.

AS 46.15.133(e). A person aggrieved by the action of the commissioner or by the failure of the commissioner to grant, deny, or condition an application in accordance with (c) of this section may appeal to the superior court.

AS 44.62.560. Judicial review.

This statute is the portion of the Administrative Procedure Act which sets forth the procedure for obtaining judicial review of final agency action. Subsection (e) is most significant in this appeal. It provides:

(e) The superior court may enjoin agency action in excess of constitutional or statutory authority at any stage of an agency proceeding. If agency action is unlawfully withheld or unreasonably withheld, the superior court may compel the agency to initiate action.

AS 16.05.940(12). "fish or game farming" means the business of propagating, breeding, raising, or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means having the fish or game under positive control as in a pen, pond, or an area of land or water which is completely enclosed by a generally escape-proof barrier;

AS 46.15.145. Reservation of water.

This statute sets forth the procedure for obtaining an instream flow reservation, who may apply for such a reservation, under what circumstances it may be granted, its duration and the effect which it has on prior appropriation.

AS 46.15.050. Priority. (a) Priority of appropriation gives prior right. Priority of appropriation does not include the right to prevent changes in the condition of water occurrence, such as the increase or decrease of stream flow, or the lowering of a water table, artesian pressure, or water level, by later appropriators, if the prior appropriator can reasonably acquire his water under the changed conditions.

(b) Priority of appropriation made under this chapter dates from the filing of an application with the commissioner.

(c) Priority of appropriation perfected before July 1, 1966, shall be determined as provided in AS 46.15.065.

5 AAC 41.005 - 100. Transportation, Possession, and Release of Live Fish.

These are the regulations which establish the fish transport permit system. They set forth uniform application procedures, provide for inspection of brood stock, describe the circumstances under which a permit can be denied, prohibit importation or release of fish without a permit, require reporting of enumerated diseases and define certain terms used therein.

5 AAC 41.030(a). Permit Issuance or Denial.

See above.

5AAC 40.220(b)(2). Review and Determination.

This regulation provides for review of an application for a private non-profit hatchery permit. The relevant portion of it is set forth in the text of the brief.

5 AAC 41.010. Uniform Application Procedures.

See above.

Appellate Rules 601 - 607.

These rules set forth the procedure for appealing final agency action to the Superior Court. They supercede contrary or inconsistent provisions contained in the Administrative Procedure Act.

STATEMENT OF JURISDICTION

This jurisdiction of this court to hear and decide all matters presented by this appeal from the decision of the Commissioner dated October 14, 1986 is based upon AS 46.15.133(e), AS 44.62.560 et. seq. and Appellate Rules 601 through 607.

STATEMENT OF ISSUES

The only issue presented for review by this appeal is whether the Commissioner of the Department of Natural Resources acted in an unreasonable, arbitrary or capricious manner, contrary to law or beyond the scope of administrative authority when she denied the application of Wilderness Acquisitions, Inc. for a water use permit.

STATEMENT OF THE CASE

Early in the morning of 1985 Wilderness Acquisitions, Inc. (WAI) became interested in property offered for sale in Warm Springs Bay on Baranof Island. The property, in the estimation of WAI, was well suited for the development of an aquaculture business primarily because it was located close to the Baranof River and contained patented tidelands. Prior to submitting an offer to purchase the property, WAI contacted the Division of Land and Water Management (DLWM) to determine the amount of water in the river which was subject to prior appropriation. It learned that with the exception of several small prior claims, the water

was available for appropriation under AS 46.15. It also learned that a permit to appropriate water which had been issued to the Alaska Department of Fish and Game (ADF&G) to use water for hatchery purposes on May 24, 1978 had lapsed on November 18, 1983 because ADF&G had failed to build the required improvements and begin beneficially using water within the required time period. On September 23, 1985, WAI purchased the property for \$350,000 and began planning the development of an aquaculture facility that would produce salmon smolt for ocean ranching and ocean farming¹ and other sea farm products (R, 028-044;098-100).

On October 26, 1985, as part of this planning process, WAI requested ADF&G to undertake a management feasibility analysis under the private non-profit (PNP) hatchery regulations to determine the benefits and detriments of developing a PNP hatchery at Warm Springs Bay (R, 005).

On November 14, 1985, ADF&G advised Northern Southeast

¹The difference between ocean ranching and ocean farming is explained by William R. Heard and Thomas Kron in the article Salmon Farming which appeared in the May-June 1986 issue of the Alaska Fish & Game magazine:

...The spawning, incubation and rearing (freshwater-fry to seawater-smolt stage) of salmon is well understood and successfully practiced throughout Alaska in state and private non-profit hatcheries. Alaska's hatcheries are currently involved in "salmon ranching", aquaculture which is designed for producing anadromous returns of adult salmon (similar to wild stocks) from hatchery releases of fry and smolt. In salmon farming, smolts that are ready for life in the ocean are held captive in cages and netpens which are anchored in protected inlets and coves where there is good circulation of pristine water. Farmed salmon are fed nutritious prepared diets over a one to four-year period in netpens while growing to either marketable size or maturity.

Regional Aquaculture Association (NSRAA) that such an analysis had been requested and advised the association that it could exercise a preference right to the site for hatchery purposes (R, 008-009).

On November 18, 1985, WAI filed an application for water rights with DNR requesting a permit to appropriate 50 cfs of water from the Baranof River for the purpose of rearing Chinook salmon and generation of electrical power. This application was filed & stamped by the Southeast Regional Office of DNR but was never serialized, assigned a case number or acted upon by it, apparently being treated as superseded by the subsequent application (R, 009-015).

On December 12, 1986, ADF&G received notice that NSRAA had elected to exercise the preference right (R, 022).

On December 19, 1985, Dale Young, acting for WAI, received a license from the Department of Revenue to operate a fish farm at Warm Springs Bay (R-025).

On December 20, 1985, WAI filed an additional application requesting a permit to appropriate 200 cfs of water from the same river for the purpose of building an aquaculture facility designed to produce 7 to 10 million smolts annually for ocean ranching and ocean farming and other sea farm products including mature pen-raised chinook salmon (R, 028-044).

On January 17, 1986, Commissioner Collingsworth requested an opinion from the Department of Law on the ability of the State to develop a hatchery at a location which was the subject

of a preference right exercised by a regional aquaculture association (R, 049-051).

On January 20, 1986, ADF&G filed an application to appropriate for itself the same quantity of water requested by WAI. (This specific information appears to be absent from the record although it is obliquely referred to at 137 as one of four competing applications and at 077 where ADF&G requests "issuance of [their] rights".)

May 6, 1986, the Department of Law issued an opinion stating that ADF&G could, in effect, override the preference and develop its own hatchery at Warm Springs Bay.

On May 19, 1986, Deputy Commissioner Pennoyer advised WAI that ADF&G intended to "develop the Baranof Warm Spring site to its highest potential" (R, 075).

On May 30, 1986, ADF&G informed DLWM of this intention and requested that water rights be awarded to ADF&G instead of WAI (R, 077).

On June 12, 1986, DLWM issued a decision denying WAI's application for the requested water use permit and advising WAI of its right to appeal the decision (R, 085-086).

On July 3, 1986, WAI appealed this decision to the Commissioner (R, 087). The point on appeal before the Superior Court was raised in the appeal to the Commissioner in the brief filed by WAI (R, 089-100).

On October 14, 1986, DNR Commissioner Wunnicke affirmed the decision of DLWM (R, 107-113).

WAI appeals to the Superior Court from this determination.

STATEMENT OF STANDARD OF REVIEW

The appropriate standard of review to be applied in this proceeding is the substitution of judgment test set forth in Jager v. State, 537 P. 2d 1100 (Alaska 1975) because this appeal does not ask the Superior Court to reweigh facts or review policy choices involving agency expertise. The appellant, WAI, contends only that DNR acted contrary to the statutes and applicable administrative regulations when it denied the water use permit.

ARGUMENT

When WAI purchased the Warm Springs Bay property and applied for the right to appropriate 200 cfs of water from the Baranof River, it contemplated a multi-purpose aquaculture operation. One purpose was ocean ranching which, in this case, would have involved the production of Chinook smolts for release into the common property fishery; WAI had originally hoped to contract with the State to do this on the State's behalf as part of the mitigation effort authorized by the recent treaty with Canada. Another purpose was the production of Chinook smolts for sale to a fledgling salmon farming industry. Still another was pen raising salmon and possibly other species for sale for human consumption. The protected location of the property and the

close availability of an abundant supply of unappropriated fresh water under a sufficient head of pressure made all of the contemplated purposes realistic.

When DLWM Director Hawkins denied the application for the water use permit requested by WAI he stated:

...the Department of Fish and Game has determined that there will be no permit issued to Wilderness Acquisitions, Inc. for development of an aquaculture facility at Warm Springs Bay. Now that it is clear that no permit will be issued, Wilderness Acquisitions, Inc. does not have the ability to complete the appropriation of water applied for under LAS #4068. Therefore, pursuant to AS 46.15.080(b) (7), application number LAS #4068 is found to be not in the public interest and therefore the issuance of a water use permit is denied and the casefile closed this 12th day of June, 1986. (R, 086)

In its effort to reverse or modify this decision, WAI divided its argument into two main components:²

The first argument, in essence, was that with respect to the ocean ranching aspect of its planned operation, WAI should have a reasonable period of time in which to secure a private non-profit hatchery (PNP) permit and that the public interest under the Water Use Act, AS 46.15, could be protected by conditioning the water use permit on the ability of WAI to secure the PNP permit within a reasonable period of time. Although the statutes and regulations, give the Commissioner ample authority to issue

²A third argument dealing with administrative discretion and the political realities of aquaculture in Alaska was also addressed to the Commissioner. Since the argument was political in nature, it is not a proper subject for judicial review and is not raised on this appeal.

such a conditioned permit, she chose not to do so believing, on the basis of statements made to her by ADF&G personel, that WAI would not be able to obtain a PNP permit. This choice appears to have been made within the scope of the administrative authority delegated to her and could not successfully be appealed to this court. Since WAI cannot engage in ocean ranching without a PNP permit from ADF&G and ADF&G has indicated that no such permit is forthcoming, WAI does not contend that it can complete the appropriation by beneficially using water to rear fish that will be released into the common property fishery.

The second argument, which is the one pursued in this appeal, is that WAI does not, at this time, need a permit from ADF&G to engage in ocean farming, that it is in position to immediately begin building the improvements which will enable it to beneficially use the water for which it has applied and that WAI is entitled by law to receive a water use permit. In addressing this argument, the Commissioner stated:

Clearly the operation of a fish farm without release into the common-property fishery does not meet the highest and best use determination of ADF&G Commissioner Collingsworth. In order to operate a fish farm, it is necessary to obtain a fish transport permit from ADF&G. Since that department intends to develop the site itself, and since fish farming without releasing the fish does not meet the highest and best use determination, it is clear that WAI does not at this time have the ability to complete the proposed water appropriation by means of fish farming.
(R, 108)

It therefore appears that the logic DNR followed in denying WAI's application for a water use permit can be restated in

the following manner: Since fish farming is not the highest and best use of the Warm Springs Bay site, ADF&G will not give WAI a fish transport permit. Without that permit, WAI cannot farm fish. If WAI cannot farm fish, it cannot complete the appropriation. If it cannot complete the appropriation, the proposed appropriation is not in the public interest. If the proposed appropriation is not in the public interest, DNR is not required to issue the water use permit. WAI, for the reasons appearing below, disagrees.

Fish farming is an activity which has been specifically contemplated by the legislature. AS 16.05.940(12) defines fish or game farming as:

... the business of propagating, breeding, raising or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means having the fish or game under positive control, as in a pen, pond or area of land or water which is completely enclosed by a generally escape-proof barrier.

ADF&G has finally and reluctantly agreed that fish farming is a legal activity. In a memorandum to Assistant Attorney General Larri Spengler dated February 6, 1987, ADF&G Commissioner Collingsworth states:

The staff has reviewed existing Title 16 statutes and regulations dealing with fish farming, commercial fisheries, salmon hatcheries, research, and fish importation, transplantation and holding. That review indicates that some fish farming activities are legal, although the route one must follow through the law to reach that conclusion is complex. Other matters are not so clear. Set out below are the results of the review...

Since it appears that fish farming, in general, is a legal activity, we must then look at the legal means of obtaining the fish to be farmed....

A question that many find perplexing is how does one obtain, other than by importation, fish for placement in a farm? It seems clear to us that, at the present time, one must do this through commercial fishing operations. Since fish farming and the sale of fish to farms as brood stock are commercial operations, the taking of those fish cannot be done under sport, subsistence or personal use regulations. If one has all the proper permits and licenses, the season is open, and legal gear is used, the fish may be harvested and subsequently farmed....

Since fish farming is an authorized activity, the question becomes how and to what extent is ADF&G able to regulate such farming? In the same memorandum, Collingsworth goes on to state:

Once a brood stock is available, the Department of Revenue (DOR) licensing and DF&G permitting processes for the fish farmer are relatively simple. The farmer would apply to DF&G, under 5 AAC 41, for a permit to transport and hold live fish. We would review the proposed operation for compliance with AS 16 and 5 AAC. Upon issuance of the permit, we would then recommend that DOR issue a fish farming license.

It is therefore the apparent intention of ADF&G to use the fish transport permit as the mechanism to regulate fish farming.

The regulations which create the fish transport permit system are set forth in 5 AAC 41.005 through 100. It is immediately apparent from a reading of these regulations that their primary, if not only, purpose is to protect against the transmission of disease from one fish population to another. These regulations specifically provide that the Commissioner will issue a permit

if ADF&G determines that the proposed transport, possession or release of fish will not adversely affect the continued health and perpetuation of native, wild, or hatchery stocks of fish. 5 AAC 41.030(a). The regulations do not authorize the Commissioner to deny a fish transport permit to an applicant because ADF&G has determined that it needs for its own project the water which the applicant is in the process of acquiring. In other words, the fish transport permit system has absolutely nothing to do with hatchery site identification and reservation; it is designed to protect existing fish stocks from disease. If WAI is able to show that it can carry forward with its operations without adversely affecting existing fish stocks, it is entitled by law to have a fish transport permit issued to it.

Commissioner Wunnicke, in denying the water use permit appeal, implied that ADF&G had the authority to determine the highest and best use of a proposed site and issue or deny a fish transport permit accordingly. More specifically, she indicated that if ADF&G determined that a proposed project did not meet ADF&G's idea of what constituted the highest and best use of a particular site, it could deny an application for such a fish transport permit. This "highest and best use" test originated in an attorney general's opinion³ which dealt with the relationship between ADF&G and regional aquaculture associations when such an association had exercised a preference right to a hatchery site which ADF&G desired to develop. The opinion concluded

³Op. Atty. Gen. No. 663-86-0282; May 6, 1986

that in deciding between a private non-profit applicant for a hatchery site and itself, ADF&G was to consider which of the two would make the best use of the site's potential. This conclusion derived from the language in 5 AAC 40.220(b)(2) which states:

The operation of the proposed hatchery must make the best use of the site's potential to benefit the common property fishery. In order to achieve optimum public benefit from the state's private non-profit hatchery program and insure that the proposed hatchery is in the best interest of the public, enhancement sites must be developed to their fullest potential, with consideration to appropriate species and technological uses of the site. (emphasis added).

This regulation and the best use standard which, according to an assistant attorney general, arises in its language have absolutely nothing to do with fish farming projects. They are, by the terms of the regulation itself, limited to sites where there is competition among applicants who wish to operate private non-profit hatcheries designed to enhance the common property fishery. If Wunnicke's reasoning is carried to its logical end, ADF&G could prohibit private development of any aquaculture project in Alaska merely by determining that the highest and best use required the site to be reserved for state use. This result is not only absurd from a practical standpoint, it is entirely without legal foundation. There is no evidence that the legislature intended to confer such plenipotent power over aquaculture on ADF&G.

There exists, however, two methods by which ADF&G, when it has identified a site which it intend to develop in the future,

can act to insure that the water supply needed for the development will not be subject to private appropriation. First, it can apply for an instream reservation under AS 46.15.145. That statute authorizes DNR to reserve a specified instream flow or level of water at a particular point for purposes such as fish propagation. The reservation can be revoked when ADF&G commences enhancement at the site. A reservation will tie up the water for a minimum of 10 years. Second, ADF&G can apply for a water use permit just like anyone else. In fact, ADF&G did so in this situation not once, but twice.⁴ In other words, ADF&G had plenty of opportunity to protect its interest in the site prior to the application by WAI if it desired to do so without relying on some convoluted notion of highest and best use to sweep aside the rights of persons or organizations such as WAI who had a higher priority to the water under AS 46.15.050.

⁴The first application for water for a hatchery at Warm Springs Bay was received by DNR on May 24, 1978. It was terminated on November 18, 1983 because ADF&G failed to build the improvements necessary to begin beneficial use of the water. The second application was filed on January 14, 1986, approximately three weeks after WAI applied for the same water. Under AS 46.15.050, priority of appropriation gives prior right and priority of appropriation dates from the filing of an application for a water use permit. If, as indicated in the letter to Greg Young from Deputy Commissioner Pennoyer dated May 6, 1986 (R, 070-072), this site was identified "over ten years ago, even prior to the comprehensive planning effort in the region" as a "world class hatchery site for the production of chinook, coho and chum salmon", one wonders what form of egregious bureaucratic malfeasance allowed water rights initially dating from May 24, 1978 to revert to common property. If ADF&G had been diligent in protecting its interest in the site, WAI would have known that the water was unavailable and would not have invested \$350,000 in the property.

The only question remaining is whether WAI must obtain a fish transport permit before the water use permit can be issued. It is immediately obvious from a reading of the regulations set forth in 5 AAC 41.005 through 100, that it would be premature and meaningless for DNR to require WAI or any other water use permit applicant at a similar stage of project development to obtain a fish transport permit before issuing the water use permit. For example, the regulation governing the content of the application for a fish transport permit, 5 AAC 41.010, requires the applicant to submit, among other information, identification of the stock to be transported or possessed, the number of fish and their life history, stage or age and a statement on the health or condition of the fish, including a disease history of the stock, any hatchery through which they may have passed and, possibly, a brood stock inspection certificate. It is going to be at least two years from the date the water use permit is granted before WAI's facility will be ready for operation. WAI has no way of being able to know what brood stock will be available at that time (particularly where, as here, the gametes will probably be acquired through commercial fishing) and if it did, the disease history of the stock could change before the facility is operable. Acquisition of a fish transport permit should be one of the last things a fish farmer does before beginning operation. DNR has no reasonable interest in and, in fact, would be proceeding in a counterproductive manner by requiring that the fish transport permit be obtained before issuing the

water use permit.

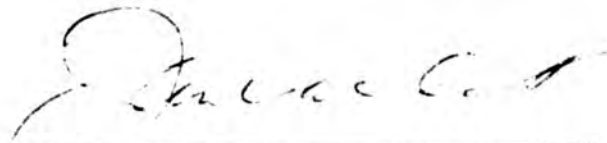
CONCLUSION

DNR denied WAI's application for a water use permit because it concluded that WAI would not be able to complete the appropriation. In so doing, it reasoned that WAI could not complete the appropriation because it would not be able to obtain a fish transport permit.

WAI is the owner of patented tidelands and an easement for a pipeline to the Bannock River. The necessary water is available for appropriation. In order to develop the planned fish farming facility, WAI must acquire a water use permit. In order to operate the facility, it must acquire a fish farm license from the Department of Revenue and a fish transport permit from ADF&G. It already has the license and will be entitled to receive the fish transport permit after the facility is completed and an acceptable brood stock is identified. WAI has done everything which it is able to do and which can be legally required of it at this time. WAI has the intent and the ability to complete the appropriation. WAI is therefore entitled to receive a water use permit from DNR.

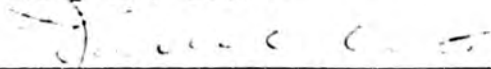
This court should therefore reverse the decision of Commissioner Wunnicke and, under the authority of AS 44.62.560(e), order DNR to issue to WAI the water use permit for which it applied.

Respectfully submitted this 23rd day of February, 1987.



Jan Van Dort
Attorney For Appellant

I hereby certify that a true and correct copy of the foregoing Brief of Appellant was served on the State of Alaska by delivery thereof to the office of Assistant Attorney General Joseph W. Geldhof on February 23, 1987.



Jan Van Dort

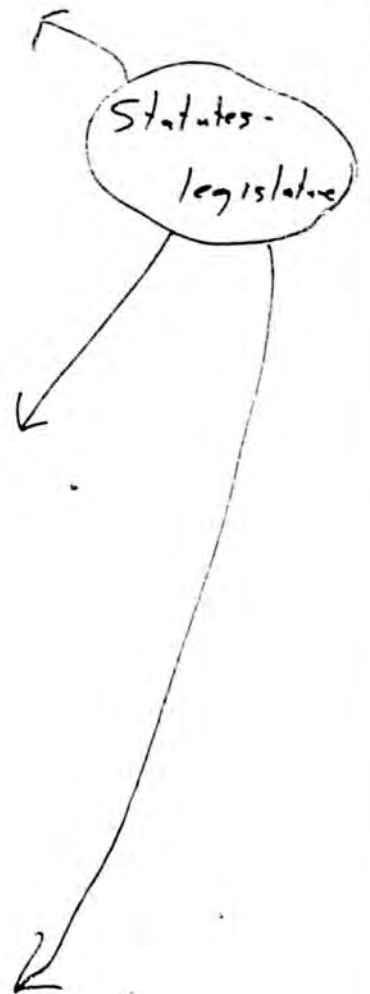
§ 16.05.940

(12) "fish or game farming" means the business of propagating, breeding, raising, or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means having the fish or game under positive control, as in a pen, pond, or an area of land or water which is completely enclosed by a generally escape-proof barrier;

§ 16.05.340

(14) Fish or game farming license 100

Sec. 16.05.920. Certain acts made unlawful. (a) Unless permitted by this chapter or by regulation adopted under this chapter, a person may not take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game or marine aquatic plants, or any part of fish, game or aquatic plants, or a nest or egg of fish or game.



As submitted by Larri Spangler
Statutes re: fish farming

(1)

§ 16.05.340

(b) The commissioner of fish and game may issue without cost a permit to collect fish and game, including fur animals, subject to limitations and provisions that are appropriate, for a scientific, propagative, or educational purpose. In addition, the commissioner shall issue a permit for the collecting of wild fur animals for improving the genetic stock of fur farm animals. Permits issued under this subsection shall be in accordance with current sustained yield management practices for the species of wild game for which the permit is requested. The annual permit fee for an Alaska resident to collect wild fur animals for fur farming purposes is the same as the fee for resident trappers.

Statutes-
legislature

16.05.940 (9) "fish" includes eggs ("any stage of its life cycle")

Sec. 16.40.010. Disposition of surplus buffalo and musk oxen.

Whenever it is determined by the Department of Fish and Game that a surplus exists in the herds of buffalo and musk oxen under its control, the department may, under regulations adopted by it, grant the surplus or portions of it to persons, groups, associations, partnerships, or

corporations for the purpose of raising and breeding the animals as domestic stock for commercial purposes, or for scientific and educational purposes. A person, group, association, partnership, or corporation may receive animals only after proving to the satisfaction of the Department of Fish and Game

- (1) intent to raise and breed the animals; and
- (2) possession of facilities for maintaining the animals under positive control. (§ 1 ch 15 SLA 1962)

AS 16.05.251

(a) The Board of Fisheries may adopt regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.05.02) for

(9) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;

State - legislative

5 AAC 41.001. APPLICATION OF THIS CHAPTER. The provisions of this chapter govern the transportation, possession, or release of live fish transplanted for or cultivated for human consumption or sport fishing purposes, or as part of an aquaculture program for scientific, educational or propagative purposes. Unless specifically provided, the provisions of this chapter do not apply to the transportation, possession, or release of fish taken for commercial, sport, or subsistence purposes.

5 AAC 41.005. PERMIT REQUIRED. (a) No person may transport, possess, export from the state, or release into the waters of the state, any live fish unless the person holds a fish transport permit issued by the commissioner or his authorized designee, and the person is in compliance with all conditions of the permit and the provisions of this chapter. A fish transport permit will be issued for a fixed term subject to the provisions of (c) of this section.

5 AAC 41.070. PROHIBITIONS ON IMPORTS AND RELEASE OF LIVE FISH. (a) Except as provided in (b) and (c) of this section, no person may import any live fish into the state for purposes of stocking or rearing in the water of the state.

(b) Live oysters originating from locations other than Korea, the Gulf of Mexico, and the Atlantic Coast of North America, may be imported for aquaculture purposes and may be released into the waters of the state only pursuant to a permit required by this chapter. Live oysters native to and originating from Korea, the Gulf of Mexico, or the Atlantic Coast of North America may be imported for aquaculture purposes pursuant to a permit required by this chapter and released into the waters of the state only if:

(1) the brood stock is derived from oysters commercially cultured on the Pacific Coast of North America through three or more generations; and

(2) the disease history or an inspection indicates no incidence of disease that is not indigenous to Alaska.

(c) Ornamental fish not raised for human consumption or sport fishing purposes may be imported into the state, but may not be reared in or released into the waters of the state. Fish wastes and waste water from ornamental fish may not be released directly into the waters of the state.

regulations - board

statute -
legislature

Sec. 16.05.930. Exempted activities. (a) This chapter does not prevent the collection or exportation of fish and game, a part of fish or game or a nest or egg of a bird for scientific or educational purposes, or for propagation or exhibition purposes under a permit which the department may issue and prescribe the terms thereof.

dept.

(b) This chapter does not prohibit a person from taking fish or game during the closed season, in case of dire emergency, as defined by regulation adopted by the appropriate board.

(c) AS 16.05.920 does not prohibit rearing and sale of fish from private ponds, the raising of wild animals in captivity for food or the raising of game birds for the purpose of recreational hunting; on (OR) game hunting preserves, under regulations adopted by the appropriate board. In this subsection, "animals" includes all animal life, including insects and bugs.

board

(d) Nondomestic animals of any species may not be transferred or transported from the state under (a) of this section unless approved by the Board of Game in regular or special meeting. Animals transferred or transported under (a) of this section shall be animals that are

certified by the department to be surplus and unnecessary to the sustained yield management of the resource. Each application for a permit under (a) of this section shall be accompanied by a statement prepared by the Department of Fish and Game examining the probable environmental impact of the action.

(e) This chapter does not prevent the traditional barter of fish and game taken by subsistence hunting or fishing, except that the commissioner may prohibit the barter of subsistence-taken fish and game by regulation, emergency or otherwise, if a determination on the record is made that the barter is resulting in a waste of the resource, damage to fish stocks or game populations, or circumvention of fish or game management programs.

(f) A permit may not be required for possessing, importing or exporting mink and fox for fur farming purposes. (§ 28 art 1 ch 94 SLA 1959; am § 1 ch 7 SLA 1972; am § 2 ch 104 SLA 1972; am § 4 ch 82 SLA 1974; am §§ 16, 17 ch 206 SLA 1975; am § 1 ch 20 SLA 1976; am § 13 ch 151 SLA 1978; am § 4 ch 23 SLA 1983)

Statute -
legislature

Sec. 16.10.420. CONDITIONS OF A PERMIT. The department shall require, in a permit issued to a hatchery operator, that:

(1) salmon eggs procured by the hatchery must be from the department or a source approved by the department;

(2) no salmon eggs or resulting fry be placed in waters of the state other than those specifically designated in the permit;

(3) no salmon eggs or resulting fry, sold to a permit holder by the state or by another party approved by the department, may be resold or otherwise transferred to another person;

(4) no salmon be released by the hatchery before department approval, and, for purposes of pathological examination and approval, the department shall be notified of the proposed release of salmon at least 15 days before the date of their proposed release by the hatchery;

(5) diseased salmon be destroyed in a specific manner and place designated by the department;

(6) adult salmon be harvested by hatchery operators only at specific locations as designated by the department;

(7) surplus eggs from salmon returning to the hatchery be made available for sale first to the department and then, after inspection and approval by the department, to operators of other hatcheries authorized by permit to operate under §§ 400 - 470 of this chapter;

(8) if surplus salmon eggs are sold by a permit holder to another permit holder, a copy of the sales transaction be provided to the department;

(9) Repealed by § 5 ch 110 SLA 1980.

(10) a hatchery be located in an area where a reasonable segregation from natural stocks occurs, but when feasible, in an area where returning hatchery fish will pass through traditional salmon fisheries.
(§ 2 ch 111 SLA 1974)

MEMORANDUM

State of Alaska

MAR 16 1987

TO: Hon. Don W. Collinsworth
Commissioner
Department of Fish & Game

DATE: March 10, 1987

FILE NO: 661-87-0360

TELEPHONE NO:

THRU:

SUBJECT: State authority to
permit and manage
fish farming

Grace Berg Schaible
Attorney General

FROM: Sarah E. McCracken *SEM*
Assistant Attorney General
Natural Resources-Anchorage

Your memorandum of February 6, 1987, sets out various statutory and regulatory provisions relating to fish farming and requests our legal advice regarding whether your department may authorize and regulate fish farming in the manner outlined in your memorandum.

Our summary response is that under existing law the Department of Fish and Game ("department") does have authority to allow fish farming essentially as set out in your memorandum. As you know, however, there is pending legislation (SB 106 and HB 108) that would significantly alter the existing responsibilities and authorities of the department. Our analysis follows.

As noted in 1985 Inf. Op. Att'y Gen. (Jan. 31; 663-84-0187), fish farming is an activity that is expressly contemplated by the legislature. AS 16.05.340(a)(14) and AS 16.05.360 provide for issuance of a \$200 fish farming license, and AS 16.05.940(14) defines "fish farming" as:

the business of propagating, breeding, raising, or producing fish ... in captivity for the purpose of marketing the fish ... or their products, and "captivity" means having the fish ... under positive control, as in a pen, pond, or an area of land or water which is completely enclosed by a generally escape-proof barrier; 1/

1/ Similar provisions for fish farming were included in the first Alaska fish and game code. See sec. 2(u), art. I, ch. 94, SLA 1959 (definition of "fish farming"); sec. 2 (15), art. II, ch. 94, SLA 1959 (fish farming license fee).

Hon. Don W. Collinsworth
Commissioner
Department of Fish & Game
661-87-0360

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In addition, AS 16.05.930 specifies that AS 16.05.920 (which generally prohibits possession and sale of fish or game unless authorized by state law) does not prohibit "the rearing and sale of fish from private ponds ... under regulations adopted by the appropriate board." 2/

Fish farming is to be distinguished from the activity of operating a salmon hatchery, which latter activity is separately provided for by statute, AS 16.10.375--AS 16.10.475. The primary difference between fish farming and operating a salmon hatchery is that in the former fish are not released into the wild, but are kept in captivity under "positive control." AS 16.05.940(14). See generally 1985 Inf. Op. Att'y Gen. (Jan. 31; 663-84-0187).

Reading the above statutory provisions together as a whole, it is clear that the activity of fish farming is one that the legislature intended to allow. 3/ As you noted in your memorandum, however, the question then arises of how a potential fish farmer may acquire fish for the farming project. Obviously there are two sources of fish: imported or in-state.

Turning first to the availability of fish within the state, one must look at three possibilities: fish from the wild, hatchery fish, and fish from other fish farms. With respect first to fish from the wild, as you noted in your memorandum the Commissioner of Fish and Game ("Commissioner") has authority to issue permits for collecting fish "for scientific, propagative, or educational purposes." AS 16.05.340(b). This authority is also reflected in AS 16.05.930(a), which specifies that AS 16.05:

does not prevent the collection or exportation of fish ... or a part of fish ... for scientific or educational purposes, or for propagation or exhibition purposes under a permit which the

2/ This section is virtually identical to that in the first Alaska fish and game code, sec. 28, art. I, ch. 94, SLA 1959.

3/ Although the business of fish farming is as yet basically undeveloped industry, it has existed for a long time. See, e.g., 2 Alaska Compiled Laws §39-2-7 (1949), allowing lease of water bottoms for oyster cultivation.

Hon. Don W. Collinsworth
Commissioner
Department of Fish & Game
661-87-0360

March 10, 1987
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department may issue and prescribe the terms thereof. 4/

You noted in your memorandum that it is a long-standing department policy that fish collected under a department collecting permit cannot be sold, bartered, or used for human consumption. This "policy" is consistent with legal advice given to you previously indicating that commercial uses are not included within the purposes for AS 16.05.340(b) collecting permits. See 1986 Inf. Op. Att'y Gen. (Nov. 14; 661-87-0149) at 6; see also 1985 Inf. Op. Att'y Gen. (Jan. 31; 663-84-0187) at 3. 5/ Thus, a person desiring to establish a commercial fish farm could not, absent legislative amendment, acquire fish under an AS 16.05.340(b) collecting permit. Similarly, a potential fish farmer could not obtain fish from an existing private fish hatchery because under AS 16.10.420(3) and (7), hatchery fry and eggs may only be sold

4/ As we noted in 1986 Inf. Op. Att'y Gen. (Nov. 14; 661-87-0149) at 4 n.2, AS 16.05.340(b) does not list the additional permit purpose of "exhibition" that is specified in AS 16.05.930(a); however, we view exhibition purposes as being included within scientific, propagative, or educational purposes and thus find the two statutory provisions compatible.

5/ We note here that AS 16.05.340(b) and AS 16.05.930(a) are susceptible to a broader reading that would allow commercial use of fish or game taken under a collecting permit. The term "propagating" in AS 16.05.340(b) is not restrictively defined and could be viewed as including breeding for commercial sale. This interpretation may be strengthened by the fact that AS 16.05.340(b) also directs the Commissioner to issue a permit to collect wild fur animals for improving genetic stock on commercial fur farms. (Although we note that there is no parallel provision requiring issuance of a permit for collecting fish for fish farms). We believe, however, that the stronger argument is that the terms "scientific," "propagative," and "educational" in AS 16.05.340(b) should be read as addressing similar purposes, and that "propagative," in the context of "scientific" or "educational" purposes, does not include commercial uses. See generally, 2A J. Singer, Sutherland Statutory Construction §47.16 at 161 (1984) (principle or noscitur a sociis, that associated words are to be construed similarly).

Hon. Don W. Collinsworth
Commissioner
Department of Fish & Game
661-87-0360

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to another hatchery or to the department - - not to a fish farmer. This provision does not, however, apply to sale of fish from a fish farm. Thus, if there were an existing permitted fish farm in the state, that fish farmer could sell brood stock to another fish farmer.

As you correctly note in your memorandum, the one available source for fish within the state is from a commercial season. AS 16.05.930(c) expressly allows the board of fisheries to authorize the rearing and sale of fish from private ponds, and AS 16.05.251(a)(2) allows the board to regulate seasons and areas for the taking of fish. Also, AS 16.05.251(a)(7) allows the board to govern "use, disposal, propagation and stocking of fish." Under these broad powers, the board of fisheries could authorize and regulate the taking of fish for establishment of fish farms, so long as the board's regulations were consistent with constitutional provisions such as managing fish on the sustained yield basis (article VIII, section 4 of the Alaska Constitution). 6/ The board could set a special fishery for collection of fish for fish farms, or, as you noted in your memorandum, fish could be taken during a normal commercial fishery (assuming the commercial fishery timing and lawful gear made this practical). 7/

6/ As already articulated in 1985 Inf. Op. Att'y Gen. (Jan 31; 663-84-0187), fish farming does not violate article VIII, section 15 of the Alaska Constitution, prohibiting exclusive rights or special privileges of fishing.

7/ Because a person taking fish for fish farming would be possessing and transporting live fish, the person would presumably be required, under 5 AAC 41.005, to have a fish transport license. 5 AAC 41.005 requires any person who transports, possesses, exports, or releases a fish into state waters to have a fish transport permit. 5 AAC 41.001, however, provides that the fish transport license requirement applies only to the "transportation, possession, or release of live fish transplanted for or cultivated for human consumption or sport fishing purposes, or as part of an aquaculture program for scientific, educational, or propagative purposes." That section further provides that the fish transport license does not apply to transportation, possession, or release of fish taken for commercial, sport, or subsistence purposes. We believe the term

Hon. Don W. Collinsworth
Commissioner
Department of Fish & Game
661-87-0360

March 10, 1987
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You state in your memorandum that "since fish farming and the sale of fish to farms as brood stock are commercial operations, the taking of those fish cannot be done under sport, subsistence, or personal use fishing regulations." We agree. Unless authorized by statute or regulation, fish may not be sold (AS 16.05.920(a)), and the only sale of fish (other than ornamental fish) that is authorized by law is sale of commercial fish (AS 16.10.265--AS 16.10.296). The definitions of "personal use" (5 AAC 77.001(f) and AS 16.05.940(23)), "sport fishing" (AS 16.05.940(27)), and "subsistence uses" (AS 16.05.940(30)), do not encompass taking fish for commercial fish farming.

The second possible source for brood stock for fish farms is imported fish. Fish may be imported only as allowed by statute or regulation. AS 16.05.920(a). Under present regulations, only ornamental fish and certain oysters may be imported into Alaska. 5 AAC 41.070. 8/ This regulation could, however, be amended by the board of fisheries to allow importation of fish for fish farming brood stock if the board found that there could be adequate controls to protect indigenous species from fish disease.

"cultivated for human consumption" probably is broad enough to encompass fish transported and held for fish farming purposes, and that the exemption for fish taken for commercial, sport, or subsistence purposes probably does not apply to fish held at fish farms. To the extent that there may be any ambiguity regarding the applicability of the fish transport permit requirement, this can easily be clarified by the board of fisheries.

8/ We note here that any prohibition on importation of fish used in commercial enterprises must be based on a factually supportable legitimate state concern for the health and welfare of the state's resources or its people - - it cannot be based on protectionist economic reasons, and the prohibition against importation must be the least discriminatory option available. See Maine v. Taylor, 106 S. Ct. 2440 (1986) (upholding Maine ban on importing baitfish based on need to protect native species from disease). C.f. Hughes v. Oklahoma, 441 U.S. 322 (1979) (striking down Oklahoma ban on export of minnows, finding ban to discriminate impermissibly against interstate commerce.)

Hon. Don W. Collinsworth
Commissioner
Department of Fish & Game
661-87-0360

March 10, 1987
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In summary, fish farming could be accommodated under existing statutory authorities. The Department of Revenue could issue a fish farming permit under AS 16.05.340(a)(14), and your department could allow a fish farmer to obtain and keep brood stock by issuing a permit under 5 AAC 41 (to possess live fish) and by allowing the fish farmer to collect fish either during a normal commercial fishery or in a new fishery to be established by the board under AS 16.05.251(a). 9/

Alternatively, fish farming could be accommodated through legislative action, such as amending AS 16.05.340(b) and AS 16.05.930(a) to authorize the Commissioner to issue collecting permits for fish farming. 10/

If you have additional questions, or would like assistance in developing appropriate regulatory changes or in addressing the specific provisions in SB 106 and HB 108 relating to fish farming, please let us know.

SEM/jmo

cc: Steven Pennoyer
Normal Cohen
Ken Parker
Stan Moberly
Bob Clasby
Tom Kron
Larri I. Spengler

9/ Fish farmers would of course still have to comply with other applicable licensing and permitting requirements, such as AS 14.43 and Department of Environmental Conservation provisions, 18 AAC 34.

10/ Legislation presently pending in the Alaska legislature, SB 106 and HB 108, would make significant changes in the statutory framework discussed in this memorandum. In particular, the bills would shift major authority and responsibility over fish farming from your department to the Department of Commerce & Economic Development.

ALASKA STATE LEGISLATURE - SENATE

SENATOR RICHARD I. ELIASON

RULES COMMITTEE, CHAIRMAN
LABOR & COMMERCE COMMITTEE, VICE-CHAIRMAN
LEGISLATIVE COUNCIL
RESOURCES COMMITTEE
FISHERIES SUBCOMMITTEE, CHAIRMAN



P.O. BOX 143
SITKA, ALASKA 99835
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4916

MEMORANDUM

TO: Don W. Collinsworth, Commissioner
Dept. of Fish and Game

FROM: Sen. Dick Eliason *Dick Eliason*

DATE: March 23, 1987

RE: State authority to permit and manage fish farming

The Attorney General's office March 10, 1987, memorandum to you states that under existing law the Department of Fish and Game does have the authority to allow fish farming.

I would strongly urge the Dept. of Fish and Game not to issue any permits or expedite any applications until the Legislature has had ample time to review the issue. We are in the process of conducting hearings on Senate Bill 106 and House Bill 108.

If we're going to have salmon farming in Alaska, we should enter into it in a manner that is consistent with sound public policy.

MEMORANDUM

State of Alaska

TO: Hon. Don W. Collinsworth
Commissioner
Department of Fish & Game

DATE: March 10, 1987

FILE NO: 661-87-0360

TELEPHONE NO:

THRU:

SUBJECT: State authority to
permit and manage
fish farming

Grace Berg Schaible
Attorney General

FROM: Sarah E. McCracken ^{SEM}
Assistant Attorney General
Natural Resources-Anchorage

Your memorandum of February 6, 1987, sets out various statutory and regulatory provisions relating to fish farming and requests our legal advice regarding whether your department may authorize and regulate fish farming in the manner outlined in your memorandum.

Our summary response is that under existing law the Department of Fish and Game ("department") does have authority to allow fish farming essentially as set out in your memorandum. As you know, however, there is pending legislation (SB 106 and HB 108) that would significantly alter the existing responsibilities and authorities of the department. Our analysis follows.

As noted in 1985 Inf. Op. Att'y Gen. (Jan. 31; 663-84-0187), fish farming is an activity that is expressly contemplated by the legislature. AS 16.05.340(a)(14) and AS 16.05.360 provide for issuance of a \$200 fish farming license, and AS 16.05.940(14) defines "fish farming" as:

the business of propagating, breeding, raising, or producing fish ... in captivity for the purpose of marketing the fish ... or their products, and "captivity" means having the fish ... under positive control, as in a pen, pond, or an area of land or water which is completely enclosed by a generally escape-proof barrier; 1/

1/ Similar provisions for fish farming were included in the First Alaska fish and game code. See sec. 2(u), art. I, ch. 94, SLA 1959 (definition of "fish farming"); sec. 2 (15), art. II, ch. 94, SLA 1959 (fish farming license fee).

Hon. Don W. Collinsworth
Commissioner
Department of Fish & Game
661-87-0360

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In addition, AS 16.05.930 specifies that AS 16.05.920 (which generally prohibits possession and sale of fish or game unless authorized by state law) does not prohibit "the rearing and sale of fish from private ponds ... under regulations adopted by the appropriate board." 2/

Fish farming is to be distinguished from the activity of operating a salmon hatchery, which latter activity is separately provided for by statute. AS 16.10.375--AS 16.10.475. The primary difference between fish farming and operating a salmon hatchery is that in the former fish are not released into the wild, but are kept in captivity under "positive control." AS 16.05.940(14). See generally 1985 Inf. Op. Att'y Gen. (Jan. 31; 663-84-0187).

Reading the above statutory provisions together as a whole, it is clear that the activity of fish farming is one that the legislature intended to allow. 3/ As you noted in your memorandum, however, the question then arises of how a potential fish farmer may acquire fish for the farming project. Obviously there are two sources of fish: imported or in-state.

Turning first to the availability of fish within the state, one must look at three possibilities: fish from the wild, hatchery fish, and fish from other fish farms. With respect first to fish from the wild, as you noted in your memorandum the Commissioner of Fish and Game ("Commissioner") has authority to issue permits for collecting fish "for scientific, propagative, or educational purposes." AS 16.05.340(b). This authority is also reflected in AS 16.05.930(a), which specifies that AS 16.05:

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Hon. Don W. Collinsworth
Commissioner
Department of Fish & Game
661-87-0360

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Hon. Don W. Collinsworth
Commissioner
Department of Fish & Game
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Page 4

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Hon. Don W. Collinsworth
Commissioner
Department of Fish & Game
661-87-0360

March 10, 1987
Page 5

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8/ We note here that any prohibition on importation of fish used in commercial enterprises must be based on a factually supportable legitimate state concern for the health and welfare of the state's resources or its people - - it cannot be based on protectionist economic reasons, and the prohibition against importation must be the least discriminatory option available. See Maine v. Taylor, 106 S. Ct. 2440 (1986) (upholding Maine ban on importing baitfish based on need to protect native species from disease). C.f. Hughes v. Oklahoma, 441 U.S. 322 (1979) (striking down Oklahoma ban on export of minnows, finding ban to discriminate impermissibly against interstate commerce.)

Hon. Don W. Collinsworth
Commissioner
Department of Fish & Game
661-87-0360

March 10, 1987
Page 6

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Alternatively, fish farming could be accommodated through legislative action, such as amending AS 16.05.340(b) and AS 16.05.930(a) to authorize the Commissioner to issue collecting permits for fish farming. 10/

If you have additional questions, or would like assistance in developing appropriate regulatory changes or in addressing the specific provisions in SB 106 and HB 108 relating to fish farming, please let us know.

SEM/jmo

cc: Steven Pennoyer
Normal Cohen
Ken Parker
Stan Moberly
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Larri I. Spengler

9/ Fish farmers would of course still have to comply with other applicable licensing and permitting requirements, such as AS 14.43 and Department of Environmental Conservation provisions, 18 AAC 34.

10/ Legislation presently pending in the Alaska legislature, SB 106 and HB 108, would make significant changes in the statutory framework discussed in this memorandum. In particular, the bills would shift major authority and responsibility over fish farming from your department to the Department of Commerce & Economic Development.

ALASKA STATE LEGISLATURE - SENATE

SENATOR RICHARD I. ELIASON

LABOR & COMMERCE COMMITTEE, VICE-CHAIRMAN
LEGISLATIVE COUNCIL, VICE-CHAIRMAN
FINANCE COMMITTEE
RESOURCES COMMITTEE



PO BOX 143
SITKA, ALASKA 99835

P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4916

March 25, 1987

Grace Berg Schaible, Attorney General
P.O. Box K
Juneau, AK 99811

Dear Attorney General:

The Legislature is currently working on the issues surrounding mariculture development in Alaska. Of particular concern is the debate over whether or not the pen-rearing of salmon (fish farming) should be allowed and encouraged.

Some have suggested the option of passing legislation which would divide the state into several geographic areas and only allow fish farming in one or several areas, while prohibiting it in others. My question is this; would such legislation be legally acceptable?

I would very much appreciate an opinion on this from the Attorney General's Office as soon as possible as our debates on this issue are currently underway and we must reach some decisions soon.

Sincerely,

A handwritten signature in cursive script that reads "Dick Eliason".

Senator Dick Eliason

MEMORANDUM

State of Alaska

DEPARTMENT OF FISH AND GAME

TO: Larri Spengler
Assistant Attorney General
Department of Law

DATE: February 6, 1987

FILE NO.:

TELEPHONE NO.: 465-4100

SUBJECT: Fish Farming

FROM: Don W. Collinsworth *DWC*
Commissioner
Department of Fish and Game

In recent months there have been an increasing number of questions as to what is legal and not legal in conducting fish farming operations. I would appreciate your assistance in analyzing existing law on the subject. There is an immediate need to clarify what can and cannot be legally done now and begin discussions on how best to clarify any ambiguous matters.

The staff has reviewed existing Title 16 statutes and regulations dealing with fish farming, commercial fisheries, salmon hatcheries, research, and fish importation, transplantation, and holding. That review indicates that some fish farming activities are legal, although the route one must follow through the law to reach that conclusion is complex. Other matters are not so clear. Set out below are the results of the review.

I would very much appreciate your timely comments on our conclusions, as well as any suggestions for needed changes. All indications are that fish farming legislation will be introduced early this session; therefore, both departments need to be prepared to deal with the legal issues involved under existing law and any proposed in legislation.

Collecting Permits

The department has issued what are commonly referred to as "collecting permits" [AS 16.05.340 (b)] to initiate cooperative efforts with other public agencies and the private sector involved in mariculture projects. While such permits are appropriate for conducting mariculture research projects, they are not appropriate for initiating commercial ventures. The statute indicates that the permit is to be limited to scientific, propagative, and educational purposes. It has been a long standing policy that fish taken under these permits may not be sold, bartered, or used for human consumption.

We prefer to stop issuing collecting permits to private individuals involved in scallop mariculture research. Many of these people believe that by receiving these permits they are grandfathering themselves into a fishery. Such is not the case. Additionally, we feel that there are other legal

avenues that can be used to establish commercial ventures associated with farming of scallops, as well as some other species.

Fish Farming License

The Department of Revenue, under AS 16.05.340 (a)(14) may issue a fish farming license. Fish farming, by definition [AS 16.05.940 (12)] is a commercial activity, thus allowing one to sell the products of the operation. The farming operation must conform to the statutory definition, e.g. the fish must be held in positive control and enclosed in an escape-proof barrier. By informal agreement, the Department of Revenue does not issue fish farming licenses without approval from the Department of Fish and Game. This policy is predicated on the fact that we are the agency that administers the laws that govern the taking or importation of the fish species that would be farmed. This policy ensures that fish farming activities are biologically and legally sound. With the growth of mariculture, the existing policy should be formalized.

Stocking Fish Farms

Since it appears that fish farming, in general, is a legal activity, we must then look at the legal means of obtaining the fish to be farmed. Those fish can be imported or obtained instate. Most of our experience has been with imported species, so I will cover those first.

The importation, transportation, and possession of live fish are covered by the regulations found in 5 AAC 41. 5 AAC 41.001 and 5 AAC 41.070 limit importation to ornamental fish. No other species of fish may be imported for use in fish farming.

A question that many find perplexing is how does one obtain, other than by importation, fish for placement in a farm? It seems clear to us that, at the present time, one must do this through commercial fishing laws. Since fish farming and the sale of fish to farms as brood stock are commercial operations, the taking of those fish cannot be done under sport, subsistence, or personal use fishing regulations. If one has all the proper permits and licenses, the season is open, and legal gear is used, the fish may be harvested and subsequently farmed. For the most part, this is clearly the case for shellfish. The case is not so clear for finfish. 5 AAC 37.900 prohibits the transplantation of aquatic plants for the purpose of farming of the plant.

no.
system

Procedures Under Current Law

The following lays out how we might handle requests for fish farms and associated operations under current laws. We would ask the individuals to discuss their operation with the local area management biologist, as well as FRED Division staff. They would review the request and route their recommendations up through channels. The farmer or fisherman would then, if he so desires, start the process of obtaining the needed permits and licenses. The processes, licenses, and permits will differ depending on species involved and whether the operation is to gather brood for sale to farms or the farming of purchased brood. Those who obtain their own brood stock will need to follow a combined process.

One who only takes fish to sell as brood stock would follow, with some possible exceptions, the process followed by typical commercial fishermen. The brood stock supplier would obtain an interim-use or entry permit from Commercial Fisheries Entry Commission (CFEC) for the species and gear types needed. He could then harvest those species during the normal open season provided by regulation. This will work fine for some species; particularly those without size limits, those for which the season is open during a period when individuals of the desired age are available, and those for which appropriate gear can be used. In some instances, seasons could be adjusted to allow the taking of juveniles or larva. Under AS 16.05.050 (10), the commissioner could approve the issuance of a CFEC permit for a new gear type, such as scallop spat collecting bags, which could be used to capture larvae or juveniles. Additional controls could be placed on brood stock fisheries through permitting processes. For most invertebrates and some bottom fish, this could be done through existing regulations such as 5 AAC 38.062. For other species, seasons for taking under the conditions of a permit issued by the department could be opened by emergency order. We have used this approach in the past to initiate experimental-type fisheries.

Once a brood stock is available, the Department of Revenue (DOR) licensing and DF&G permitting process for the fish farmer are relatively simple. The farmer would apply to DF&G, under 5 AAC 41, for a permit to transport and hold live fish. We would review the proposed operation for compliance with AS 16 and 5 AAC. Upon issuance of the permit, we would then recommend that DOR issue a fish farming license.

As I indicated earlier, the above processes can currently be used to handle most fish farming and brood stock requests. The process is not easily deduced by the public, and for that matter some staff, and is rather complex in

Larri Spengler

-4-

February 6, 1987

implementing. If you agree that the processes as outlined are legal, we could then develop a document that explains those processes in a logical clear manner. Additionally, your analysis and comments on the process will be invaluable in assisting the legislature in development of clear fish farming policy and statutes.

cc: Steven Pennoyer
Ken Parker
Tom Kron

MEMORANDUM

State of Alaska

TO: Hon. Don Collinsworth
Commissioner
Dept. of Fish and Game

DATE: January 31, 1985

FILE NO: 366-187-84

NORMAN C. GORSUCH
Attorney General

TELEPHONE NO: 465-3600

FROM: ^{LIS} By: Larri I. Spengler
Assistant Attorney General
Department of Law

SUBJECT: Marine net pen
salmon rearing

You have asked whether marine net pen salmon rearing is authorized under current fish and game statutes and regulations, and if it is not, what steps would be needed to do so. As discussed below, it appears that fish farming would not pose any constitutional problems, but that it is not now statutorily authorized.

As explained by your department, marine net pen salmon rearing differs from the private nonprofit hatchery program authorized and governed by AS 16.10.375 -- 16.10.475 in that the salmon are not released into the open ocean where they are subject to the common property fishery. Additionally, the salmon are not hatched from eggs as part of the operation, but rather smolts are reared in enclosures that either float or are grounded on the ocean bottom under state or federal leases. The salmon in the enclosures are placed there by the operator of the fish farm.

Fish farming is clearly contemplated by existing statutes. It is defined in AS 16.05.940(12) as

the business of propagating, breeding, raising, or producing fish ... in captivity for the purpose of marketing the fish ... or their products, and "captivity" means having the fish ... under positive control, as in a pen, pond, or an area of land or water which is completely enclosed by a generally escape-proof barrier.

A fish farming license costs \$100 and is to be obtained from the Department of Revenue. AS 16.05.340(a)(14); AS 16.05.360.

Just after statehood, the attorney general's office determined that salmon farming as defined now in AS 16.05.940(12) would not violate the Alaska Constitution. 1959 Inf. Op. Att'y Gen. (June 10; Gregg). The question arose because article VIII, section 15, of the Alaska Constitution provides in part:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

This provision is "based on section 1 of the White Act of June 6, 1924, 43 Stat. 464, under which Alaska's fisheries were regulated prior to Alaska's statehood." Bozanich v. Reetz, 297 F. Supp. 300, 306 (D. Alaska 1969), rev'd on other grounds sub nom Reetz v. Bozanich, 397 U.S. 82 (1970). The leading case considering the White Act is Hynes v. Grimes Packing Co., 337 U.S. 86 (1949), which noted:

Congress did not propose that these rich fishing grounds should be monopolized ... [t]he legislative history of the White Act only emphasizes what the statute clearly says, that is, no special privileges in Alaskan fishing preserves.

337 U.S. at 120. The case enjoined a closure of certain Alaskan waters to fishing by all but residents of the Karluk Indian reservation and their licensees. It is that kind of exclusive right or special privilege that article VIII, section 15, is designed to prohibit; no fishing opportunity may be made available to a closed class. As the court in Hynes noted, the provision prohibits a grant to a single individual, corporation, or any special group or number of people. 337 U.S. at 122.

In the case of marine net pen salmon rearing, the opportunity to operate a fish farm would not be available only to an established, closed class of individuals. It is not an exclusive right or special privilege of fishery as envisioned by article VIII, section 15. The salmon farming would occur as an exercise of a property right, via state or federal leases. Salmon already legally reduced to possession would be raised in water leased by the operator, within "a generally escape-proof barrier." AS 16.05.940(12).

An analysis of whether tidelands fishery leases for commercial set nets violate article VIII, section 15, is helpful in evaluating the constitutionality of fish farming. The attorney general's office has concluded that leasing tideland sites for commercial set net fishing does not create an exclusive right or special privilege of fishery. 1963 Op. Att'y Gen. No. 3 (March 13). This conclusion is based on the fact that what is granted is a property right, not a right of fishery. */ The same would be true of a state or federal lease to use marine waters. In fact, for fish farming the conclusion that article VIII, section 15, is not violated is even clearer than for set net sites, because the salmon raised in the net pens would have been already legally reduced to possession.

*/ Similarly, the lease of tidelands and submerged lands for shellfish culture involves a property right, not an exclusive right of fishery. 1983 Inf. Op. Att'y Gen. (Sept. 26; 366-119-84).

Honorable Don Collinsworth
Commissioner
Department of Fish and Game
Our File No. 366-187-84

January 31, 1985
Page 3

However, there is no mechanism under current fish and game statutes for smolts to be legally reduced to possession to transfer to rearing pens. Currently, no person may possess live fish without a permit from the Commissioner of Fish and Game. Permits may be used for transportation, possession, and release of live fish for "human consumption or sport fishing purposes" or for "scientific, educational or propagative purposes." AS 16.-05.340(b); 5 AAC 41.001 and 5 AAC 41.005. Raising salmon for sale -- commercial purposes -- is not encompassed. The salmon to be reared in marine fish farms in state waters may not be imported from outside Alaska. 5 AAC 41.070(a); compare with 5 AAC 39.-975(13) and 5 AAC 75.995(31) (defining "waters of Alaska"). Further, they could not be purchased from hatcheries within the state, for AS 16.10.420 prohibits sale or transfer of eggs or fry from hatcheries to anyone other than the department or other hatcheries.

Because of the existing statutory framework, there is no legal basis for regulations that would authorize the acquisition from hatcheries within the state of smolts for rearing and eventual commercial sale. In order to accomplish such a result, a mechanism for obtaining the smolts would need to be enacted, such as an amendment to AS 16.10.420 regarding possible sale of hatchery fry. Alternatively, the Board of Fisheries under AS 16.65.251(9) could amend 5 AAC 41.070 to allow importation of smolts. Further, in either case, the board would need to amend 5 AAC 41 under AS 16.05.251 to authorize release and possession of the smolts in the marine pens, for rearing and eventual sale.

In summary, marine net pen salmon rearing would not constitute an exclusive right or special privilege of fishery, but is not currently authorized by fish and game statutes and regulations.

LIS:dlm

cc: Steve Pennoyer
Norman Cohen
Stan Moberly
Kevin Duffy

MEMORANDUM

State of Alaska

TO: Steve Pennoyer
Deputy Commissioner
Department of Fish and Game

DATE: December 11, 1984

FILE NO: 366-187-84

Norman C. Gorsuch
Attorney General

TELEPHONE NO: 465-3600

FROM: ^{LIS}
By: Larri Irene Spengler
Assistant Attorney General
Department of Law

SUBJECT: Marine net pen
salmon rearing

Attached is a draft response to your department's request for an opinion on whether marine net pen salmon rearing is currently authorized. I would appreciate any suggestions or comments in the next two weeks, after which time the memorandum will be issued.

Thank you.

LIS:d1m

Attachment

cc w/attachment: Norman Cohen
Stan Moberly ✓
Kevin Duffy

DEC 13 1984

366-187-84 [66DC84] Dorian

Hon. Don Collinsworth
Commissioner
Dept. of Fish and Game

December 13, 1984

366-187-84

Norman C. Gorsuch
Attorney General

465-3600

By: Larri I. Spengler
Assistant Attorney General
Department of Law

Marine net pen
salmon rearing

You have asked whether marine net pen salmon rearing is authorized under current fish and game statutes and regulations, and if it is not, what steps would be needed to do so. As discussed below, it appears that fish farming is not prohibited currently, and that it does not pose any constitutional problems.

As explained by your department, marine net pen salmon rearing differs from the private nonprofit hatchery program authorized and governed by AS 16.10.375-475 in that the salmon are not released into the open ocean where they are subject to the common property fishery. The rearing takes place in enclosures that either float or are grounded on the ocean bottom under state or federal leases. The salmon in the enclosures are propagated and placed there by the operator of the fish farm.

Fish farming is clearly contemplated by existing statutes. It is defined in AS 16.05.940(12) as:

the business of propagating, breeding, raising, or

Honorable Don Collinsworth
Commissioner
Department of Fish and Game
Our File No. 366-187-84

December 13, 1984
Page 2

..... producing fish ... in captivity for the purpose of marketing the fish ... or their products, and "captivity" means having the fish ... under positive control, as in a pen, pond, or an area of land or water which is completely enclosed by a generally escape-proof barrier.

A fish farming license costs \$100 and is to be obtained from the Department of Revenue. AS 16.05.340(a)(14); AS 16.05.360.

Just after statehood, the Attorney General's Office determined that salmon farming as defined now in AS 16.05.940(12) would not violate the Alaska Constitution. 1959 Inf. Op. Att'y Gen. (June 10, Gregg). The question arose because article VIII, section 15 of the Alaska Constitution provides in part:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

This provision is "based on section 1 of the White Act of June 6, 1924, 43 Stat. 464, under which Alaska's fisheries were regulated prior to Alaska's statehood." Bozanich v. Reetz, 297 F.Supp. 300, 306 (D. Alaska 1969), reversed on other grounds, sub nom Reetz v. Bozanich, 397 U.S. 82 (1970). The leading case considering the White Act is Hynes v. Grimes Packing Co., 337 U.S. 86, (1949), which noted:

Congress did not propose that these rich fishing

Honorable Don Collinsworth
Commissioner
Department of Fish and Game
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Page 3

grounds should be monopolized ... the legislative history of the White Act only emphasizes what the statute clearly says, that is, no special privileges in Alaskan fishing preserves.

337 U.S. at 120. The case enjoined a closure of certain Alaskan waters to fishing by all but residents of the Karluk Indian reservation and their licensees. It is that kind of exclusive right or special privilege that article VIII, section 15 is designed to prohibit; no fishing opportunity may be made available to a closed class. As the court in Hynes noted, the provision prohibits a grant to a single individual, corporation, or any special group or number of people. 377 U.S. at 122.

In the case of marine net pen salmon rearing, the opportunity to operate a fish farm would not be available only to an established, closed class of individuals. It is not an exclusive right or special privilege of fishery as envisioned by article VIII, section 15. The salmon farming would occur as an exercise of a property right, via state or federal leases. Salmon already legally reduced to possession for propagative purposes under a permit from the Commissioner of Fish and Game pursuant to AS 16.50.340(b) and 5 AAC 41.005 would be raised in water leased by the operator, within "a generally escape-proof barrier." AS 16.05.940(12).

Honorable Don Collinsworth
Commissioner
Department of Fish and Game
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December 13, 1984
Page 4

An analysis of whether tidelands fishery leases for commercial set nets violate article VIII, section 15, is helpful in evaluating the constitutionality of fish farming. The Attorney General's Office has concluded that leasing tideland sites for commercial set net fishing does not create an exclusive right or special privilege of fishery. 1983 Op. Att'y Gen. No. 3 (March 13). This conclusion is based on the fact that what is granted is a property right, not a right of fishery 1/ The same would be true of a state or federal lease to use marine waters. In fact, for fish farming the conclusion that article VIII, section 15, is not violated is even clearer than for set net sites, because the salmon in the net pens would have been propagated from fish already legally reduced to possession.

As noted above, the Commissioner of Fish and Game issues permits for transportation, possession, and release of live fish for "scientific, educational or propagative purposes." AS 16.05.340(b); 5 AAC 41.001 and 005. The salmon to be used for propagative purposes in marine fish farms in state waters may not be imported from outside Alaska. 5 AAC 41.070(a); compare 5 AAC

1/ Similarly, the lease of tidelands and submerged lands for shellfish culture involves a property right, not an exclusive right of fishery. 1983 Inf. Op. Att'y Gen. (Sept. 26; 366-119-84).

Honorable Don Collinsworth
Commissioner
Department of Fish and Game
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Page 5

39.975(13) and 5 AAC 75.995(31) (defining "waters of Alaska").
The decision to issue a permit to transport, possess, or release
live fish is made based on considerations of the continued health
and perpetuation of native, wild, or hatchery stocks. See 5
AAC 41.005(c)(1); 5 AAC 41.010(a)(5) (6) and (9); 5 AAC 41.020; 5
AAC 41.030; 5 AAC 41.050 and 5 AAC 41.080.

In summary, marine net pen salmon rearing is not pro-
hibited by current fish and game statutes and regulations, and
would not constitute an exclusive right or special privilege of
fishery.

LIS:dlm

cc: Steve Pennoyer
Norman Cohen
Stan Moberly
Kevin Duffy

MEMORANDUM

State of Alaska

TO: Norman C. Gorsuch
Attorney General
Department of Law

DATE: October 5, 1983

FILE NO:

TELEPHONE NO: 465-4100

FROM: Don W. Collinsworth *DWC*
Commissioner
Department of Fish and Game

SUBJECT: Opinion Request on
Net Pen Rearing of
Salmon in Alaska

There is a growing concern within the fishing industry about the possibility of fish farming in the marine environment as a new form of salmonid aquaculture in the State of Alaska. This aquaculture would be performed by utilizing net-pens to rear salmon to a marketable size.

Private nonprofit salmon ranching is presently permitted and is being conducted through the Private Nonprofit (PNP) Hatchery Program, in addition to State-operated facilities. This salmon ranching program is administered through the FRED Division.

Fish farming licenses are presently available through the Department of Revenue. However, these licenses have been issued only for shellfish farming operations, (e.g., oyster farming.)

A major distinction between salmon ranching and salmon farming is that farming does not entail any release of salmon into the open ocean where they become subject to the common property fishery. Instead, salmon are raised in net pens until the point where they are harvested and sold. This leads us to a second distinction, which is the fact that salmon farming is a profit-making venture, whereas private salmon ranching in the State of Alaska is permissible only under a nonprofit corporation status.

Accordingly, I would appreciate your advice concerning two important questions:

- I. Can net-pen rearing of salmon (farming) be allowed under present PNP regulations and statutes governing the operations of salmon ranching or under fish farming licenses issued by the Department of Revenue?
- II. If present law does not allow for the development of salmon farming in the marine environment, what would have to be done in order for this activity to be legal in the State?

Thank you for your consideration of these questions regarding the potential operation of salmon farming as a form of salmonid aquaculture in the State of Alaska. If you need additional information on this request, please contact Stan Moberly, FRED Division Director.

MEMORANDUM

State of Alaska

TO: Hon. Don Collinsworth
Commissioner
Dept. of Fish and Game

DATE: January 31, 1985

FILE NO: 366-187-84

Norman C. Gorsuch
Attorney General

TELEPHONE NO: 465-3600

FROM: ^{LIS} By: Larri I. Spengler
Assistant Attorney General
Department of Law

SUBJECT: Marine net pen
salmon rearing

You have asked whether marine net pen salmon rearing is authorized under current fish and game statutes and regulations, and if it is not, what steps would be needed to do so. As discussed below, it appears that fish farming would not pose any constitutional problems, but that it is not now statutorily authorized.

As explained by your department, marine net pen salmon rearing differs from the private nonprofit hatchery program authorized and governed by AS 16.10.375 -- 16.10.475 in that the salmon are not released into the open ocean where they are subject to the common property fishery. Additionally, the salmon are not hatched from eggs as part of the operation, but rather smolts are reared in enclosures that either float or are grounded on the ocean bottom under state or federal leases. The salmon in the enclosures are placed there by the operator of the fish farm.

Fish farming is clearly contemplated by existing statutes. It is defined in AS 16.05.940(12) as

the business of propagating, breeding, raising, or producing fish ... in captivity for the purpose of marketing the fish ... or their products, and "captivity" means having the fish ... under positive control, as in a pen, pond, or an area of land or water which is completely enclosed by a generally escape-proof barrier.

A fish farming license costs \$100 and is to be obtained from the Department of Revenue. AS 16.05.340(a)(14); AS 16.05.360.

Just after statehood, the attorney general's office determined that salmon farming as defined now in AS 16.05.940(12) would not violate the Alaska Constitution. 1959 Inf. Op. Att'y Gen. (June 10; Gregg). The question arose because article VIII, section 15, of the Alaska Constitution provides in part:

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Honorable Don Collinsworth
-Commissioner
Department of Fish and Game
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Page 1

This provision is "based on section 1 of the White Act of June 6, 1924, 43 Stat. 464, under which Alaska's fisheries were regulated prior to Alaska's statehood." Bozanich v. Reetz, 297 F. Supp. 300, 306 (D. Alaska 1969), rev'd on other grounds sub nom Reetz v. Bozanich, 397 U.S. 82 (1970). The leading case considering the White Act is Hynes v. Grimes Packing Co., 337 U.S. 86 (1949), which noted:

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337 U.S. at 120. The case enjoined a closure of certain Alaskan waters to fishing by all but residents of the Karluk Indian reservation and their licensees. It is that kind of exclusive right or special privilege that article VIII, section 15, is designed to prohibit; no fishing opportunity may be made available to a closed class. As the court in Hynes noted, the provision prohibits a grant to a single individual, corporation, or any special group or number of people. 377 U.S. at 122.

In the case of marine net pen salmon rearing, the opportunity to operate a fish farm would not be available only to an established, closed class of individuals. It is not an exclusive right or special privilege of fishery as envisioned by article VIII, section 15. The salmon farming would occur as an exercise of a property right, via state or federal leases. Salmon already legally reduced to possession would be raised in water leased by the operator, within "a generally escape-proof barrier." AS 16.05.940(12).

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*/ Similarly, the lease of tidelands and submerged lands for shellfish culture involves a property right, not an exclusive right of fishery. 1963 Inf. Op. Att'y Gen. (Sept. 26; 366-119-64).

Honorable Don Collinsworth
Commissioner
Department of Fish and Game
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January 31, 1985
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However, there is no mechanism under current fish and game statutes for smolts to be legally reduced to possession to transfer to rearing pens. Currently, no person may possess live fish without a permit from the Commissioner of Fish and Game. Permits may be used for transportation, possession, and release of live fish for "human consumption or sport fishing purposes" or for "scientific, educational or propagative purposes." AS 16.05.340(b); 5 AAC 41.001 and 5 AAC 41.005. Raising salmon for sale -- commercial purposes -- is not encompassed. The salmon to be reared in marine fish farms in state waters may not be imported from outside Alaska. 5 AAC 41.070(a); compare with 5 AAC 39.975(13) and 5 AAC 75.995(31) (defining "waters of Alaska"). Further, they could not be purchased from hatcheries within the state, for AS 16.10.420 prohibits sale or transfer of eggs or fry from hatcheries to anyone other than the department or other hatcheries.

Because of the existing statutory framework, there is no legal basis for regulations that would authorize the acquisition from hatcheries within the state of smolts for rearing and eventual commercial sale. In order to accomplish such a result, a mechanism for obtaining the smolts would need to be enacted, such as an amendment to AS 16.10.420 regarding possible sale of hatchery fry. Alternatively, the Board of Fisheries under AS 16.65.251(9) could amend 5 AAC 41.070 to allow importation of smolts. Further, in either case, the board would need to amend 5 AAC 41 under AS 16.05.251 to authorize release and possession of the smolts in the marine pens, for rearing and eventual sale.

In summary, marine net pen salmon rearing would not constitute an exclusive right or special privilege of fishery, but is not currently authorized by fish and game statutes and regulations.

LIS:dln

cc: Steve Pennoyer
Norman Cohen
Stan Moberly
Kevin Duffy

No source
for fry:
hatcheries/leg
import/bds

No permit
currently
for this purpose
(5AAC 41)

§ 16.05.940

(12) "fish or game farming" means the business of propagating, breeding, raising, or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means having the fish or game under positive control, as in a pen, pond, or an area of land or water which is completely enclosed by a generally escape-proof barrier;

Statutes -
legislative

§ 16.05.340

(14) Fish or game farming license 100

Sec. 16.05.920. Certain acts made unlawful. (a) Unless permitted by this chapter or by regulation adopted under this chapter, a person may not take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game or marine aquatic plants or any part of fish, game or aquatic plants, or a nest or egg of fish or game.

2

§ 16.05.340

7 (b) The commissioner of fish and game may issue without cost a permit to collect fish and game, including fur animals, subject to limitations and provisions that are appropriate, for a scientific, propagative, or educational purpose. In addition, the commissioner shall issue a permit for the collecting of wild fur animals for improving the genetic stock of fur farm animals. Permits issued under this subsection shall be in accordance with current sustained yield management practices for the species of wild game for which the permit is requested. The annual permit fee for an Alaska resident to collect wild fur animals for fur farming purposes is the same as the fee for resident trappers.

Statutes-
legislature

16.05.940 (9) "fish" includes eggs ("any stage of its life cycle")

Sec. 16.40.010. Disposition of surplus buffalo and musk oxen. Whenever it is determined by the Department of Fish and Game that a surplus exists in the herds of buffalo and musk oxen under its control, the department may, under regulations adopted by it, grant the surplus or portions of it to persons, groups, associations, partnerships, or corporations for the purpose of raising and breeding the animals as domestic stock for commercial purposes, or for scientific and educational purposes. A person, group, association, partnership, or corporation may receive animals only after proving to the satisfaction of the Department of Fish and Game

- (1) intent to raise and breed the animals; and
- (2) possession of facilities for maintaining the animals under positive control. (§ 1 ch 15 SLA 1962)

AS 16.05.021

(a) The boards of fisheries may adopt regulations to administer
divisions in accordance with the Administrative Procedure Act and

State - legislative

prohibiting and restricting the live fish,
possession, transport, or release of exotic fish or their
eggs

5 AAC 41.001. APPLICATION OF THIS CHAPTER. The provisions of
this chapter govern the transportation, possession, or release of live fish
transplanted for or cultivated for human consumption or sport fishing pur-
poses, or as part of an aquaculture program for scientific, educational or
propagative purposes. Unless specifically provided, the provisions of this
chapter do not apply to the transportation, possession, or release of fish
taken for commercial, sport, or subsistence purposes.

5 AAC 41.005. PERMIT REQUIRED. (a) No person may transport,
possess, export from the state, or release into the waters of the state, any
live fish unless the person holds a fish transport permit issued by the com-
missioner or his authorized designee, and the person is in compliance with
all conditions of the permit and the provisions of this chapter. A fish
transport permit will be issued for a fixed term subject to the provisions of
(c) of this section.

regulations -
board

5 AAC 41.070. PROHIBITIONS ON IMPORTS AND RELEASE OF LIVE FISH. (a) Except as provided in (b) and (c) of this section, no person may
import any live fish into the state for purposes of stocking or rearing in the
water of the state.

(b) Live oysters originating from locations other than Korea, the Gulf
of Mexico, and the Atlantic Coast of North America, may be imported for
aquaculture purposes and may be released into the waters of the state only
pursuant to a permit required by this chapter. Live oysters native to and
originating from Korea, the Gulf of Mexico, or the Atlantic Coast of North
America may be imported for aquaculture purposes pursuant to a permit
required by this chapter and released into the waters of the state only if:

(1) the brood stock is derived from oysters commercially
cultured on the Pacific Coast of North America through three or more
generations; and

(2) the disease history or an inspection indicates no incidence of
disease that is not indigenous to Alaska.

(c) Ornamental fish not raised for human consumption or sport fishing
purposes may be imported into the state, but may not be reared in or
released into the waters of the state. Fish wastes and waste water from or-
namental fish may not be released directly into the waters of the state.

statute-
legislation

Sec. 16.05.930. Exempted activities. (a) This chapter does not prevent the collection or exportation of fish and game, a part of fish or game or a nest or egg of a bird for scientific or educational purposes, or for propagation or exhibition purposes under a permit which the department may issue and prescribe the terms thereof.

dept.

(b) This chapter does not prohibit a person from taking fish or game during the closed season, in case of dire emergency, as defined by regulation adopted by the appropriate board.

(c) AS 16.05.920 does not prohibit bearing and sale of fish from private ponds, the raising of wild animals in captivity for food or the raising of game birds for the purpose of recreational hunting in (A) game hunting preserves, under regulations adopted by the appropriate board, or the raising of animals for the purpose of raising and selling for food.

board

(d) Nondomestic animals of any species may not be transferred or transported from the state under (a) of this section unless approved by the Board of Game in regular or special meeting. Animals transferred or transported under (a) of this section shall be animals that are

certified by the department to be surplus and unnecessary to the sustained yield management of the resource. Each application for a permit under (a) of this section shall be accompanied by a statement prepared by the Department of Fish and Game examining the probable environmental impact of the action.

(e) This chapter does not prevent the traditional barter of fish and game taken by subsistence hunting or fishing, except that the commissioner may prohibit the barter of subsistence-taken fish and game by regulation, emergency or otherwise, if a determination on the record is made that the barter is resulting in a waste of the resource, damage to fish stocks or game populations, or circumvention of fish or game management programs.

(f) A permit may not be required for possessing, importing or exporting mink and fox for fur farming purposes. (§ 28 a: 1 ch 94 SLA 1959; am § 1 ch 7 SLA 1972; am § 2 ch 104 SLA 1972; am § 4 ch 82 SLA 1974; am §§ 16, 17 ch 206 SLA 1975; am § 1 ch 20 SLA 1976; am § 13 ch 151 SLA 1978; am § 4 ch 23 SLA 1983)

Statute -
legislature

Sec. 16.10.420. CONDITIONS OF A PERMIT. The department shall require in a permit issued to a hatchery operator, that:

(1) salmon eggs procured by the hatchery must be from the department or a source approved by the department;

(2) no salmon eggs or resulting fry be placed in waters of the state other than those specifically designated in the permit;

(3) no salmon eggs or resulting fry, sold to a permit holder by the state or by another party approved by the department, may be resold or otherwise transferred to another person;

(4) no salmon be released by the hatchery before department approval, and, for purposes of pathological examination and approval, the department shall be notified of the proposed release of salmon at least 15 days before the date of their proposed release by the hatchery;

(5) diseased salmon be destroyed in a specific manner and place designated by the department;

(6) adult salmon be harvested by hatchery operators only at specific locations as designated by the department;

(7) surplus eggs from salmon returning to the hatchery be made available for sale first to the department and then, after inspection and approval by the department, to operators of other hatcheries authorized by permit to operate under §§ 400 - 470 of this chapter;

(8) if surplus salmon eggs are sold by a permit holder to another permit holder, a copy of the sales transaction be provided to the department;

(9) Repealed by § 5 ch 110 SLA 1980.

(10) a hatchery be located in an area where a reasonable segregation from natural stocks occurs, but when feasible, in an area where returning hatchery fish will pass through traditional salmon fisheries. (§ 2 ch 111 SLA 1974)

MEMORANDUM

State of Alaska

Department of Law

TO: Hon. Don Collinsworth
Commissioner
Department of Fish and Game

DATE: July 8, 1987

FILE NO.: 663-87-0454

THRU: TELEPHONE NO.: 465-3600

SUBJECT: Current scope of permits to hold live fish

FROM: ^{LIS} Larri Irene Spengler
Assistant Attorney General
Natural Resources Section

You have asked whether the Department of Fish and Game currently has authority under 5 AAC 41.005 to issue a permit to hold live fish for commercial mariculture purposes. Under current law a person cannot hold live fish for that or any other purpose without a permit issued under that regulation. The regulation, which governs issuance of permits to hold live fish, is quite ambiguous with respect to whether a permit could be issued for mariculture purposes. However, as discussed below, it probably does not authorize a permit for that purpose. Although not free from doubt, we believe that, without regulatory action by the Board of Fisheries or legislative action re-structuring department and board authorities and mandates, the department probably does not currently have authority to issue a permit to hold live fish for commercial fish farming.

The existing statutes and regulations pertaining to fish farming have been discussed in two relatively recent memoranda from the Attorney General's Office, attached. 1985 Inf. Op. Att'y Gen. (Jan. 31; 663-84-0187); 1987 Inf. Op. Att'y Gen. (Mar. 10; 661-87-0360). The 1985 memorandum concluded that there were no constitutional problems posed by mariculture and that it was statutorily provided for as a legal possibility, rather than a legal mandate. That memorandum also explained that fish farmers could not obtain stock from hatcheries in the state because AS 16.10.240 limits transfer of hatchery eggs to other hatcheries and the department. Further, that memorandum noted that fish farmers generally could not import stock from out of the state because 5 AAC 41.070 prohibits importing any live fish (defined in AS 16.05.940(10) to include eggs) other than oysters or ornamental fish.

The 1987 memorandum reiterated those conclusions, and in answer to the department's inquiry, agreed that it was possible that fish farmers could obtain stock from a commercial harvest. However, that memorandum also noted that in order to hold those fish for mariculture a permit would be needed under 5 AAC 41.005. The memorandum further explained that it was not clear whether a permit could be issued for those purposes as the regulation was written, but that the board had the authority to clarify it. The ambiguity is described in footnote 7 on pages 4 and 5 of the 1987 memorandum.

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You have now asked how the department should interpret the scope of 5 AAC 41.005, until and unless it is clarified by the board. The question is whether the board intended that a 5 AAC 41.005 permit could be issued for commercial purposes, such as fish farming.

Under AS 16.05.920(a), a person may not possess fish unless authorized by statute or regulation. This is reinforced by AS 16.05.930(c), which states that AS 16.05.920 does not prohibit rearing and sale of fish from private ponds under regulations adopted by the board. The board is given the authority in AS 16.05.251(a)(9) to regulate possession of live fish and eggs. Thus, unless the board has allowed possession of fish for a commercial purpose, it is unlawful to hold them in a commercial fish farm.

The purposes for which the board has said a permit to hold live fish may be issued by the department are listed in 5 AAC 41.001, but these do not include "commercial" uses. As discussed in the 1987 memorandum, the only listed purpose that might be construed to include commercial mariculture is "human consumption." ^{1/} We have reviewed the regulatory history of that regulation, in the form of tape number 42 from the Board of Fisheries January 1981 board meeting, and the accompanying log notes to attempt to help resolve the ambiguity. Unfortunately, major portions of that tape are inaudible because of a loud hum superimposed over the discussions. Specifically, the portion of the meeting during which the board went through the proposed regulations governing the transport and possession of live fish is virtually completely inaudible, although from the earlier portions of the tape some clues can be gained about board intent.

The proposed regulations at that January 1981 meeting (which included 5 AAC 41.001 and 5 AAC 41.005) were referred to during the discussion as "fish disease regulations." At the outset, staff of the department explained to the board that these regulations were being proposed because of a bill that passed the legislature in 1980, ch. 110, SLA 1980, relating "to fish disease control and the cost of fish inspections." That legislation

^{1/} Questions might arise over whether "commercial purposes" are encompassed by the language of 5 AAC 41.001, "as part of an aquaculture program for scientific, educational, or propagative purposes." As explained in footnote 5 on page 3 of the 1987 memorandum, we believe they are not.

clarified in AS 16.05.251(a) that the Board of Fisheries not only had the authority to adopt regulations concerning the extent and effect of "predation and competition among fish" and exercising necessary control measures, but also could properly be concerned about "the extent and effect of disease" among fish of the state. Sec. 1, ch. 110, SLA 1980; AS 16.05.251(a)(8). Further, not only could the board prohibit the "live capture, possession, transfer, or release" of fish or their eggs, but it was clarified that the board could also regulate those activities. Sec. 2, ch. 110, SLA 1980; AS 16.05.251(a)(9). The remainder of that bill dealt with fish health inspection authority.

In line with that focus in the bill on fish disease control, the portions of the tape that are audible evidence concern by the department and the board about the risks involved in transporting fish and the importance of the "genetic makeup" of each stock. The only testimony on the proposed regulations came from people involved with private nonprofit hatcheries, who voiced concern about fish disease and genetics as well.

In the portions of the tape that are audible, neither the department nor the individuals testifying nor the board made any mention of commercial mariculture endeavors or any intention to further those. 2/ Because the tape was inaudible during main part of the discussion, in which the department explained each of the proposed regulations to the board, I consulted with staff of the department who were involved in making that presentation and was informed that neither they nor the board ever mentioned that permits to hold live fish would be issued for commercial mariculture purposes. In fact, I am informed that at least the people involved from the department assumed that commercial purposes would not be encompassed by the regulation, since no such endeavors were ongoing at the time.

2/ The only reference to anything related to commercial fish farming was in the summary given by the department of the existing statutes relating to the board's authorities over fish in general. The department, in passing, mentioned the authority of the board in AS 16.05.930(c) to regulate the rearing and sale of fish from private ponds. That reference was one of a laundry list of references given in the department's introduction and is not mentioned again at any time during the audible portion of the discussions.

The above regulatory history seems to indicate that the board did not specifically consider including commercial purposes within the scope of the permits to hold live fish, and in fact did not so intend.

For further guidance, we can turn to regulations and statutes on similar subjects. For example, 5 AAC 41.070(b) specifically authorizes the import of oysters "for aquaculture purposes." This contrasts with the absence of any specific reference to such purposes in 5 AAC 41.001, suggesting that if the board intended commercial mariculture purposes, it would so state. Further, in a statute allowing private possession of fish and game that is analogous in purpose to the regulation at issue here, the legislature specifically provided that surplus buffalo and musk oxen may be granted to private individuals "for commercial purposes." AS 16.40.010. In light of the fact that such clear statements of intent are possible (and have been used) by both the board and the legislature, it would be appropriate for the department to assume that if the board had meant a permit to hold live fish to be issued for "commercial purposes" it would have so specified.

Although the answer is not absolutely clear, it is probably correct that without action by the board clarifying the scope of 5 AAC 41.005 it would be consistent with the regulatory history, and with recognition of analogous regulations and statutes, for the department to refrain from issuing permits to hold live fish for commercial mariculture purposes until the board modifies the regulation. 3/

3/ In this regard, it is worth noting that HCS CSSB 297, passed by the legislature in May 1987, places a moratorium on the issuance of permits under 5 AAC 41.005 until July 1, 1988, with respect to commercial fin fish farming operations. The bill also provides an exemption from that moratorium for fin fish farming in "a privately owned fresh water body that has no outlet to state water." Thus, under the moratorium, until July 1, 1988, the board would be free to modify 5 AAC 41.001 and 5 AAC 41.005 with respect to commercial shellfish farming and commercial fin fish farming in private ponds and have those modifications translate into permits which could be issued. If the board desired to modify those regulations with respect to all other commercial fin fish farming operations, permits for those purposes could not be issued until July 1, 1988.

Commissioner Don Collinsworth
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Please let me know if you have further questions.

LIS:jf:prm:ck

attachments (2)

cc: Steve Pennoyer
Norman Cohen
Dave Benton
Brian Allee
Ken Parker
Beth Stewart
ADF&G

Liza McCracken
Joe Geldhof
DOL

MEMORANDUM

State of Alaska

DEPARTMENT OF FISH AND GAME

TO: Steve Cowper
Governor

DATE: March 13, 1987

FILE NO.:

TELEPHONE NO.: 465-4100

SUBJECT: Fisheries Cabinet
Recommendation on
Mariculture

FROM: Don W. Collinsworth *DWC*
Commissioner
Department of Fish and Game

Enclosed for your consideration is a recommendation from the Fisheries Cabinet for an administration position on mariculture legislation. The recommendation was arrived at after extensive review of the legislation and the issues surrounding these bills. The intent of the position is to give general guidance to the Legislature regarding the principles which any legislation must address, and yet provide flexibility to work out the details.

The agencies involved with this review include the Departments of Natural Resources, Commerce and Economic Development, Environmental Conservation, Labor, Community and Regional Affairs, Fish and Game, and the Limited Entry Commission.

Enclosure

cc: Fisheries Cabinet

Fisheries Cabinet Recommendation
Cowper Administration Position on Mariculture
March 13, 1987

Mariculture may provide substantial economic benefits to our coastal communities and help diversify and stabilize our economy if it is developed in an orderly fashion which provides the maximum benefit to Alaskans while ensuring protection for our fisheries resources, other resource users and the environment. In order to accomplish these objectives, any legislation authorizing a mariculture industry must satisfy the following principles:

1. The mariculture industry must benefit Alaskans.

The mariculture industry must be developed in a manner which does not result in unfair competition with existing fisheries or cause undue economic displacement in our coastal communities. Legislation should, to the extent possible under the law, provide for local hire at mariculture facilities and give preferential access to mariculture permits and mariculture related tidelands leases to Alaskans.

2. The mariculture industry must pay for itself and the state should get a fair return for the use of state resources.

Legislation should contain provisions for recovering administrative and other state costs associated with managing the industry. The legislation should also ensure that the state gets a fair return for the use of tidelands and other resources.

3. The development of the mariculture industry in Alaska should be done in an orderly fashion which encourages a stable, dependable industry.

Legislation should provide general criteria which will lead to the development of a regulatory program which discourages speculation on permits and tidelands leases, encourages sound financial planning, and provides for a diverse industry ranging from "Mom and Pop" ventures to larger corporate operations.

4. The mariculture industry must meet all state and federal requirements for human health, product quality and sanitation.

Legislation should ensure that mariculture facilities meet all state and federal requirements for human health, safety, and sanitation. Legislation should also require that mariculture products meet or exceed

all state and federal product quality and human health standards, and provide the means to ensure that state regulators can protect human health and product quality.

5. Mariculture activities must be managed to ensure protection of the biological integrity of natural plant and animal stocks.

Legislation must address the issues of pathological and genetic protections for natural sea vegetable and fish stocks.

6. Mariculture activities must be managed in a manner which ensures adequate environmental safeguards and habitat protection.

Legislation must ensure that mariculture facilities are sited, designed and operated to protect air and water quality, to provide for proper disposal of wastes, and to minimize adverse effects to important fish and wildlife habitat.

7. Mariculture facilities must be sited to minimize land-use conflicts, maintain navigation and ensure access to upland areas.

Legislation should provide guidance for siting facilities to minimize conflicts with other tidelands users, reducing visual and aesthetic impacts, maintaining navigation and ensuring access across state tidelands.

8. Broodstock acquisition for mariculture purposes should be carefully regulated, especially for species subject to limited entry fisheries.

Legislation should contain provisions limiting the acquisition of broodstock for species subject to limited entry fisheries. Legislation should grant the Department of Fish and Game the authority to regulate the acquisition, transport, and propagation of mariculture broodstock, and provide the Board of Fisheries the ability to resolve allocation decisions regarding broodstock acquisition if necessary.