

2-01-01

MARI-

CULTURE

05 AAC 41

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Sen. Robin Taylor, Vice-Chair
Sen. Lyda Green
Sen. Georgianna Lincoln
Rep. Jeannette James
Rep. Joe Hayes



State Capitol, Room 116
Juneau, AK 99801-1182
(907) 465-5446 fax: 465-6592
Interim
716 W. 4th Ave. Suite 430
Anchorage, AK 99501
(907) 269-0250 fax: 269-0249

Administrative Regulation Review Committee

AGENDA

Thursday 02/01/01, Butrovich Room, 9:30 am – 11:00 am

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

***This Hearing will be teleconferenced**



**Administrative Regulation
Review Committee**

SIGN-IN

Subject of Meeting

Review of Jan. 8, 2001 F&G hearing on
Mariculture Regulations

Official Business

Date: Feb. 01, 2001

PLEASE PRINT

Pg 1 of _____

NAME	ADDRESS (MAILING & ZIP)	Phone	Representing	Do you want to testify?
✓ Bob Hertley	PO Box 2294, Homer AK 99803	586-4844	ASGA	Yes
✓ Dennis Watson	Box 725 Craig AK	826-3275	Mayor City of Craig	Yes
✓ Roger Pawler	Box 20704 Juneau	463-3600	ASFA	Yes
✓ Ron Long	Box 2464 Seward AK	224-7068	QUICKACK Shellfish	YES
✓ Shannon O'Fallon	Dept of Law	5-3600		NO
✓ Sue GullvFsen	LAA / LIO	5-4648	LAA	IF necessary
✓ Doug Mecum	AK DEPT FISH AND GAME	465-4210	ADFG Comm Fish	Yes

SITE: Seward LIO

COMMITTEE:

Admin. Reg. Review

DATE: 2/01/2001

SUBJECT OF MEETING:

Shellfish Regulations

UPDATE #:



PLEASE SIGN IN

PLEASE PRINT:

NAME

ADDRESS (MAILING & ZIP)

REPRESENTING

**DO YOU WANT
TO TESTIFY?
Y or N**

NAME	ADDRESS (MAILING & ZIP)	REPRESENTING	DO YOU WANT TO TESTIFY? Y or N
✓ Jon Agosti			Yes



Alaska Division of Legislative Audit Audit Digest #11-30002-01

[HTML Format](#)[PDF Format](#)[2001 Audit Report List](#)[Legislative Audit Home Page](#)

* Requires Acrobat Reader



SUMMARY OF: A Special Report on the Departments of Fish and Game, Natural Resources, Office of the Governor, Division Governmental Coordination, Mariculture Development and the Aquatic Farm Act, October 23, 2000.

REPORT CONCLUSIONS

Although more than 40 aquatic farm sites operate under DNR and DFG permits, many of the proposed farm operations that sought permits in 1999 involved "on-bottom" farming rather than "suspension" farming as had previously been the case. These proposed on-bottom aquatic farm operations involved circumstances that were new issues to DFG reviewers. Permits for geoduck farms in Southeast (SE) Alaska and permits for Kachemak Bay littleneck clams both raised different, but unique, issues.

1. SE geoduck permits. For permits sought to commercially raise and harvest geoducks in south Southeast Alaska waters, DFG reviewers were concerned about proposed operating provisions involving transfer of state common property resources to farm applicants.

Alaska's constitution provides for equal access of citizens to the State's common property resources. The relevant constitutional clauses related to equal access to the State's resources are rather unique to Alaska. The constitutional requirements mandate state government observe certain principles when regulating how individuals and corporate entities access the common property resources that belong collectively to all citizens.

DFG believes when the AFA was enacted the only aquatic farming contemplated was a "suspension" type operation, which involved little or no use of the common property resource. Even though DFG has relied on the AFA as a basis to transfer standing stock to "farmers" in the past, the department asserts the nature and scope of the geoduck operations are substantially different.

In the absence of formal regulations, or documented legal advice, many of DFG actions that effectively denied the SE geoduck farming permit applications were inconsistent with various aspects of the AFA statute, historical precedent, and department policy regarding aquatic farming. Additionally, due to delay of viable geoduck farming operation coming on line, the state-built Quetchak Hatchery in Seward, becomes less operationally feasible.

2. Permits sought for the Kachemak Bay area. Since on-bottom operations have more potential to adversely affect surrounding habitat, and the standard for habitat protection are particularly high for a legally designated critical habitat area such as Kachemak Bay, DFG rejected proposed permittees due to the impact the operations would have on the bay's habitat.

FINDINGS AND RECOMMENDATIONS

1. DFG should obtain formal legal advice from the Department of Law regarding allocation of common property resource under the AFA.
2. DFG should develop and adopt regulations to further define and clarify various provisions of the AFA that have had a substantial impact on the interpretation and application of the statute during the most recent permit review process.
3. DFG's commissioner should seek legislation amending the AFA to address utilization and transfer of the State's common property resource to prospective aquatic farming operators.
4. DFG should foster staff awareness of potential conflicts of interest.
5. DFG's commissioner should ensure the factual basis for findings relating to denial of aquatic farm applicant's permit is communicated to the applicant.

 [Audit Report
HTML Format](#)

 [Audit Report
PDF Format *](#)

[2001 Audit
Report List](#)

[Legislative Audit
Home Page](#)

* Requires Acrobat Reader



October 23, 2000

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

DEPARTMENTS OF FISH AND GAME,
NATURAL RESOURCES, OFFICE OF THE GOVERNOR
DIVISION OF GOVERNMENTAL COORDINATION
MARICULTURE DEVELOPMENT AND AQUATIC FARM ACT

October 23, 2000

Audit Control Number
11-30002-01

This audit report addresses the implementation of the Aquatic Farm Act and related impact on the development of mariculture in Alaska in recent years. More specifically, the audit discusses the issues that have grown out of the 1999 application process for aquatic farm permits involving proposed sites in Kachemak Bay and geoduck "farms" in Southeast Alaska. As discussed in the report, the review of the Southeast Alaska geoduck permits has resulted in concerns about the legality and advisability of transferring state common property fishery resources under the terms and conditions of the Aquatic Farm Act.

The audit was conducted in accordance with generally accepted government auditing standards. Fieldwork procedures utilized in the course of developing the findings and discussion presented in this report are discussed on page one of the report in the Objectives, Scope, and Methodology section.

Pat Davidson, CPA
Legislative Auditor

TABLE OF CONTENTS

	<u>Page</u>
Objectives, Scope, and Methodology	1
Organization and Function	3
Background Information	5
Report Conclusions	11
Findings and Recommendations	19
Agency Response:	
Department of Fish and Game	27
Department of Natural Resources	37
Legislative Auditor's Additional Comments	39

OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Titles 24 of the Alaska Statutes and a special request of the Legislative Budget and Audit Committee, we conducted a review of the implementation of the State's Aquatic Farm Act. More specifically, we reviewed the process and the issues that grew out of the 1999 review process of aquatic farming permit applications.

This review process involves the Office of the Governor, Division of Government Coordination (DGC), the Department of Natural Resources (DNR), and the Department of Fish and Game (DFG). We focused our review on whether the agencies involved have implemented mariculture policies that are consistent with those set out under the statutes and/or regulations and, also the Aquatic Farm Act of 1988.

Objectives

Our specific audit objectives were to review the process followed by the various agencies involved with the 1999 review of aquatic farming permits, and evaluate the issues involved with the permits that were not approved. We were to assess if the rationale for not approving the permits was consistent the Aquatic Farm Act and the public policy goal of promoting aquaculture and mariculture industry within the State of Alaska.

Scope and Methodology

We evaluated the 1999 applications reviewed by the two resource agencies, DFG and DNR, and the state coordinative agency, DGC. The aquatic farm application process is a multi-agency task involving DFG, DNR, and DGC and coastal districts. DNR issues the site lease permit for the use of state tideland, shoreland, or upland after it has made its "best interest finding" for the state. DFG issues the operation permit. In order for these permits to be issued, aquatic shellfish farm sites must be consistent with the Alaska Coastal Management Program (ACMP). DGC coordinates the ACMP consistency review process.

After conducting our initial audit survey fieldwork, we determined the central issues of concern involved the oversight and permitting activities of DFG. Accordingly, the scope of our review primarily addresses those DFG activities and excludes DGC and DNR operations and procedures from further review.

The scope of the review primarily involved DFG permitting concerns and how prospective permits for aquatic farms in Kachemak Bay and Southeast Alaska were handled by the department.

Toward that end, we reviewed the following documents:

- Applicable sections of Alaska's statutes and regulations
- Department of Law Attorney General Opinions and memorandums of advice.
- Permits and related conditions issued by DFG for current aquaculture operating permittees.
- Listings and related information from the Commercial Fisheries Entry Commission related to individuals qualifying for the Southeast limited entry geoduck dive fishery.
- Information, court filings, and associated other correspondence from applicants for Southeast Alaska geoduck aquatic farming permits.
- Correspondence and other related information from individuals applying for aquatic farming permits in Kachemak Bay.

We also interviewed the following individuals:

- An advisor and aquatic farming advocate associated with the University of Alaska's marine advisory program.
- Southeast Alaska geoduck and Kachemak Bay littleneck clam aquatic farm permit applicants.
- Executive director, Southeast Alaska Regional Dive Fisheries Association.
- President and vice president of Alaska Shellfish Growers Association.
- Staff of the Qutekcaq Shellfish Hatchery in Seward.
- An assistant attorney general knowledgeable of common property resource issues involved with aquatic farm permits and applications.
- Attorney for a Southeast Alaska geoduck applicant currently filing a lawsuit against the State of Alaska over actions and decisions of DFG related to the 1999 permit review process.

ORGANIZATION AND FUNCTION

Processing of application for mariculture farming is a multi-agency process. The Office of the Governor's Division of Governmental Coordination (DGC) coordinates with the two state resource agencies, Department of Natural Resources (DNR) and Department of Fish and Game (DFG), to determine whether the application is consistent with the Alaska Coastal Management Program (ACMP) and to facilitate the issuance of the other necessary permits.

DGC helps develop district coastal management programs, implement the coastal project consistency review process, educate the public about coastal management, and serve as the link between all those who participate in the ACMP network.

DNR consists of eight divisions that reflect its major programs: Agriculture, Forestry, Geological and Geophysical Surveys, Land, Mining and Water Management, Oil and Gas, Parks and Outdoor Recreations, and Support Services. Leasing of mariculture farm sites falls under the purview of the Division of Land, Mining and Water Management (DLMW). The division is the primary manager of Alaska's land holdings. DLMW responsibilities include ensuring the State's title; preparing land use plans and easement atlases; classifying land; leasing and permitting state land for recreation, commercial and industrial uses; and coordinating and overseeing the needed authorizations for major development on the North Slope.

DFG consists of the following divisions, commission, and boards: Administrative Services, Commercial Fisheries, Habitat and Restoration, Sport Fish, Subsistence, Wildlife Conservation, Commercial Fisheries Entry Commission, Board of Fish, and Board of Game. DFG's mission is to manage, protect, maintain, and improve the fish, game and aquatic plant resources of Alaska. The primary goals are to ensure that Alaska's renewable fish and wildlife resources and their habitats are conserved and managed on the sustained yield principle, and the use and development of these resources are in the best interest of the economy and well being of the people of the State.

Within DFG, the Division of Commercial Fisheries (DCF) administers aquatic farming in the State. Division of Habitat and Restoration (DHR) administers aquatic farming situated in critical habitat areas. DFG develops and maintains a comprehensive and coordinated state plan:

1. for the orderly present and long-range rehabilitation, enhancement, and development of all aspects of the State's fisheries for the perpetual use, benefit, and enjoyment of all citizens,
2. to encourage the investment by private enterprise in the technological development and economic utilization of the fisheries resources, and

3. Through rehabilitation, enhancement, and development programs do all things necessary to ensure perpetual and increasing production and use of the food resources of state waters and continental shelf areas.

Mariculture Oversight and Assistance

Within the Division of Commercial Fisheries, is a designated mariculture coordinator. This individual is responsible for the oversight and the provision of technical assistance to permitted aquatic farm sites, and is the primary reviewer of permit applications for proposed new sites.

BACKGROUND INFORMATION

In 1988 the legislature adopted statutes referred to collectively as the Aquatic Farm Act (AFA). This legislation was seen by many as being the definitive statement of public policy at the time, made in response to more than a decade of debate about the desirability, workability, and potential of both finfish and shellfish farming. The legislature, through the adoption of the aquatic farm act established as public policy, in statute, that the State could proceed, and indeed encourage development, in the area of shellfish farming – but finfish farming was prohibited.

Aquatic farming was seen as strengthening the competitiveness of Alaskan seafood in the world marketplace by broadening the diversity of products and providing year-round supplies of premium quality seafood. Two central tenets of the State's aquatic farming policy, which were set out in the legislation adopting AFA were:

1. The State should encourage the establishment and responsible growth of an aquatic farming industry; and,
2. Development and siting of aquatic farming operations should be made with full consideration of established and ongoing activities.

The legislature heard testimony that it should consider the role the Board of Fisheries should play in permitting aquatic sites, but it apparently chose not to give the board any authority in this area. Rather, it appears authority for permitting and regulating AFA activities is solely left to Department of Fish and Game (DFG's) commissioner.

Critical habitat area management plans developed from Alaska Statute

Critical habitat areas were created by the legislature in 1972. The primary purpose of critical habitat areas is *"to protect and preserve habitat areas especially crucial to the perpetuation of fish and wildlife, and to restrict all other uses not compatible with that primary purpose."* The statute defines the areas covered by critical habitat designation. The legislature established Kachemak Bay as a critical habitat area effective May 17, 1974.

In 1993, utilizing a public hearing process, DFG developed with other state, federal, and municipal agencies the Kachemak Bay and Fox River Flats Critical Habitat Area Management Plan. The following goals were adopted for the management of Kachemak Bay and Fox River Flats:

- To maintain and enhance fish and wildlife populations and their habitat.
- To maintain and enhance public use of fish, wildlife and critical habitat area lands and water consistent with the other goals of the management plan.

In April 1994, the goals and policies of the December 1993 Kachemak Bay and Fox River Flats Critical Habitat Area Management Plan were adopted in regulations by reference. The plan

requires a special area permit for any habitat altering activity, including construction. Division of Habitat and Restoration is required to review each special area permit application for consistency with these goals and policies.

The initial aquatic farm sites involved suspension-type operations

The initial aquatic farming operations that were permitted under AFA involved are referred to as suspension-type operations. The operations involve cultures of shellfish, primarily oysters and mussels grown on lantern nets suspended in the water.

This compares to on-bottom operations which involves "planting" and "harvesting" shellfish in the subtidal or intertidal substrate. There was an on-bottom experimental farm site for littleneck clams initially established on a half-acre site in Southeast (SE) Alaska in 1993. On-bottom operations involved "growing" shellfish stock buried either on substrate always submerged (subtidal) or substrate that is covered by water part of the time, by virtue of sea tides (intertidal). For subtidal operations the planting of seed and "harvesting" of biomass would be carried out through underwater diving.

From the beginning, these on-bottom operations involved utilization of existing wild stocks that were often already present on the farm site. In November 1993, DFG issued a three year experimental farm permit to the Tenass Pass Shellfish (TPS) Company. Under the permit TPS was allowed to harvest all legal sized clams on a one half acre site adjacent to the company's suspension oyster "farm."

In authorizing such a harvest DFG relied on the authority provided by regulations related to administering miscellaneous shellfish fisheries. TPS was given a commercial harvest permit. TPS was to provide data to DFG, which would help evaluate the feasibility of on-bottom littleneck clam farming in Southeast Alaska. TPS harvested the clams but did not provide the data nor did DFG conduct a technical feasibility analysis.

In 1996 DFG began allowing harvests of wild stocks through the use of a stock acquisition permit. Stock acquisition permits are established under AFA. As set out in the statute, this permit serves as a means to allow aquatic farmers to take wild stocks "*necessary to meet the initial needs of [the] farm.*"

More than 20 "suspension type" shellfish farms have been permitted in Kachemak Bay

Aquatic farming was first permitted in the Kachemak Bay Critical Habitat Area (KBCHA) in the 22 acres set aside by Division of Parks and Outdoor Recreation (DPOR), Department of Natural Resources (DNR) in Halibut Cove Lagoon in 1983. Blue mussels were cultured using rafts with suspended gear. Presently, there are 24 special area permits for aquatic farms in KBCHA. These farms all consist of suspended longline culture of shellfish, primarily oysters and blue mussels.

Geoducks in SE region are the object of a developing fishery and increased farming interest

SE Alaska has a geoduck dive fishery with more than 100 participating divers. About half of the divers are from outside the State. In the early years of the fishery it was estimated that the non-resident divers' catch made up 75% of the fishery's total revenue. More recent statistics from the Commercial Fisheries Entry Commission (CFEC) suggest that in recent years revenues are split approximately 55% and 45%, respectively between resident compared to non-resident divers.

The revenues involved with the dive fishery are relatively small. It is estimated that in recent years the average diver earns between \$5,000 and \$10,000. In contrast, a single geoduck applicant's farm sites contain geoduck biomass that is estimated to have a commercial value between \$2 - \$5 million.

The dive fishery has been limited because of the way in which it is conducted. Before DFG allows diving to take place in an area the department conducts a survey of the available biomass. Based on the results of this survey DFG sets a quota of how much biomass can be taken. Since little is known about the life cycle of wild geoducks, the rate of reproduction, etc., these quotas have been set at what appears to be relatively low levels – less than 5%. Limited funding has restricted the number of areas DFG has been able survey, which in turn has slowed expansion of the fishery. For FY 01 DFG has allocated \$90,000 of \$1.25 million in federal grant funds to conduct geoduck reconnaissance and biomass surveys.

CFEC has begun the process of limiting entry into the fishery. Limited entry draft regulations are still under review, but the maximum number of entry permits has been established at 104.

Aquatic farming leasing statutes amended in 1998 in response to court decision

In 1993, a public interest group sued DNR over how the department went about identifying and establishing districts and zones suitable for aquatic farming. Although DNR's actions were upheld at the Superior Court level, in 1997 the State Supreme Court found in favor of the interest group, deciding DNR had not acted appropriately.

As a result of the State Supreme Court decision, DNR's statutes relating to aquatic farm sites were amended. The legislature passed statutory changes related to the aquatic farm permitting process in 1997. The revised legislation changed DNR's aquatic farming permit program, in part, to a land leasing program.

The litigation and the development of the eventual statutory remedy resulted in DNR suspending state aquaculture leasing applications for three years. As a result, there was a pent-

up demand for such permits when the application window was reopened in January 1999. At that time DNR received more than 40 applications¹ for aquatic farming leases.

DFG denied permits for on-bottom aquatic farming in Kachemak Bay and SE Alaska projects

The Alaska Coastal Management Program (ACMP) implements the 1977 Alaska Coastal Management Act. ACMP requires any activities or projects that may take place in or affect Alaska's coastal zone to be reviewed by coastal resource management professionals. Before a permit can be issued such activities and projects must be determined to be consistent with ACMP statewide standards and coastal district policies.

The consistency review process for AFA permits was coordinated by the Division of Governmental Coordination (DGC) and involved DFG, DNR, and to a lesser extent the Department of Environmental Conservation (DEC). When the consistency review process was completed, many permit applicants were disappointed with the response of DFG. For most of the permits, DFG either:

1. Flatly denied permits on the grounds of habitat impact. Activities that are incompatible with the goals and policies for the critical habitat area and their resources are restricted from the critical habitat. For applicants seeking permits for Kachemak Bay DFG cited provisions of the KBCHA management plan. In the view of the department, the plan absolutely banned certain types of aquaculture operations. For other applicants, DFG denied permits citing conflicting uses, such as subsistence, even though in the view of a DGC reviewer the department had minimal or no support for its position.

or

2. Proposed "unfeasible" permit conditions. In the view of geoduck applicants and a university expert, DFG either imposed or proposed permit conditions that were structured in such a way as render the proposed aquatic farm site operationally and/or financially unfeasible.

In effect, from the perspective of the applicants (and other participating state agencies to some extent) the State, or more specifically DFG, has adopted an oversight philosophy and approach to on-bottom shellfish farming which has been difficult to understand. This in turn has the effect of limiting the development of the "industry."

Exxon Valdez Oil Spill (EVOS) funds appropriated to construct a shellfish hatchery

In FY 94 the legislature appropriated to DFG \$3.25 million from the EVOS restoration fund to construct a shellfish hatchery on the Kenai Peninsula. Additionally, the facility was planned to serve as a mariculture technical center (MTC) to be operated under the University of Alaska.

¹Applications may include bivalve species like on-bottom and suspended culture geoduck and littleneck clams and oysters, mussels and scallops, respectively. Aquatic plants like green sea urchins and ribbon kelp are also included. There are 10 geoduck applicants for 13 farm sites.

EVOS funding was designed to aid in the restoration of subsistence resources or services, lost or diminished, by the Exxon Valdez oil spill. Towards that end, it was believed a shellfish hatchery could be instrumental in growing the necessary seed and spat to plant on beaches for personal and subsistence use, and to be used in commercial aquatic farming operations.

The hatchery/MTC was constructed in Seward. DFG leased the hatchery/MTC to the City of Seward. The City of Seward subcontracted the operation of the hatchery, to Qutekcak Native Tribe (QNT), a Native non-profit corporation operating under the umbrella of the Chugach Regional Resource Commission. The hatchery's 1997 business plan projected that 40% of the facility's sales revenues would come from the sales of littleneck and geoduck clam seeds to aquatic farming operations that were anticipated to be coming on line over the next few years.

Blank Page

REPORT CONCLUSIONS

Our review primarily discusses actions taken by Department of Fish and Game (DFG) in reviewing aquatic farming applications received during early 1999. We reviewed the handling of permits sought for on-bottom operations in southern Southeast (SE) Alaska for geoduck farming and in Kachemak Bay for littleneck clams. We also discuss DFG's efforts to promote aquaculture under the State's Aquatic Farm Act (AFA).

The central tenets of the AFA are to encourage the establishment and responsible growth of an aquatic farming industry and the development and siting of farming operations with full consideration of ongoing activities.

Department of Natural Resources (DNR) completed as scheduled its required portion of the applications' coastal zone consistency and forwarded the recommendations to Division of Governmental Coordination (DGC). In contrast, DFG made a request to DGC on January 7, 1999 to suspend geoduck applications' consistency review until regulations were developed to evaluate the proposals.

DFG did not develop the regulations. DGC received DFG's coastal zone consistency recommendations for the remaining geoduck applications on March 21, 2000. DGC issued consistency review determinations based on these recommendations.

DFG proposed various conditions on six applicants seeking permits to commercially grow and harvest geoducks. From the perspective of the applicants, these permit requirements made the proposed farming operations unworkable. After there was no agreement involving the proposed conditions, DFG formally denied the permits. For Kachemak Bay applicants, the department rejected the permits outright, citing the bay's designation as a critical habitat area, making it subject to stringent land use requirements.

Based on our review of DFG's decision-making, we developed the following conclusions:

DFG's objection to geoduck applicants involved concerns over common property resources

Alaska's constitution provides for equal access of citizens to the State's common property resources. The relevant constitutional clauses related to equal access to the State's resources are rather unique to Alaska. The constitutional requirements mandate state government observe certain principles when regulating how individuals and corporate entities access the common property resources that belong collectively to all citizens.

There was a constitutional amendment, adopted by a vote of the people in 1970, which allowed certain exceptions to equal the access clause as it relates to the State's common property fisheries resource. Specifically, Article VIII, section 15 states:

No exclusive right or special privilege of fisheries shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State. [Emphasis added.]

One interpretation of this constitutional provision is that the State can establish fisheries available on a "special privilege" basis for the purposes of commercial fishing and aquaculture. The government has established a process to recognize and license a limited number of participants in various commercial fisheries around the State. This process has been subject to court challenge and judicial interpretation. The process by which special privilege has been made available for aquaculture has perhaps not been similarly constructed or if it has by virtue of AFA, it has not been tested in court.

In this context, DFG actions related to SE geoduck farm applicants reflected two concerns:

1. The allocation of the common property geoduck resource to an exclusive user is not consistent with the requirements of the constitution.² DFG does not believe the AFA contemplated the transfer of such a valuable amount of common property resource to finance farming operations.

DFG believes when the AFA was enacted the only aquatic farming contemplated was a "suspension" type operation, which involved little or no use of the common property resource. Even though DFG has relied on the AFA as a basis to transfer standing stock to "farmers" the department seemingly asserts the nature and scope of the geoduck operations are substantially different and should be permitted in a manner that provides more extensive due process to the public at large.

2. The applicants' proposed sites and species conflicts with an established and ongoing area activities. Under the legislative intent accompanying the AFA, permitting of aquatic farming must be done in "*full consideration of ongoing activities.*" Further, when assessing the viability of a proposed aquatic farm application the activity "*may not require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources.*"

As discussed in the Background Information section, since the mid-1980s there has been a small dive fishery harvesting geoducks in south Southeast Alaska waters. DFG is concerned that this developing fishery is likely to be affected by the proposed geoduck farming operations, even though this dive fishery has not been historically conducted on the specific sites set out in the farming applications.

² It should be noted the constitution appears to provide an exception for the "*efficient development of aquaculture.*"

DFG acted inconsistently in many ways in denying SE geoduck farming permits

Many of DFG actions that effectively denied the SE geoduck farming permit applications were inconsistent with various aspects of statute, historical precedent, and department policy regarding aquatic farming. Specifically, the actions were:

1. Inconsistent with the requirements of AFA.

As discussed in Exhibit 1 at right, the aquatic farm act sets out four criteria that should be considered when granting a permit. Our analysis of the 1999 SE geoduck applications found that additional conditions for issuance of the aquatic farm operation permit were added to these four statutory criteria. These proposed conditions were as follows:

- (1) *"For each proposed site, describe in writing to ADF and G a method for distinguishing (or segregating) wild common property geoducks from cultivated, farmed geoducks. The method must allow for practical access and commercial or personal use harvest of wild geoducks on each site that are not acquired through stock acquisition permit.*

Exhibit 1

AFA Establishes Four Criteria for Issuance of an Aquatic Farm Permit

The aquatic farm act at AS 16.40.105 sets out four criteria that must be met before an aquatic farm permit is issued:

1. The proposed site must be suitable for farming from a physical and biological perspective.
2. The proposed farm or hatchery may not require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources.
3. The proposed farm may not significantly affect fisheries, wildlife, or their habitats in an adverse manner.
4. The proposed farm must demonstrate technical and operational feasibility.

At the same time, the method must prevent excessive disturbance of cultivated, farmed geoducks by commercial access and harvesting."

- (2) *"If ADF and G, in its discretion, determines that the method described in paragraph 1 will accomplish the requirement of that paragraph, you must agree, in a signed statement to use that method on your farm site(s). Your signed statement and a detailed summary of approved method(s) will be attached and incorporated as conditions of your aquatic farm operation permit."*

The geoduck applicants found these conditions unacceptable and filed appeals with the superior court.

The department did not originally dispute any of the permits on any of these operational grounds. By attempting to impose conditions to the extent of making the operations unfeasible, the department was not acting consistently with AFA's statutory mandate that

DFG "encourage the establishment and responsible growth" of aquatic farming in the State.

2. Inconsistent with prior departmental actions. DFG's main objection to SE applications is that proposed operating plans necessarily would involve "removing" and selling existing standing stock of geoducks. The commercial value of the geoducks involved has been estimated to be as much as \$5 million. DFG officials have expressed reservations about whether it was appropriate to allow private individuals such access to the State's common property resource without compensation to the state treasury.

In the past, however, DFG has allowed at least three aquatic farm operators to harvest and sell wild littleneck clam stocks found at or adjacent to their sites. Then in 1996 DFG began allowing such harvest through the use of a stock acquisition permit. This permit is part of the AFA, rather than commercial fishing regulations. DFG has changed the way these harvests were regulated, apparently in an effort to rectify allowing common property resource wild stock to be taken under the provisions of the AFA.

3. Inconsistent with prior DFG mariculture development policy. The legislature, in the statement attached to the 1988 legislation establishing AFA, said the law was to encourage the establishment and responsible growth of an aquatic farming industry in the State and allocation of aquatic farming sites with full consideration of established and ongoing activities in an area.

From 1988 until the 1999 permit application period, DFG operated to promote the aquaculture policy that accompanied the passage of the AFA. Aquatic farms were permitted for suspended culture farming of mainly oysters and mussels. While the farming of mussels may have incidentally involved a transfer of a common property resource, the relatively small commercial value and high densities of the mussel populations involved made such use of common property natural stocks a limited concern.

DFG initially allowed on-bottom littleneck clam farming as a way for oyster farmers to diversify and supplement their income. Such activities, however, were not necessarily aquatic farming in the traditional sense. The early operations were little more than permitting existing farmers to commercially harvest clams. Farmers obtain permitted "farm sites" for littleneck clams, which they harvested without really engaging in any substantial farming activity.

Under the current program farmers are allowed to request new "farm sites" with each aquatic farm application period thereby enabling the farmer to continue harvesting with little or no efforts to replenish the resource. The abundance of littleneck clams in Southeast Alaska and the ability of a site to recover in a short time span kept these "farming" practices from becoming a major public issue.

Besides these industry friendly regulatory actions, DFG staff accompanied representatives of the University of Alaska Fairbanks' (UAF) marine advisory program (MAP), to various

public meetings where they encouraged attendees to consider becoming entrepreneurs and take up aquatic farming. In such presentations, which were admittedly lead by an enthusiastic proponent from UAF-MAP, the department's presence gave the impression that the agency supported such commercial development, in accordance with the AFA's legislative intent.

The Division of Commercial Fisheries has restructured the duties of the mariculture coordinator. In past years, one of the functions of the position included the coordinator working with the university marine advisory program to actively encourage members of the public to take up aquaculture. Currently, the coordinator position has been restructured to focus on regulating and providing assistance to individuals operating active permits rather than actively promoting aquaculture with potential new permittees in the general public.

The development of a lucrative Asian market for geoduck clams has resulted in applications for over ten farmsites to raise geoducks and the development of a geoduck dive fishery. The potential value of the standing stock on these proposed farmsites has raised issues concerning the common property resource and has caused DFG to adopt a more conservative and restrictive policy toward on-bottom aquatic farming.

Prospective geoduck farmers are not allowed to harvest the standing stock on a farmsite. The Division of Commercial Fisheries' letter dated May 19, 2000 informed an applicant of general principles that will guide the department on pending operation permit applications. DFG interpreted AS.16.40.105(2) in terms of geoduck fishery to include determination at the time the farm operation permit is applied for or renewed: (1) whether the proposed farm site has an occurring commercial geoduck fishery at that specific location; or (2) whether the proposed farm site is within an area that has been identified in an operating plan developed under AS 43.76.200(b).

The May 2000 letter also specified that these determinations will be made each time that a farm operation permit is being renewed or every five years. It stated that:

if during the time since the last renewal the site has been identified in an annual plan as an area for a bioassessment and commercial harvest, a conflict would exist. In that case the permit renewal would be denied or it would be granted only if commercial divers are first allowed an opportunity to harvest wild geoduck at the site.

This change of policy concerning the ownership of the standing stock on a farmsite is not consistent with past DFG policy or with the present on-bottom littleneck clam farming and suspended mussel culture practices currently allowed.

Denial of Kachemak Bay aquatic farming permits was consistent with area use plan

As discussed in the Background Information section, the aquatic farming applications for sites in Kachemak Bay are subject to the provisions of the Kachemak Bay and Fox River

Flats Critical Habitat Area management plan. Staff of DFG's Division of Habitat and Restoration (DHR) reviewed the permit applications for consistency with the plan.

Based on the division's review, all of the on-bottom aquatic farm permits were denied. DHR determined that on-bottom operations were incompatible with appropriate activities as set out in the management plan. Further, DHR noted, for on-bottom applicants seeking transfer of common property standing stocks, that all of the resources were already fully allocated by the Board of Fisheries.

DFG applied the provisions of the KBCHA management plan in evaluating conflict of each farm site. Individual analysis of conflicts with fishery, habitat, public access, and fish population enhancement was made for each proposed site. The process used by DFG and the conclusion arrived at was consistent with the regulatory requirements in place.

The management plan has a provision that aquatic farming may be allowed in the critical habitat areas on a case-by-case basis. Our review of the history of the special area permits authorized under this exception showed they were exclusively for suspension type farming operations. There are currently 24 aquatic farm site special area permits in the critical habitat area consisting of longline suspended cultures of oysters and blue mussels. At least three new suspension-type aquatic farm sites within Kachemak Bay were approved during the 1999 application period.

DFG stated that the factual basis for the initial permit denial was provided in a September 10, 1999 response to DGC. However, each of the four Kachemak Bay applicants received a letter with the same general denial language that the proposed activity was inconsistent with: (1) the protection of fish and wildlife and their use; (2) protection of fish and wildlife habitat; and, (3) the purpose for which the special area was established.

The detail analysis of each farm site's conflicts with the overall goal and policies of KBCHA management plan was provided only after applicants' legal counsel requested reconsideration of DFG's denial decision.

DFG staff involved in review of farm site applications have a perceived conflict of interest

Certain DFG staff members who had responsibilities involving the review and comment on aquatic farming applications had an apparent, if not real, conflict of interest.

Staff involved with the review and approval of the Kachemak Bay applications may have had a conflict of interest due to owning property in the area. By being a property owner that could be affected by the presence of an aquatic farm site, the reviewer may not have been as objective as possible.

One staff member involved with the review of SE geoduck applications was married to a dive fisherman who is on the eligible list for a Commercial Fisheries Entry Commission (CFEC) limited entry permit and also on CFEC's 2000 permit holder list for Geoduck dive fishery.

Since a major issue surrounding the geoduck applications involves whether farming operations have an impact on the existing dive fishery, such a relationship raises a concern about a conflict of interest.

DFG was not prepared to implement the AFA for on-bottom operations requiring access to common property resources

Although the AFA was passed in 1988, DFG does not have regulations in place to carry out the provisions of the statute. More than once, DFG staff promised legislative committees and the public that it would modify and expand the regulations in place to use in reviewing permit applications. But the department failed to have appropriate regulations in place when the mariculture application period opened in January 1999.

Lack of a sufficient DFG regulatory approach contributed to a considerable delay in DGC's consistency review process for the aquatic farming applications. The absence of regulations also led to a situation where applicants had reason to believe their permits would be considered and approved along the same way as the department had historically acted. Three separate formal administrative appeals have been filed over DFG's handling and denial of 12 aquatic farm applications. Six individuals with nine geoduck farm applications and all three of the Kachemak Bay littleneck clam applicants have appealed the DFG denials.

DFG has made efforts to promote aquatic farming in a variety of other ways

In many respects, DFG has supported the development of aquatic farming in a variety of ways. As discussed in this section, DFG did allow oyster farmers to "harvest" littleneck clams in an attempt to diversify their product base and supplement their income. Since the farmers were uniquely situated by virtue of their site location, they were the only viable harvester of the resource – essentially having exclusive use.

Even though geoduck farming has been developed with some success in Washington and British Columbia, DFG staff has concerns about the species' biology in Alaskan waters. The department points to technical problems that the Qutekcak hatchery continues to have in spawning and rearing geoduck seed. Further, Alaska waters are the most northerly areas where geoduck clams are found; the biological dynamics of the species at the edge of its habitat may be significantly different. By contrast, seed development for littleneck clams is further along, and the specie's capacity for recovery through natural reproduction is established. In short, much more is known about the biology of littleneck clams than about geoducks and this lack of knowledge is the reason dive fishery is managed cautiously.

As stated earlier, DFG believes the AFA was developed at a time when the only aquatic farming activity involved suspension-type operations requiring little or no transfer of the common property resource. The department has worked diligently, within constraining fiscal and staffing limitations, to implement the AFA. The first aquatic farm permit issued under the act was in 1989. Between then and 1997, when permit applications were suspended for three years because of litigation against the Department of Natural Resources, DFG issued 176 aquatic farm permits, permit amendments, or permit renewals.

In this context, DFG has approved almost every application for oyster and mussel farms throughout the State. The department has conducted numerous meetings and teleconferences with shellfish farmers to provide technical assistance for their operations or assist them in modifying their applications in order to comply with regulatory requirements governing operations.

Operational viability of the Qutekcak Shellfish Hatchery has been jeopardized

As discussed in the Background Information section, Exxon Valdez oil spill funds were used to finance construction of a shellfish hatchery on the lower Kenai Peninsula. The original plan included a mariculture technical center (MTC) on the site which would be operated under UAF-MAP.

Higher than anticipated construction-related costs resulted in substantial reductions to the MTC. The department leased the facility to the City of Seward. The city in turn assigned operations of the facility to the Qutekcak Native Tribe.

The tribe also obtained more than \$500,000 in funding assistance from the Alaska Science and Technology Foundation while also indirectly receiving another \$250,000 in additional state funds.

The goal of the hatchery is to spawn adult shellfish and grow out the seed for sale to aquatic farmers. The shellfish include:

- Pacific Oysters
- Littleneck Clams
- Rock Scallops
- Geoduck Clams, and
- Cockles

Currently, the major portion of hatchery revenue comes from the sale of oyster seed primarily to aquatic farmers, with a smaller amount generated from the sale of littleneck clam seed. According to the hatchery manager, for the facility to break even it must be able to successfully grow out and sell geoduck seed to relatively large scale SE farms it had projected would come online in 2000. Although there may be legitimate issues involved in the hatchery's ability to develop viable geoduck seed, the inability of SE applicants to obtain the necessary permit has threatened the hatchery's ability to operate as a going concern, putting "at risk" over \$4 million in state funding that has been invested in the facility.

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The Department of Fish and Game (DFG) should obtain formal legal advice from the Department of Law (DOLaw) regarding allocation of common property resource under the Aquatic Farm Act (AFA).

The primary concern DFG has had with the Southeast Alaska (SE) geoduck aquatic farm permits involves the appropriateness of transferring ownership of common property resource wild stocks to the applicant. As discussed in the Report Conclusions section, in the past DFG has allowed aquatic farm operators to take common property resource under the provisions of the AFA. However, given the circumstances involved with the prospective geoduck permits the department has insisted on conditions that would protect the common property resource wild stocks from being harvested by the applicant.

From our discussions with DFG, the department seems to have two rationales for its seemingly inconsistent actions:

1. Prior transfers involved common property resource for which there was not a competing user group. The previous transfer of common property resource to an aquatic farmer involved littleneck clams in Southeast Alaska. Even though there may have been an interest in developing a commercial fishery for littleneck clams in Southeast Alaska, due to budgetary and operational constraints, no competing harvesters existed at the time. Accordingly, DFG could take action under the provisions of the AFA and permit such activity since it did not "*require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources.*"³

In the case of the geoducks, a commercial dive fishery existed which prohibited permitting of an aquatic farm site due to alteration it would cause to a traditional fishery.

2. AFA does not contemplate transfer of common property resource to private ownership. Notwithstanding the prior transfer of common property resource wild stocks made to a littleneck clam operator under a stock acquisition permit, the department is not sure AFA legally supports such a transfer. There is concern that at the time the AFA was drafted, the legislature did not contemplate nor provide for a process that would allow exclusive access to existing wild stocks by virtue of an aquatic farm permit. DFG no longer utilizes AFA related permits to allow the harvesting of littleneck clams, but rather has shifted to the use of commercial fishing regulatory vehicles.

³The italicized phrase comes from AS 16.40.105(2), which is the second of four criteria set out in statute that the DFG commissioner must consider in issuing aquatic farm permits.

Geoduck aquatic farm applicants view that issuance of an AFA stock acquisition permit transfers the ownership of the common property resource wild stocks currently existing on their farm site to private ownership.

Applicants have based this interpretation upon aforementioned prior agency actions and statements. See Exhibit 2 at right for discussion of how DFG has historically utilized stock acquisition permits to transfer common property resource stocks.

Additionally, the applicants cite AS 16.40.120(g) which states "*[a]quatic plants and shellfish acquired under a [stock acquisition permit] become the property of the permit holder and are no longer a public or common resource.*"

DFG responds by citing AS 16.40.120(f)(1) which limits transfer of wild stock only necessary to meet "*the initial needs of [the] farm.*" DFG then cites the relevant statutory definitions set out at AS 16.40.199(8) which defines stock as "*live aquatic plants or shellfish acquired, collected, possessed, or intended for use by a hatchery or aquatic farm for the purpose of further growth or propagation.*" [Emphasis added.] DFG states this means that the common property resource wild stocks can only be taken to provide seed for "planting" other geoducks rather than being harvested and sold to provide the applicant's operating capital.

From the perspective of the applicants, taking out the existing stock of geoducks is necessary to make their farming operation viable. They assert that farming technology requires that the site be cleared as much as possible of existing stocks so that planted stocks can better thrive. Accordingly, in their view, removal of wild stocks under such conditions meets the statutory definition that the stocks be transferred for the purpose of further growth and

Exhibit 2

Contrary to its Current Position, DFG has made Statements that Common Property Resource Transfer is Provided Under AFA

AFA, at AS 16.40.120(g) does not clearly establish when common property resource ownership is transferred. In prior actions involving littleneck clam farmers, DFG allowed access to the common property resource under the provisions of AFA. Statements were similarly made by DFG officials that indicated ownership of the common property resource was transferred through AFA permits. Applications submitted in 1999 were made in good faith based on these actions and statements by DFG. These statements include:

- A presentation made by a former mariculture coordinator, who, at a 1996 shellfish conference told the audience of aquatic farmers that "... [the Aquatic Stock Acquisition Permit] is the document that takes the resource out of the public domain and becomes yours to culture and sell."
- Testimony regarding stock acquisition permits to the House Resources Standing Committee in February, 1999 by the then acting Deputy Director of Commercial Fisheries, that "... once [a stock acquisition permit is] acquired by a farmer [the common property resource clams] are private property."
- A March, 1999 letter from DFG commissioner Rue to the Alaska Shellfish Growers Association, which stated, "The department believes that property rights to 'standing stocks' pass to the permittee with the lease, operations permit, and stock acquisition permit ..."

propagation. They concede the revenues generated from the sale of the geoducks would provide working capital for their operations.

Throughout all of these varying interpretations of statute, we have not seen any formal written interpretation or guidance provided to DFG from DOLaw. In fact, we have seen analyses attributed to an assistant attorney general that discusses how the AFA may or may not be an appropriate statute to provide common property resource access in a way that would withstand legal challenge.

We realize that the State is currently facing litigation involving these very issues. Once the litigation has been completed, it is likely DFG will have court-tested analysis of the extent of AFA as the statutes relate to allocation of common property resources. Such an outcome would make some, if not most, of this recommendation moot.

DFG, however, seems to have acted many times during the most recent permitting process without clear written legal advice from DOLaw regarding the interpretation and application of the AFA. We believe it would have been much wiser had DFG obtained some written advice addressing the constitutionality of the AFA, in order to provide a firmer basis for the department's actions. Accordingly, to the extent any court decision does not address all relevant legal issues involved, it would still be advisable for DFG to request a written analysis from DOLaw regarding interpretation and application of the AFA.

Recommendation No. 2

DFG should develop and adopt regulations to further define and clarify various provisions of the AFA that have had a substantial impact on the interpretation and application of the statute during the most recent permit review process.

Statutes that relate to the permitting of aquatic farming activities include language and phrases, the interpretation of which has proven critical to decisions made by DFG when reviewing aquatic farm permits. Two statutory phrases in particular proved to be contentious during the recent application period, with DFG citing them as a basis for denying sought after permits:

1. Significantly affect. Under AS 16.40.105 DFG's commissioner must issue an aquatic farm permit if a proposed farm does not "...*significantly affect fisheries, wildlife, or their habitat in an adverse manner.*"⁴ [Emphasis added.] This provision served as one of the reasons that the Kachemak Bay aquatic farm permits were not approved by the Division of Habitat and Restoration (DHR).

The applications contemplated farm operations that would involve netting to protect the farmed clams from predators. Use of such netting, along with the disruption of "planting"

⁴The excerpt is from AS 16.40.105 (3), which states "*the proposed farm or hatchery may not significantly affect fisheries, wildlife, or their habitats in an adverse manner....*"

clam seed in intertidal settings were considered as adversely affecting the Kachemak Bay habitat. We suggest that the use of the phrase "significantly affect" in the statute implies that there may be an operation that may have some affect on habitat that is adjudged to be insignificant, and accordingly non-adverse.

When we inquired of DHR staff about their assessment of this statutory phrasing, they stated that the "degree" of impact was irrelevant, that any degradation of the habitat in a critical habitat area would be significant and adverse. In our view, if this is the perspective of DFG, it should be through the regulation adoption process that would subject such interpretation and application to public review and comment.

2. Traditional fisheries and existing use. Under another provision of AS 16.40.105 DFG's commissioner must issue an aquatic farm permit if a proposed farm does "...not require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources."⁵ [Emphasis added.] The conditions attached to applications for SE geoduck aquatic farms, were designed in part to provide access to underwater divers participating in the local fishery for the species.

The geoduck fishery had been conducted in recent years at selected areas in southern southeast Alaska waters. The harvest of geoducks is determined by allowing only a small percentage of the resource to be taken out of a given area. Accordingly, an area must be biologically surveyed so that DFG managers have an accurate idea of how much geoduck biomass is present. At the time of application, none of the aquatic farm sites were in areas that had been formally surveyed by DFG – therefore none of the sites involved areas that had been used by the dive fishery.

Given this distinction, it does seem plausible that the specific sites involved in the aquatic farm permits did not interfere or "significantly alter" a "traditional fishery" or even an "existing use of fish" resource. Again, rather than automatically citing this rather unconventional and small commercial effort as being a traditional fishery or representing a disqualifying existing use, we suggest DFG reduce such a working definition to regulation and solicit public comment as to the reasonableness of such a classification.

Current regulations do not fully consider issues peculiar to on-bottom farming. This creates gaps in the regulations that do not address many situations. This promotes confusion among applicants and inconsistencies among program administrators. Lack of regulations has undermined the ability of DFG to develop and promote the on-bottom aquatic shellfish farming industry.

1. Lack of consistent supportive treatment from DFG. On-bottom farming for littleneck clams and geoducks has not experienced consistent supportive treatment. That is not the case with suspended culture for oysters and mussels. On-bottom farming has been subjected to DFG policy changes in the middle of the application and review process that

⁵The excerpt is from AS 16.40.105 (2), which states "the proposed farm or hatchery may not require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources."

has resulted in permit denials, wasted time, and increased investment risks to the applicants. The end result is that a potentially lucrative geoduck farming industry has been brought to a standstill.

2. Absence of Regulations. The absence of regulations led DFG to suspend the consistency review process after it had started. This contributed to frustration on the part of permit applicants and resulted in increased involvement by not only Division of Governmental Coordination (DGC), but to inquiries by the Office of the Governor and legislative committees.
3. Policy of the State. It is the policy of the State to encourage the establishment and responsible growth of an aquatic farming industry. Allocation of aquatic farming sites shall be made with full consideration of established and ongoing activities in the area. In addition, the AFA's legislative letter of intent directs the commissioner of the Department of Fish and Game to work with prospective farmers and the Board of Fisheries to develop appropriate proposals to meet the goals of the legislation. Development of regulations is consistent with the State's policy and legislative intent.

By subjecting proposed definitions and clarifications of statute to DOLaw interpretation of regulations' consistency with statute and public scrutiny, through the regulation adoption process, the department would be seen as being less arbitrary in the way the agency interprets and applies various statutory provisions. The commissioner should also expedite the development and adoption of procedural AFA regulations to comply with the intent of the act.

Recommendation No. 3

DFG's commissioner should seek legislation amending the AFA to address utilization and transfer of the State's common property resource to prospective aquatic farming operators.

As stated in the Report Conclusions section, the main reason that DFG did not approve the recent SE geoduck farming permits was due to the department's reservations whether the AFA was of sufficient scope to permit extensive transfer of common property resources to private ownership. Although DFG has allowed some farmers access to common property resource near or at their sites, such transfers have not involved competing users nor involved all resources in a given area.

DFG officials have commented that when the legislature was considering the bill which became the AFA, there was no consideration given to the prospect that aquatic farmers would utilize the State's common property resource in their operations. Our review of the testimony offered before various legislative committees that considered the bill tends to support this perspective. We saw no evidence where the transfer or allocation of the common property resource was ever discussed before the committees that had a hand in developing the AFA legislation.

We share DFG concerns that the State be adequately compensated for any activity that utilizes the State's common property resource. The farming applicants we have interviewed assert that they are not currently required, nor should they be made to, compensate the State for taking any common property resource necessary to their operations. They claim to have the same status to the resource as commercial fishers participating in a limited entry situation. The farmers point out that beyond the cost of the permit, the fishers do not compensate the State for removal of the common property resource.

In our view, there is a distinction to be made between prospective on-bottom aquatic farmers and commercial fishers. The fishers have only an opportunity to take a resource; there are no guarantees that they will be successful. The on-bottom farmers in this case, are requesting an exclusive access to clams, a common property resource of very limited mobility. Due to the relatively captive nature of the resource involved, the farmers' harvest and sale of these creatures can be viewed as more closely resembling mineral extraction than it does traditional commercial fishing. It is in this regard that we share some of the misgivings of DFG managers. We think it only appropriate that the legislature reconsider and perhaps clarify certain provisions of the AFA to address the policy implications involved with providing preferred access to the State's common property resources.

As discussed in Recommendation No. 1, we suggest that DFG obtain a formal opinion from DOLaw regarding the legality of transferring common property resources to the ownership of permittees. Even though DFG may be advised that such transfer would be legal, the commissioner should also take the issue up again with the legislature and seek clarification of the AFA to the use of the common property resource in such a manner.

Recommendation No. 4

DFG should foster staff awareness of potential conflicts of interest.

Certain staff members with an apparent potential conflict of interest reviewed authorizations of geoduck and littleneck clam farm sites operating permit applications. These conflicts involved financial and personal interests⁶ that could have been adversely affected by approval of the permits.

Although, the farm sites may have been evaluated objectively and in accordance with statutory provisions, known financial and personal interests of staff harms the public perception of the propriety of the review decisions.

⁶Alaska Statute 39.52.960(9)(A) defines financial interests as "an interest held by a public officer or immediate family member, which includes an involvement or ownership of an interest in a business, including a property ownership, or a professional or private relationship, that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit."

DFG's ethics policy provides for individual evaluation of perceived conflict of interest based on the Executive Branch Ethics Act AS 39.52, the State of Alaska Personnel Rules, and the agency's Standard of Professional Conduct, including the following considerations:

1. Extent of management jurisdiction an employee may have over a departmentally managed resource and the extent to which an employee may have an access to information not generally distributed to the public.
2. Potential an individual employee may have by virtue of his or her position in the department to affect or influence the management decisions.
3. Extent to which a conflict is real or immediate or whether it is significant, conjectural, or contrived.
4. Extent to which a perceived conflict will adversely affect the credibility of the employee and the department.

The commissioner should enforce the department's ethics policy. Prior to assigning staff to review such permits, DFG should require a certification that they are free from conflict of interests. Agency personnel with a close relationship to a party with financial interest in the outcome of a review, should be excluded from the assignment or participation in review and/or the approval process of aquatic farm applications.

Recommendation No. 5

DFG's commissioner should ensure the factual basis for findings relating to denial of aquatic farm applicant's permit is communicated to the applicant.

Initial special area permit denials issued to Kachemak Bay Critical Habitat Area applicants did not contain a factual basis for the findings. A blanket citation of conflicts with the primary purpose of the KBCHA plan "*To protect and preserve the habitat areas especially crucial to the perpetuation of fish and wildlife, and to restrict all other uses not compatible with that purpose,*" was used as the basis for the denials. Detail analysis of conflicts was provided only after applicants' legal counsel appealed for reconsideration.

This rationale basically shuts out all or any activity that may be proposed in the critical habitat area that has incompatibility with the stated goals and policies.

Alaska Statute 16.40.120(d) requires that denial of the permit by the commissioner must contain the factual basis for the finding.

Denials issued should be supported with detailed analysis of each conflict that would explain and support the agency decision.

STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

Office of the Commissioner

TONY KNOWLES, GOVERNOR

P.O. BOX 25526
JUNEAU, AK 99802-5526
PHONE: (907) 465-4100
FAX: (907) 465-2332
INTERNET:

December 28, 2000

Pat Davidson, CPA
Legislative Auditor
Division of Legislative Audit
P.O. Box 113300
Juneau, AK 99811-3300

Dear Ms. Davidson:

The Department of Fish and Game (DFG), in consultation with the Department of Law (DOL), submits these comments in response to preliminary audit report 11-30002-01, regarding mariculture development and the Aquatic Farm Act (AFA). Specifically, the audit examines issues related to applications submitted for on-bottom aquatic farming permits in 1999.

We appreciate the statements in the audit that recognize the validity of the department's primary concern that the transfer of public resources to individual farmers for exclusive use is not authorized by law and raises serious constitutional and public policy issues. However, both DFG and DOL believe a number of conclusions in the audit are wrong and we question how these conclusions were reached. I address several aspects of the audit report below, followed by a discussion of each of the audit recommendations.

Use of Common Property Resources

The controversy between the State and the geoduck applicants basically involves the desire of the applicants to be granted possession of natural stocks of geoducks present on their proposed farm sites and then to sell those geoducks to generate revenue for their farming operations. The AFA does not authorize this, a matter upon which the auditors appear to agree with DFG and DOL as stated under Recommendation No. 3. "Our review of the testimony offered before various legislative committees that considered the bill tends to support this perspective. We saw no evidence where the transfer or allocation of the common property resource was ever discussed before the committees that had a hand in developing the AFA legislation."

The value of the public resources the applicants want are far from trivial. One proposed farm contains an estimated two to five million dollars worth of wild geoducks, depending on whether they are marketed fresh or frozen. When the department proposed to issue permits to the geoduck applicants under conditions that would have prevented them from harvesting and selling wild geoducks, they refused to accept the conditions, rejected the permits, and took their claims to court and to the state legislature.

On-bottom Farming in Kachemak Bay Critical Habitat Area

The central controversy with the littleneck clam farming applicants in Kachemak Bay concerns the location of the proposed farm sites within the boundaries of the Kachemak Bay and Fox River Flats Critical Habitat Area (KBFRFCHA). DFG denied Special Area Permits for these proposed sites because on-bottom farming of littleneck clams was determined to be inconsistent with the purposes of the KBFRFCHA plan. In regard to the finding of consistency with the plan, the auditors agree on page 16 of the audit that: "The process used by DFG and the conclusion arrived at was consistent with the regulatory requirements in place." The unsuccessful littleneck clam farming applicants have chosen to appeal the denial of their Special Area Permits, and have gone to court and to the legislature.

We don't understand how the auditors can agree with DFG and DOL that fundamental public policy issues are involved in permitting on-bottom aquatic farming, yet fault the agencies for attempting to resolve them. The audit goes far beyond criticizing the state for taking too long to resolve these issues and implies some intention by DFG and DOL to subvert or block implementation of the AFA. We categorically dispute this inference.

Efforts by DFG to Implement AFA

The department has worked diligently, within constraining fiscal and staffing limitations, to implement the AFA. The first aquatic farm permit issued under the act was in 1989. Between then and 1996, when permit applications were suspended for three years because of litigation against the Department of Natural Resources (DNR), DFG issued 176 aquatic farm permits, permit amendments, or permit renewals.

When the program was reopened for new applications in 1999, 41 new farm permit applications were submitted. Eleven aquatic farm operation permits have been issued. Of the remaining 30 permits:

- Eight were withdrawn by the applicants;
- Six were eliminated because of unremedied deficiencies in their applications;
- Two have been sent to the applicants for their acceptance signatures, receipt of which would result in their issuance;
- Four were denied site leases by DNR and are under appeal by the applicants;
- Four were denied Special Area Permits because of incompatibility with the KBFRFCHA Management Plan (while denials of their Special Area Permits are being appealed, review for their aquatic farm operation permits have been suspended); and
- Six geoduck clam permits were denied after refusal by the applicants to accept the conditions of the permits.

The six geoduck permits were denied DFG aquatic farm operation permits because the applicants would not accept conditions on the permits that limited the use of wild stocks, not because of established or conflicting public uses.

Another major effort to assist the development of a mariculture industry by DFG involved overseeing construction of the Seward Shellfish Hatchery and Mariculture Technical Center and its continuing commitment to completion of the facility's wastewater depuration system. This effort was funded by the legislature and supported by the department because it was believed, by

both the department and the shellfish farmers, that a shellfish hatchery and mariculture research center were necessary to facilitate the development of the aquatic farming industry in Alaska. Once the hatchery was complete, the department secured a contractor to operate the facility. While unable to fund the operation of the hatchery, the department has supported the hatchery operator's efforts to secure funding from third party sources. These include the Exxon Valdez Oil Spill Settlement Trustees, the Alaska Science and Technology Foundation, and the University of Alaska.

Another example of DFG support for the mariculture industry is the work of our fish pathology program, which provides complete diagnostic services for salmon hatchery operators and the shellfish hatchery in Seward. Fish pathology program support of mariculture includes:

- Disease certification of shellfish hatchery sources in the Pacific Northwest for import of Pacific oyster spat into Alaska;
- Examination of shellfish broodstocks and juveniles regarding excessive mortality or to establish a disease history for instate movement from farm site to farm site;
- Review of all fisheries resource and transport permits for shellfish and proposals for applied research on diseases of wild and cultured shellfish;
- Annual inspections of the shellfish facility in Seward; and,
- Maintaining a statewide shellfish disease history database and performing investigative research on shellfish diseases.

The laboratory work is currently conducted at no cost to shellfish growers or the hatchery in Seward, other than transportation costs of forwarding samples to the lab for testing.

Even the department's efforts to allow shellfish farmers to utilize littleneck clams in the vicinity of their oyster farm sites, for which the department was and is still being criticized, demonstrates our support of development of a mariculture industry in Alaska. The limited permitting of small-scale clam harvesting, in association with existing oyster farms in southeastern Alaska and Prince William Sound, was intended as a supplemental measure to improve the financial viability of those farms, many of which reportedly operate on very thin margins.

However, during the 2000 application period the department received several applications requesting wild stocks found on the proposed farm site for the purpose of financing farm operations. This is not aquatic farming. In fact, this is just a form of commercial fishing that allows the applicant exclusive harvest rights to valuable public resources. It is inconsistent with the AFA and other provisions of law. It also violates the Alaska constitution which reserves fish in their natural state to "the people for common use."

The review of these applications caused the department to more closely examine the issues associated with on-bottom farming and the use of wild stocks. The wisdom of carefully reviewing the public policy implications of these issues is one place where the auditors appear to agree completely with the department. The department is currently undertaking, in consultation with DOL, such a review and released draft regulations on December 19, 2000 governing the permitting of aquatic farms and the use of wild, standing stocks on farm sites, for public review and comment.

Misinterpretation of State Law

In our judgment, the audit report is predominantly an interpretation of law - an analysis of whether the department's policies for permitting aquatic farms are consistent with the AFA. However, it misinterprets and misstates state law. It contains no case citations, rules of construction, or any other legal tools used to give meaning to statutes. This results in an "interpretation" that examines only parts of relevant statutes, ignores overlying constitutional law, and gives priority to some statutory sections over other sections of equal status.

Page 6 of the report provides background information on stock acquisition permits, which are governed by the AFA. The report states the AFA allows a farmer to take wild stocks "necessary to meet the initial needs of the farm." There are a number of problems with this statement. First, this is an inaccurate rendition of the law. The statute refers to "the initial needs *of farm or hatchery stock*" not simply the "initial needs of the farm." See AS 16.40.120(f)(1) (Emphasis added). Second, the report omits the other condition - that wild stock may only be used for "further growth and propagation." See AS 16.40.199(8). In other words, if a farmer needs to obtain wild stock to begin farming, instead of obtaining seed or brood stock elsewhere, the farmer may be able to obtain wild stock for "further growth or propagation" by being issued a stock acquisition permit. See AS 16.40.120(d). For the report to mention that a farmer may obtain wild stock to meet the initial needs of the farm, without mentioning the limited purposes for using that stock, neglects an important limitation of the law.

Page 12 of the report notes that the constitution allows several exceptions to the ban against the exclusive right of fishery. One of the exceptions is to promote aquaculture. The report goes on to state that "[t]he process by which special privilege has been made available for aquaculture has perhaps not been similarly constructed or if it has by virtue of AFA, it has not been tested in court." (Emphasis added).

There is no legal basis for the suggestion that the legislature, through the AFA, may have granted an exclusive right of fishery to aquatic farmers. Implementing a system that grants an exclusive right in any fishery would have to be done with clear legislative intent, and there is no such intent in either the Act or its legislative history. In fact, the audit report acknowledges that on-bottom aquaculture was probably not even in the legislators' minds when they adopted the Act.

On this same page, the report states "[e]ven though DFG has relied on the AFA as a basis to transfer standing stock to 'farmers' the department seemingly asserts the nature and scope of the geoduck operations are substantially different and should be permitted in a manner that provides more extensive due process to the public at large." This is an incorrect statement about how a common property resource can be transferred to a farmer.

The AFA provides for two types of permits. One of them, a stock acquisition permit, can serve as a vehicle for transferring a common property resource to a farmer, if the wild stock is to be cultivated. DFG has always been clear that stock transferred via a stock acquisition permit is no longer common property. That permit is the only way a farmer can gain ownership of wild, common property shellfish.

The other type of permit, an aquatic farm operating permit, merely allows a farmer to engage in aquatic farming practices at a particular location. An aquatic farm permit does not authorize the farmer to harvest, cultivate, or otherwise deal with common property shellfish at that site. Thus, the farmers are wrong when they say that by merely receiving an operating permit and a lease from DNR they gain ownership of the wild resources on the site. They would also need a stock acquisition permit, and that permit may only be issued if the farmer intends to use the wild shellfish for the limited purposes set out in the statutes - further growth or propagation. The department was correct and not "contrary to its current position" (Report, p. 20, Exhibit 2), when it said, "The department believes that property rights to 'standing stocks' pass to the permittee with the lease, operations permit, *and stock acquisition permit...*" (Emphasis added).

On page 13, the report states that "[b]y attempting to impose conditions to the extent of making operations unfeasible, the department was not acting consistently with AFA's statutory mandate that DFG 'encourage the establishment and responsible growth' of aquatic farming in the State." The report, however, pins consistency on this one mandate, and in the process, ignores the other statutory purposes mentioned above (further growth and propagation) and ignores the Alaska constitution's prohibition against exclusive rights in fisheries.

Elsewhere, the report states that the department "added" the conditions to four, existing statutory criteria that govern the issuance of farm permits. In reality, the department's conditions merely implement those statutory criteria or implement the constitutional prohibition against exclusive fishing rights. The conditions are derived from the laws; they are not "additions" to it.

For example, one of the department's conditions, criticized in the report, requires farmers to identify a method for distinguishing wild stocks from farmed stocks. This condition is critical because, as explained above, a farmer may not acquire ownership of wild stocks without a valid stock acquisition permit, and none of the farm applicants now suing the department applied for stock acquisition permits. Given this, the only way the department could ensure that the proposed farms would not violate the constitutional prohibition against exclusive fishing rights as well as insure that the public's access to those resources would be preserved was to require the applicants to show that standing stocks would not be affected by farming operations.

Conditions must be imposed on the farmers to make certain they operate farms that meet the criteria in AS 16.40.105. Finding fault with conditions imposed by DFG reflects an apparent bias that DFG should have granted permits regardless of its statutory duties to protect fish and wildlife and other users of the resource, in order to promote farming. Second, it presupposes that a farmer could have access to the wild stock as a source of revenue for the farm, an assumption that is not finally questioned until the latter part of the report. Third, it overlooks the fact that farmers who claimed to have no geoducks on their site, still refused to agree to the permit conditions, even though the requirement for distinguishing wild from planted stock ostensibly would not have affected them. DFG did not impose additional requirements to the criteria listed in AS 16.40.105. The conditions were necessary to guarantee the farmers would continue to operate in a manner consistent with the criteria in AS 16.40.105 and AS 16.40.120.

Comparison of Commercial Dive Fishery and Aquatic Farming Not Valid

On page 7, the report makes a comparison of the economic value and benefits to the state from two development options: commercial fishing and aquatic farming. This comparison is

misleading and invalid. First, it compares an existing enterprise with one that doesn't exist. However "lucrative" geoduck farming in Alaska may look conceptually, it has yet to be proven in reality. Until demonstrated, there is no certainty that geoduck farming in Alaska will be economically or biologically feasible. This biological uncertainty is acknowledged on page 17 of the report: "Further, Alaska waters are the most northerly areas where geoduck clams are found; the biological dynamics of the species at the edge of its habitat may be significantly different." The only evidence that exists that indicates geoduck farming may be feasible is in Washington State where farming is allowed, but only in inter-tidal areas on privately owned beaches.

Without conducting any business or economic analysis of geoduck farming, the report appears to assume that it will be not only viable but could also be "lucrative." Strangely, the comparison chosen to demonstrate this doesn't even contain an estimated value for farmed production. It compares the revenue earned from harvesting wild geoducks by individual divers, operating under a harvest rate of less than 5%, with the exclusive harvest by a single farm operator of the entire wild geoduck population on his proposed site. This particular farm site also happens to contain the highest concentration of geoducks on any proposed site. There is no attempt whatsoever to calculate revenue produced from actual farmed, as distinct from wild production.

DFG Policies Do Not Jeopardize Shellfish Hatchery

Page 18 of the report criticizes the department for jeopardizing the operational viability of the Qutekcak Shellfish Hatchery. In fact, the department's policies actually *enhance* the hatchery's ability to sell its products. That is because the department has always supported farmers who engage in actual aquatic farming – growing fishery resources from planted seed stock. What the department questions are "farmers" who intend to harvest existing wild stocks under the pretext of mariculture. The reason that the plaintiffs are not customers of the hatchery is that they refused to accept permits that limited their ability to harvest wild geoducks now growing on their proposed sites. The permits offered by the department would *not* have limited their ability to plant, cultivate, and harvest shellfish grown from seed purchased from the hatchery.

In reviewing the Qutekcak business plan, it is clear that oyster production was the primary purpose of the facility; the plan says the hatchery will initially concentrate on oyster production. The plan projects, if technical production problems are overcome, market issues resolved, and a demand develops, that over time more income will come from other shellfish species, like littleneck clams, geoducks, scallops, and mussels. A spreadsheet is included showing the hoped for expectations. It should be noted that the first projected revenue from geoduck sales was expected to occur in the third quarter of 1998, several months before the first geoduck farm application was even received by DFG.

The hatchery's business plan was never approved by DFG. The department made it clear to Qutekcak that it had doubts about the viability of the business plan. According to the then DFG mariculture coordinator, Qutekcak was unresponsive to the department's concerns.

It should be noted that the hatchery, not the department, projected that large-scale geoduck farms would come on line in 2000. The reasoning for this assumption is unclear, and the small scale of oyster farming in Alaska, even after over ten years of development, should have served as a warning to the hatchery operator that geoduck development might also be expected to proceed

slowly, especially given the experimental state of geoduck culture. Since the projection of expected revenue was made more than two years prior to the first application for a geoduck farm, that revenue projection must be viewed as speculative.

The audit report presents no information or reasoning to conclude that the revenue projections of Qutekcak were realistic or achievable. The statements of Qutekcak are presented as a matter of fact without any attempt to independently verify if the statements are factual. It is unwarranted to put the blame for the hatchery's problems on DFG. As stated previously, the department issued six geoduck permits recently, but the applicants rejected them because conditions in the permits would have prevented the farmers from selling the wild geoducks on their farm sites. It should be apparent to all concerned that geoduck farmers that are merely harvesting wild stocks won't have much need for geoduck seed from a hatchery.

DFG Inconsistencies

The audit alleges that DFG has been inconsistent in the manner it has implemented two provisions of the AFA: the promotion of aquatic farming and the permitting of on-bottom aquatic farms.

Permitting of on-bottom farming

We acknowledge that the department has struggled with permitting issues where applicants proposed to farm native species of shellfish on public tidelands and submerged lands, especially where others were also using these resources. The department pointed out that on-bottom farming of native shellfish was not discussed during the legislative hearings on the AFA, so it had little guidance on how to deal with these issues when they surfaced.

We further acknowledge that development of permitting regulations addressing the unique issues involved with on-bottom farming of native species should have occurred at an earlier date. A stock acquisition permit was also issued under circumstances inconsistent with the law in the past, but this mistake has been corrected in current permitting practices. However, it has always been DFG policy that wild stock ownership does not pass to a farmer via an operating permit. DFG has consistently required a farmer to obtain a stock acquisition permit before wild stock can be transferred.

On page 20, the report provides information that allegedly demonstrates the inconsistency of the department's position on the transfer of common property resources. The report confuses DFG statements with regard to the limited transfer, for brood stock and further growth and propagation of a public resource under a stock acquisition permit, with the transfer of a common property resource for commercial sale from an aquatic farm. The initial policy of DFG was to respond to the requests from aquatic farmers to harvest wild stocks by issuance of a miscellaneous commercial shellfish permit. Subsequently, three shellfish farmers were allowed to harvest and sell wild shellfish under a stock acquisition permit. The department has recognized this is inconsistent with law, has ceased the practice, and returned to its original policy for issuing the miscellaneous commercial shellfish permits. Unlike a stock acquisition permit, these commercial fishing permits bestow no exclusive rights to the resource.

All the statements referred to in Exhibit 2 say that if a farmer has an acquisition permit for wild stocks on the farm site, those wild stocks become the property of the farmer. DFG has said this

all along, and that continues to be its position today. The statements in Exhibit 2 are out of context and construed as evidence of a department policy that does not exist. DFG recognized that the isolated instances in which the department granted stock acquisition permits for the purpose of selling wild stocks to finance farm operations was inconsistent with the statute and has ceased this activity.

Promotion of aquatic farming

The report criticizes the department for inconsistency in promoting aquatic farming. Examples referred to in the audit include: varying levels of participation by DFG in aquatic farming workshops and public meetings; inconsistent participation with the University of Alaska Sea Grant Program; and restructuring of the mariculture coordinator's duties with less emphasis on encouraging members of the public to take up aquatic farming.

The ability of any state agency to carry out its duties is directly related to the financial resources provided by the legislature. In that regard, the legislature has not provided additional operating funds for the promotion of aquatic farming. In fact, the department, and the division of commercial fisheries specifically, have seen very significant reductions in general fund appropriations during the last ten years.

At one time, there were three employees in the aquatic farming section. For some time there has been only one. Some prioritization and reduction in the scope of the program is a logical response to reductions in staffing and funding and is well within the proper administrative discretion of the department. In evaluating how the department has prioritized its limited resources, I do not believe there can be any disagreement that the first priority is to ensure that its regulatory and permitting functions are carried out. Despite this, it is still the policy of DFG that its mariculture coordinator participate, to the extent funding and time allow, in mariculture meetings, workshops, and conferences.

Recommendation No. 1:

The Department of Fish and Game (DFG) should obtain formal legal advice from the Department of Law (DOLaw) regarding allocation of common property resources under the Aquatic Farm Act (AFA).

DFG concurs with this recommendation with the caveat that litigation on this issue is currently underway and the court will likely provide an answer to the question of whether common property resources may be allocated to a private farmer for exclusive use and benefit. We want to emphasize that DFG has consistently sought the advice of DOL on this issue and it is the view of both DFG and DOL that the AFA does not provide the authority for transferring common property resources to a private party, except for the limited uses prescribed under a stock acquisition permit. In the unlikely event that the court ruling does not address this issue, DFG will request a formal, written opinion on the question from the attorney general.

Recommendation No. 2:

DFG should develop and adopt regulations to further define and clarify various provisions of the AFA that have had a substantial impact on the interpretation and application of the statute during the most recent permit review process.

DFG concurs with this recommendation and the agency has already released proposed regulations for public review and comment. The regulations should be in effect by the spring of 2001.

Recommendation No. 3:

DFG's commissioner should seek legislation amending the AFA to address utilization and transfer of the State's common property resource to prospective aquatic farming operators.

DFG does not concur with this recommendation. As has been previously stated, DOL and DFG believe that state law is clear that the AFA does not authorize the transfer of the State's common property resource to prospective aquatic farm operators, except for the limited purposes conveyed by a stock acquisition permit. Pending the outcome of current litigation, the department sees no public interest in amending the AFA.

Recommendation No. 4:

DFG should foster staff awareness of potential conflicts of interest.

DFG concurs with this recommendation. The department currently notifies employees twice per year of the need to disclose outside employment. This notification will be broadened to include other potential conflicts of interest.

Recommendation No. 5:

DFG's commissioner should ensure the factual basis for findings relating to denial of aquatic farm applicant's permit is communicated to the applicant.

DFG concurs with this recommendation. Prior to the permit review period for 2001 aquatic farm applications, I will issue a memorandum to staff that emphasizes the results of the audit and directs staff to provide the factual basis for any denial of an aquatic farm applicant's permit.

Thank you for the opportunity to comment on this preliminary audit report. If you have any questions or require additional information, please contact me.

Sincerely,

Frank Rue
Commissioner

Pat Davidson

10

December 28, 2000

Drafted by Kevin Brooks
CO Log Item #7501

cc: Doug Mecum
Ken Taylor
Division of Administration
Shawn Hunstock

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES
OFFICE OF THE COMMISSIONER

TONY KNOWLES, GOVERNOR

400 WILLOUGHBY AVE. 5th FL.
JUNEAU, ALASKA 99801-1796
PHONE: (907) 465-2400
FAX: (907) 465-3886

550 WEST 7th AVENUE, STE 1400
ANCHORAGE, ALASKA 99501
PHONE (907) 269-8431
FAX (907) 269-8918

December 21, 2000

Pat Davidson
Legislative Auditor
P.O. Box 113300
Juneau AK, 99801-3300
legaudit@legis.state.ak.us

Ref: Audit Control No 11-30002-01

Dear Ms. Davidson:

We appreciate the opportunity to comment on the October 23rd preliminary audit report concerning the issues that came up during the state's 1999 aquatic farm application period.

We noticed that some statements relating to ADF&G issues appeared to be inaccurate or represented in part. We hope that Fish and Game will have the same opportunity to review the report in order to respond and clarify the statements and issues in the document.

The following comment addresses a DNR paragraph. Please refer to Page 7, paragraph 7. We recommend rewording it to read:

"As a result of the State Supreme Court Decision, DNR's (*deletion*) statutes relating to aquatic farmsites *were* amended. The legislature passed statutory changes related to the aquatic farm permitting process in 1997. The *revised legislation* changed DNR's aquatic farming permit program, *in part*, to a land leasing program.

Sincerely,

Carol Carroll
Director

Cc: Pat Pourchot
Bob Loeffler
Nancy Welch
Kim Kruse

January 4, 2001

Members of the Legislative Budget
and Audit Committee

We have reviewed the responses to the preliminary report prepared by the Department of Fish and Game (DFG) and the Department of Natural Resources (DNR). In response we have made some minor editorial changes suggested by DNR. As for DFG's response we offer the following comments and observations:

1. Objections about "inferences" made in the report. On page two of DFG's response (page 28 of the report), the department states "*(t)he audit goes far beyond criticizing the state for taking too long to resolved these issues and implies some intention by DFG and DOL to subvert or block implementation of the (Aquatic Farm Act) AFA. [emphasis added]*"

We discuss in the report that DFG has issued permits and has supported aquaculture activities involving suspension-like farming. In these areas DFG is satisfactorily carrying out the precepts of AFA, and accordingly we believe the report gives the department due credit.

The report also discusses the issues raised by permit applicants that are seeking approval for what are referred to as "on-bottom" aquaculture operations. For prospective geoduck applicants we discuss a central objection that DFG has to the proposed operations – the requested transfer of the existing common property geoducks for the exclusive use of the applicants.

The report contains a discussion of the conflicting arguments regarding whether the Aquatic Farm Act (AFA) is an appropriate statutory vehicle to transfer common property resource (CPR) for exclusive use. The report acknowledges that there are legitimate questions of law that need to be settled. We think it is fair to report that DFG has, in the past, operated under AFA authority to transfer common property resources to an aquatic farmer, albeit on a lesser scale involving littleneck clams. While DFG's current position, although perhaps legally appropriate and defensible, is still inconsistent with past department actions. We believe it was important to point out this inconsistency in the report.

- 39 -

2. Denial of permits involving conditions or conflicting public uses. In the next to the last paragraph on page 2 of the department's response (page 28 of the report), DFG states that six geoduck permit applicants were denied not because of "*conflicting public uses*" but because the applicants "*would not accept conditions on the permit that limited the use of wild stocks.*"

In our view, one of the objectives behind the proposed conditions was to preserve access to geoduck wild stocks for other potential users. Accordingly, we believe DFG's attempted imposition of permit conditions is consistent with the report's characterization that the department was concerned about access of other user groups to the geoduck wild stocks.

3. Legal interpretation of constitution and AFA. On pages 4 and 5 of the department's response (pages 30 and 31 of the report), DFG and the Department of Law (DOL) argue the State's legal position regarding the interpretation and application of the State constitution and AFA.

For purposes of informative disclosure, we believe it is important to set out in the report the general legal arguments that geoduck applicants assert. While not vouching for its interpretation, such arguments are included in order identify the issues involved in the dispute between DFG and geoduck applicants.

The ultimate validity and appropriateness of the department's actions and positions will presumably be settled in litigation. But again, regardless of DFG's current position and legal interpretation of AFA, in the past the department has acted in a manner inconsistent with the agency's current interpretation of AFA as it relates to the ownership of, and access to, standing common property stock.

4. Economic Comparisons. DFG criticizes the comparisons of the economic value of geoducks that we presented as part of Background Information section of this report. DFG's points regarding amount and prospective value of geoducks are well taken.

The information presented in the report was developed from projections and estimates made by both DFG and the geoduck applicants. We used the projections of geoduck applicants because these estimates were referred to many times by DFG staff we interviewed during the audit. Accordingly, department personnel tacitly acquiesced to the general concept that there is a large, possibly very lucrative market existing for live geoducks. The projections developed for the dive fishery was taken from DFG's own records and reports prepared for Commercial Fisheries Entry Commission.

5. Outokcak Shellfish Hatchery (OSH) . On page 6 (page 32 of the report) of its response ADFG takes exception with the report's characterization of the department's role as it related to the operational viability of QSH. We do not intend to imply that DFG actions related to geoduck applications was the sole factor that adversely affected the operational viability of QSH.

Indeed, as set out in DFG's response, we agree QSH business plans may not have been viable from the beginning, and as the department notes, QSH was unresponsive to many of the department's concerns. We believe it was important to mention QSH's predicament in the report, but recognize that there are many other factors besides the denied geoduck aquatic farm applications that have had an impact on QSH's ability to operate as a going concern.

In summary, we reaffirm the conclusions and recommendations contained in the report.

Pat Davidson, CPA
Legislative Auditor

5 AAC 41.200 is amended to read:

5 AAC 41.200. APPLICABILITY OF REGULATIONS. The provisions of 5 AAC 41.200 - 5 AAC 41.400 govern the permit application, review, and issuance of [PROCESS FOR] aquatic farm operation and shellfish hatchery operation permits, stock acquisition permits, shellfish and aquatic plant stock transfer permits, and establish guidelines and procedures regarding the operation of permitted aquatic farms and shellfish hatcheries. (Eff. 4/10/88, Register 106; am 8/12/89, Register 111; am ____/____/2001, Register __)

Authority: AS 16.05.050 [AS 16.05.340 (b)] AS 16.40.160
AS 16.05.092 AS 16.40.100

5 AAC 41.210 is repealed:

5 AAC 41.210. PERMIT REQUIRED. Repealed ____/____/2001. (Eff. 4/10/88, Register 106; am 8/12/89, Register 111; repealed ____/____/2001, Register ____)

Authority: AS 16.05.050 AS 16.05.092 AS 16.05.340(b)
AS 16.40.100 AS 16.40.160

5 AAC 41.220 is repealed and readopted to read:

5 AAC 41.220. AQUATIC FARM AND SHELLFISH HATCHERY OPERATION PERMIT APPLICATIONS. (a) An applicant for an aquatic farm or a shellfish hatchery operation permit that requires the use of state tideland, shore land, or upland managed by the Department of Natural Resources, shall submit a multiagency application and a coastal project questionnaire to the Department of Natural Resources, during an application filing period under

11 AAC 63.020. Applications will be reviewed in accordance with 11 AAC 63.030-63.900, 6 AAC 50.010-50.190, and 5 AAC 41.200-41.400.

(b) An applicant for an aquatic farm or shellfish hatchery operation permit that does not require the use of state tideland, shore land, or upland managed by the Department of Natural Resources, may obtain an application and a coastal project questionnaire from the department and submit it at any time. An application submitted under this section will be reviewed in accordance with 6 AAC 50.010-50.190, and 5 AAC 41.200-41.400.

(c) An application for an aquatic farm or hatchery operation permit, submitted under (a) or (b) of this section, shall include the following information;

(1) the name, mailing address, and telephone number of the applicant;

(2) the name, mailing address, and telephone number of anyone acting as an agent for the applicant, if applicable;

(3) a United States Geological Survey topographic map and a National Ocean Survey nautical chart of the largest, commercially available scale, clearly indicating the location of the proposed site and the direction and distance to the nearest major community;

(4) the common and scientific names of all species requested for culture;

(5) documentation of the natural range of the species intended for culture (Pacific oysters (Crassostrea gigas) and other oyster species being transported under 5 AAC 41.070 are exempt from this requirement);

(6) an overhead view (site plan) of the site at a scale adequate to clearly diagram or depict

(A) the location, outline of the boundaries, dimensions, and size (to the nearest tenth of an acre) of each separate subtidal, intertidal, and upland parcel of land comprising the proposed site;

(B) the areas of the seabed composed of exposed sand, mud, rocks, or gravel and the areas that are covered by beds of eelgrass, kelp, barnacles, mussels or concentrations of other species of plants or animals on, and around, each parcel of the proposed site;

(C) the number and location of transects, the location and individual size of sampled plots, and the results of any biological sampling conducted on the site;

(D) the location, type, size, configuration, and number of culture gear and support structures proposed for use in the farming or hatchery operations;

(E) the direction from which the prevailing winds and storms hit the proposed site, the known or inferred meteorological extremes affecting the site, and the means of protecting the site and the cultured species from harm by storms, icing, and other weather conditions;

(F) the directions in which the ebb and flood tides run at the proposed site and the known or inferred speed, in knots, of the maximum ebb and flood currents at the site;

(G) the latitude and longitude of the northeast corner of each separate parcel to the nearest hundredths of a minute;

(H) the names and addresses of upland property owners within one-half mile on either side of the proposed site and the location of their property in relationship to the site;

(I) the location and type of all known past or present human uses of marine resources and lands, on and around the proposed site, including commercial fishing, personal and subsistence use, and recreation;

(J) a description of how the proposed activities may affect existing uses of fish and wildlife resources, and a description of proposed methods to minimize or mitigate potential conflicts with existing uses;

(K) the location of all anadromous fish waters, specified in AS 16.05.870(a), within 300 feet of the boundaries of the proposed site, and the anadromous fish species using the stream for spawning, rearing, or seasonal refuge;

(L) the location of the nearest reliable source of suitable freshwater that will be used by the farm or hatchery for processing and domestic use;

(M) the general distribution of wild stocks of the species intended for culture, and an estimate of their total number within the proposed site;

(N) the areas on the proposed site (in acres or fractions of an acre) which appear to be suitable for culture of the intended species but on which wild stocks of the species currently are not found;

(O) the locations where fuel, lubricants, or other petroleum-based products will be stored on the site, and where oil containment and spill cleanup equipment will be maintained on the site; and

(P) the alignment of the side (cross-sectional) views of each parcel required in subsection (7) below;

(7) a side (cross-sectional) view of each parcel of the proposed site at a scale adequate to clearly depict

(A) support structures or facilities, such as suspended culture gear and anchoring systems necessary to conduct the proposed activities; and

(B) water depths, major physical and biological features on the seabed, and bottom contours;

(8) a list of the common and scientific names of all known or likely predators of the species intended for culture that occur in the vicinity of the proposed site;

(9) types of non-destructive control measures intended to prevent predation on the species intended for culture, including detailed specifications of methods to be used to discourage predation by marine mammals any species which are listed as of-concern, threatened, or endangered;

(10) photographs, or electronic images, of each parcel of the proposed site, with major physical and biological features clearly labeled;

(11) information regarding the water quality at the site, including

(A) any known incidences of paralytic shellfish poisoning or occurrence of human pathogens in the local shellfish or waters on the site;

(B) any known or potential water pollution sources at or around the site and proposed means of mitigation or treatment; and

(C) any seasonal problems that might be anticipated due to fresh water discharges from local rivers, sediment loads from glaciers, or transient human or animal use of the site;

(12) a separate development plan for each species proposed for culture, for the first five years of operation, including

(A) proposed cultural methods and equipment proposed for use in site preparation;

(B) seed source and number of seed to be planted;

(C) planting schedules, and methods and equipment proposed for use in planting seed and cultivating animals; and

(D) harvest schedule, and methods and equipment proposed for use in harvesting operations.

(13) a business plan that includes the costs associated with each activity or phase of development;

(14) documentation of the technical and operational feasibility of the proposed activities;

(15) if an applicant intends to cultivate and harvest wild stock in accordance with 5 AAC 41.245, the application must include

(A) a plan and schedule for collecting information on the abundance, biomass, and size composition of the wild stock on the site;

(B) a description of the culture practices to be used to increase productivity;

(C) a projection of the rate of increased productivity that will result from the use of culture practices; and

(D) if supplemental feeding of cultured animals is intended, a feeding plan that includes the type, origin or harvest location, annual amount, and the means of preventing adverse effects of unconsumed feed stock on the local environment;

(16) if an applicant does not intend to cultivate and harvest wild stock present at the proposed site, an explanation of how wild stock, which occupy or may naturally settle on the site, will be differentiated from planted stock and protected from harvest or harm by the proposed activities; and

(17) other information as may be required by the department. (Eff. 4/10/88, Register 106; am 8/12/89, Register 111; am 12/16/98, Register 148; am ____/____/2001, Register ____)

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.160
AS 16.05.092

5 AAC 41 is repealed and readopted to read:

5 AAC 41.230. ADDITIONAL INFORMATION. (a) After an application has been received by the department, the department shall determine whether the information in the application is adequate. If the information provided is inadequate, the department shall, in writing, request additional information from the applicant. The applicant shall have 30 calendar days in which to provide a written response. Failure to respond to a request for additional information will result in termination of review of an application.

(b) Failure of an applicant to provide sufficient information for the evaluation of the application will result in termination of further consideration of the application. (Eff. 4/10/88, Register 106; am 8/12/89, Register 111; am ____/____/2001, Register ____)

Authority: AS 16.05.050 AS 16.05.092 AS 16.05.340(b)
AS 16.40.100 AS 16.40.160

5 AAC 41.240 is repealed and readopted to read:

5 AAC 41.240. REVIEW AND DETERMINATION. (a) The commissioner shall not issue an aquatic farm or shellfish hatchery operation permit unless the application meets the criteria in AS 16.40.105 and the regulations adopted in this chapter.

(b) The commissioner will deny a permit if it is determined, that

(1) the proposed site:

(A) is unsuitable for the species intended for culture;

(B) is unsuitable for the gear proposed for use;

(C) is in close proximity to known or likely sources of pollutants;

(D) is exposed to adverse weather or oceanographic conditions to an extent that the proposed facilities or cultured species can be expected to suffer severe damage or destruction;

(E) supports a high abundance of predators or competitors of the species intended for culture;

(F) is in an area that contains critical habitat for species which are listed as of concern, threatened, or endangered in an area federally designated as critical habitat, if the species intended for culture or the proposed culture technique will adversely affect the species being provided federal protection; or

(G) covers an excessive proportion of the available habitat in a biologically or geographically defined area, such as an enclosed inlet.

(2) the proposed site is

(A) used for the conduct or support of any traditional fishing operations, including the setting, operation, and retrieval of fishing gear, for anchoring, staging, or

storage of vessels or other fishing gear, or for transfer or storage of a harvested product or gear;

(B) identified in an annual operating plan developed by the department, by itself or in cooperation with other users of the resource, such as the southeastern Alaska regional dive fishery development association under AS 43.76.200(b);

(C) used for research conducted by authorized agencies, organizations, or individuals and the proposed activities will significantly alter this use;

(D) used for harvesting, handling, or processing of fish, wildlife, or plant resources by commercial, sport, subsistence or personal users, and the proposed activities will significantly alter this use;

(E) used for traditional, cultural, or ceremonial purposes associated with resources on the site; and the proposed activities will significantly alter this use, or

(F) within a terminal harvest or special harvest area of a Private and Non-profit salmon hatchery.

(3) the proposed site or facility

(A) will disrupt or adversely affect

(i) milling, spawning, or rearing of herring or other species of important forage fish;

(ii) use of the area by shorebird or waterfowl species for feeding, refuge, or staging;

(iii) sea otter feeding, pupping, nursing, or refuge;

(iv) salmon milling, spawning, or rearing;

(v) maintenance of kelp or eelgrass beds;

(vi) critical or unique nursery areas for fish, shellfish, or aquatic plants;

(vii) critical wildlife travel corridors or feeding areas; or

(viii) harbor seal rookeries

(B) is within

(i) a one-mile radius of seabird colonies, or sea lion or walrus haul-outs;

(ii) a 330 foot radius of bald eagle nest trees;

(iii) a three-mile radius of sea lion rookeries;

(iv) 300 feet of an anadromous fish stream; or

(v) an area specifically closed to aquatic farm operations by 5

AAC 95.

(4) the applicant cannot

(A) demonstrate or document the success of the proposed culture practices in areas with habitat similar to the habitat on the proposed site;

(B) demonstrate or document that the proposed site is within the natural range of the species intended for culture, except Pacific oysters (Crassostrea gigas) and other approved species of oysters, which are exempt from this requirement;

(C) demonstrate how the growth and survival rates (productivity) of the species intended for culture will be measured;

(D) identify where seed or brood stock will be acquired; and

(E) demonstrate, if supplemental feeding of cultured species is being proposed, how use of supplemental feeding of cultured animals can be conducted without degrading water quality or damaging habitat.

(c) The commissioner will issue a decision on the application after a determination on project consistency with the Alaska Coastal Management Program has been issued by the division of governmental coordination, office of management and budget, under 6 AAC 50.

(d) An application for an aquatic farm or shellfish hatchery operation permit that has been denied by the commissioner will, in the commissioner's discretion, be reconsidered if the applicant provides new information, not available at the time the application was submitted, that might alter the original decision. A request for reconsideration must be received by the Commissioner within 30 days of the applicant's receipt of the Commissioner's denial of the permit application and must include the new information and reasons why it was not submitted with the original application. (Eff. 4/10/88, Register 106; am 8/12/89, Register 111; am ____/____/2001, Register ____)

Authority: AS 16.05.050 [AS 16.05.340 (b)] AS 16.40.160
AS 16.05.092 AS 16.40.105

5 AAC 41 is amended by adding a new section to read:

5 AAC 41.245. HARVEST OF WILD RESOURCES. (a) Wild stock that occurs naturally at a proposed farm or shellfish hatchery site do not become the property of an aquatic farm or shellfish hatchery operation permit holder unless the permit holder obtains a stock acquisition permit issued under 5 AAC 41.290.

(b) An aquatic farm operator who has obtained a stock acquisition permit for the purpose of cultivating wild stock for harvest, must demonstrate that the rates of reproduction, recruitment of spat, survival, or growth of the wild stock has been enhanced by the application of farming practices. Wild stock that has been enhanced may only be harvested at a rate equivalent to the increase in abundance or biomass that can be directly attributed to use of aquatic farming practices. This section does not apply to seed stock acquired through a stock acquisition permit and planted by an aquatic farm operator. (Eff. ____/____/2001, Register ____)

Authority: AS 16.05.050 AS 16.40.105 AS 16.40.160

5 AAC 41.250 is repealed and readopted to read:

5 AAC 41.250. PERMIT CONDITIONS. (a) The commissioner may attach conditions to an aquatic farm or shellfish hatchery operation permit, including, but not limited to, requirements that a permit holder

(1) demonstrate that culture activities enhance the productivity of the cultured species on the farm or shellfish hatchery site by application of farming methods and practices;

(2) limit the use of a permitted farm or shellfish hatchery site to the rearing and harvest of approved species for culture;

(3) may store, or otherwise possess, on the permitted farm or shellfish hatchery site, commercially or recreationally harvested animals only if they are not present on the site at the same time as animals of the same species that have been permitted for culture on the farm;

(4) must identify the site with specified signage, including

(A) the name of the holder of the aquatic farm or shellfish hatchery operation permit;

- (B) the ADF&G aquatic farm or hatchery operation permit number;
 - (C) a telephone number or physical address at which the aquatic farm operation permit holder may be contacted; and
 - (D) posting the sign in a manner to be readable from outside boundaries of the site.
- (5) prevent aquatic farm and shellfish hatchery operations from adversely affecting existing commercial, subsistence, sport, and personal use of fish and wildlife;
 - (6) conduct aquatic farm and shellfish hatchery operations to avoid adversely affecting fish, wildlife, and their habitats;
 - (7) report site preparation activities, use of wild stocks, disposition of incidental species, and harvest methods and gear;
 - (8) prevent injury or death to predators or incidental species;
 - (9) minimize any adverse effects of predator exclusion devices on the environment and incidental species;
 - (10) submit an annual report;
 - (11) apply for stock transfer permits;
 - (12) report outbreaks of disease;
 - (13) report any observations of non-native or exotic species occurring on the site;
- and
- (14) leave the same number of the permitted species on the site as were there when the site was permitted for use as an aquatic farm.
- (b) A permit will be issued for a period of five years.

(c) If the commissioner determines that the operation of an aquatic farm or shellfish hatchery is adversely affecting fisheries, fishes, wildlife, or habitat and the adverse effects cannot be mitigated, the aquatic farm or shellfish hatchery operation permit will be revoked.

(d) If the commissioner determines that the holder of an aquatic farm or shellfish hatchery operation permit is not complying with conditions set forth under this regulation, the permit will be revoked. (Eff. 4/10/88, Register 106; am 8/12/89, Register 111; am 12/16/98, Register 148; am ____/____/2001, Register ____)

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.160
AS 16.05.092

5 AAC 41.260 is repealed and reenacted to read:

5 AAC 41.260. INSPECTION OF AN AQUATIC FARM OR SHELLFISH HATCHERY. (a) An aquatic farm or shellfish hatchery permit holder must retain a copy of the operation permit, including any amendments, and make it available upon the request of a representative of the department or the Department of Public Safety.

(b) For the purpose of inspecting and monitoring compliance with the terms of the aquatic farm or shellfish hatchery operation permit or the requirements of this chapter, an aquatic farm or shellfish hatchery operation permit holder shall give representatives of the department or the Department of Public Safety access to the aquatic farm or hatchery site if the department notifies the permit holder at least 48 hours before the date of inspection. (Eff. 4/10/88, Register 106; am 8/12/89, Register 111; am 12/16/98, Register 148; am ____/____/2001, Register ____)

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.160

AS 16.05.092 AS 16.40.150

5 AAC 41.270 is repealed and readopted to read:

5 AAC 41.270. ANNUAL REPORT. The department will distribute an annual report form to aquatic farm and shellfish hatchery operation permit holders during each calendar year for completion and return to the department by January 15 of the following year. The report shall detail the activities of the aquatic farm or shellfish fishery for the previous year, including any reports required as site- or species-specific conditions of the aquatic farm or shellfish hatchery operation permit. The department will mail the annual report form to the most recent address in its files. (Eff. 4/10/88, Register 106; am 8/12/89, Register 111; am 12/16/98, Register 148; am ____/____/2001, Register ____)

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.160
AS 16.05.092

5 AAC 41 is amended by adding a new section to read:

5 AAC 41.275. ANNUAL SHELLFISH HATCHERY MANAGEMENT PLAN. (a)
A shellfish hatchery operation permit holder shall submit, with the annual report specified in 5 AAC 41.270, an annual management plan that sets production goals and development plans for the ensuing year.

(b) Department staff will cooperate with the shellfish hatchery operation permit holder to prepare an annual management plan and conduct preliminary discussions on transports and acquisitions for the year by the hatchery. (Eff. 4/10/88, Register 106; am 8/12/89, Register 111; am 12/16/98, Register 148; am ____/____/2001, Register ____)

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.160
AS 16.05.292

5 AAC 41.280 is repealed and readopted to read:

5 AAC 41.280. PERMIT RENEWAL AND TRANSFER. (a) An aquatic farm or shellfish hatchery operation permit holder may request the renewal or transfer of an operation permit by applying on the form described in 5 AAC 41.220 and submitting the application at least three months prior to the expiration of the operating permit or the intended date of transfer.

(b) In addition to the information required on the application described in 5 AAC 41.220, a permit holder must describe conditions that have changed on the site or in its operation, such as amendments that have been approved for culture of new species and use of more or new kinds of gear since issuance of the previous permit.

(c) Requests for renewal of an aquatic farm or shellfish hatchery operation permit will be reviewed under the same criteria as a permit issued under AS 16.40.105 and 5 AAC 41.240. If the commissioner determines that an aquatic farm or shellfish hatchery operation permit holder has not complied with conditions in the site's previous operation permit, the permit will not be renewed.

(d) Requests for transfer of an aquatic farm or shellfish hatchery operation permit will be reviewed under the same criteria as a permit issued under AS 16.40.105 and 5 AAC 41.240. An aquatic farm or shellfish operation permit cannot be transferred unless the proposed transferee has obtained an aquatic farmsite lease from the Department of Natural Resources or is exempt from the lease requirement.

(e) If the commissioner determines that the operation of an aquatic farm or shellfish hatchery is adversely affecting fisheries, wildlife, or habitat and the adverse effects cannot be mitigated, its operation permit will not be renewed or transferred. (Eff. 8/12/89, Register 111; am ____/____/2001, Register _____)

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.110

AS 16.05.092 AS 16.40.105 AS 16.40.160

[AS 16.05.340 (b)]

5 AAC 41.290 is repealed and readopted to read:

5 AAC 41.290. AQUATIC STOCK ACQUISITION PERMIT. (a) An aquatic farm operation permit holder, a shellfish hatchery operation permit holder, or a person intending to collect and supply wild stock to a permitted aquatic farm or hatchery must obtain an aquatic stock acquisition permit from the commissioner before acquiring wild stock. An applicant shall apply for an aquatic stock acquisition permit on a form provided by the department. The application shall include the following information:

- (1) the name, mailing address, and contact phone number of the applicant;
- (2) the name, mailing address, and contact phone number of anyone acting as an agent for the applicant;
- (3) the name, business name, mailing address, contact phone number, and aquatic farm or shellfish hatchery operation permit number of the aquatic farm or hatchery for which the applicant will collect wild stock;
- (4) the species, number, life history stage, and size range of the wild stock to be collected;

- (5) when the wild stock will be collected;
- (6) the purpose for which the wild stock will be used;
- (7) the names of the vessel and its operator(s) if other than the persons conducting the collections,
- (8) the kind of gear and the methods to be used for acquiring the wild stock;
- (9) the location from which the wild stock will be taken; and
- (10) the location and facilities at which collections will be consolidated, held, and staged prior to the transfer of the wild stock.
- (11) other information that may be required by the department.

(b) A stock acquisition permit shall only be issued for supplying wild brood or seed stock to an aquatic farm or shellfish hatchery, or to an aquatic farm operation permit holder for the purpose of cultivating the wild stock.

(c) In addition to the permit conditions in AS 16.40.120, an aquatic stock acquisition permit may require the permit holder to

- (1) give reasonable notice to the department before engaging in collection activities.
- (2) report the results of wild stock collection activity to the department;
- (3) submit samples of wild stock collected to the state fish pathology laboratory to establish a disease history of the wild stock collected, prior to the transfer of the wild stock to an aquatic farm or shellfish hatchery;
- (4) give reasonable notice to the department before transferring wild stock to an aquatic farm or shellfish hatchery; and
- (5) comply with 5 AAC 41.245 prior to the harvest of enhanced wild stock.

(d) Stock acquisition permits must be in the possession of the permit holder or authorized agent in physical possession of the organisms being collected and transported, and available for inspection upon request by representatives of the department or the Department of Public Safety.

(e) The commissioner shall deny or restrict a stock acquisition permit if the commissioner finds, that the proposed harvest will impair sustained yield of the species or will unreasonably disrupt established uses of the resources by commercial, sport, personal use, or subsistence users.

(f) For the purposes of determining whether wild stock is necessary to meet the initial needs of farm or hatchery stock under AS 16.40.120(f)(1) the commissioner will consider whether the applicant has access to seed or brood stock from a previously established source, such as a hatchery that is operating within the state. Acquiring stock for immediate sale and harvest to finance farming or hatchery operations will not be considered necessary to meet the initial needs of farm or hatchery stock.

(g) For the purposes of determining whether wild stock is fully utilized under AS 16.40.120(f)(3) the commissioner will consider whether

(1) a regulatory management plan has been adopted for the species;

(2) guideline harvest levels or harvest quotas have been established and met in recent years;

(3) the fishery for the species is subject to limited entry by the Commercial Fisheries Entry Commission; and

(4) commercial, sport, personal use, or subsistence fisheries are closed for conservation reasons. (Eff. 8/12/89, Register 111; am ____/____/2001, Register ____)

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.160
AS 16.05.092 AS 16.40.120 [AS 16.05.340 (b)]

5 AAC 41 is amended by adding a new section to read:

5 AAC 41.295. TRANSFER PERMITS (a) No transfer of stock to, from, or between an aquatic farm or shellfish hatchery may occur without a valid shellfish or aquatic plant transfer permit issued by the commissioner.

(b) It shall be the responsibility of the recipient of the transferred stock to submit applications for, and obtain, transfer permits.

(c) Before submitting a shellfish or aquatic plant transfer permit application, an applicant must notify the state fish pathologist, in writing, to arrange for a health inspection of the stock intended for transfer. The state fish pathologist will conduct the inspection and provide a written health inspection report, or a disease history report, to the applicant within 60 days after receipt of the applicant's request for a health inspection and notify the applicant that

(1) the current disease history report is acceptable and that no further inspection is required at the time;

(2) the health inspection detected the presence of pathogens or parasites of a type that make transfer conditionally acceptable, or

(3) the health inspection detected the presence of pathogens or parasites of a type that make transfer unacceptable.

(d) A shellfish or an aquatic plant transfer permit application must include an acceptable or conditionally acceptable disease history report from the state fish pathologist on the stock intended for transfer.

(e) A shellfish or aquatic plant transfer permit application must be submitted at least 45 days before the proposed date of transfer.

(f) A transfer of stock will be denied by the commissioner if

(1) the proposed transfer would risk alteration of the genetics or the habitat of strains of native species at the proposed destination of the stock being transferred; and

(2) the transferred animals and their progeny cannot be cultured under total quarantine conditions at their proposed destination.

(g) When a stock transfer permit has been approved by the commissioner and is issued to the applicant, a transfer is authorized.

(h) This section does not apply to the acquisition of wild stock authorized and permitted under conditions in 5 AAC 41.005, 5 AAC 41.290 and AS 16.40.120, or for aquatic farm products sold or transferred to commercial markets or consumers and intended for no further exposure to waters of the state. (Eff. ____/____/2001, Register ____)

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.160
AS 16.05.092 AS 16.40.120 [AS 16.05.340 (b)]

5 AAC 41.300 is repealed:

5 AAC 41.300. LIMITATIONS ON SALE, TRANSFER OF STOCK, AND PRODUCTS. Repealed. (Eff. 8/12/89, Register 111; am 12/16/98, Register 148; am ____/____/2001, Register ____)

Authority: AS 16.40.140

5 AAC 41.400 is repealed and readopted to read:

5 AAC 41.400. DEFINITIONS.

(1) "adversely affect" means that an activity will diminish the abundance, diversity, or productivity of fish and wildlife that permanently or seasonally occupy a site, or occur in its immediate vicinity;

(2) "aquatic farm" has the meaning given in AS 16.40.199;

(3) "aquatic farming" means the operation of a permitted aquatic farm site that grows, propagates, or cultivates aquatic plants and invertebrates, including shellfish, in captivity or under positive control in ways that measurably increase the productivity of the species intended for cultivation, above which would be attainable under natural conditions;

(4) "aquatic farm product" has the meaning given in AS 16.40.199;

(5) "brood stock" means mature specimens of a species collected to produce seed stock;

(6) "commissioner" means the commissioner of the Department of Fish and Game.

(7) "culture, cultivate or cultivation" means to use methods to manipulate the biology and the physical habitat of a desired species to optimize density, growth rates, uniformity of size, and use of the available habitat, and to predictably and efficiently produce a product suitable for a commercial market;

(8) "department" means the Alaska Department of Fish and Game;

(9) "enhance the productivity" means to increase the abundance or total biomass of a species, by increasing its survival or growth rates ;

(10) "established use" means;

(A) a commercial fishery that is subject to limited entry under AS 16.43, managed under terms of a permit, registration, and other authorization required by the department for harvest and sale of fish, shellfish, or plants, subject to management under regulations adopted by the Board of Fisheries, subject to openings, or managed through development of area-specific surveys, formal resource assessment surveys, or species-specific management plans;

(B) a sport fishery that occurs with historical regularity, as demonstrated by department field surveys, creel census sampling, sport use surveys, or other reliable sources of information or validated testimony;

(C) a personal use fishery that occurs with historical regularity, as demonstrated by personal use permit reports, department field surveys, personal use surveys, or other reliable sources of information or validated testimony;

(D) a subsistence fishery that occurs with historical regularity, as demonstrated by subsistence permit reports, department field surveys, community use surveys, or other reliable sources of information or validated testimony.

(11) "existing use of fish and wildlife resources" means the documented past or present utilization of an area, that includes a proposed farm site, by commercial, sport, personal use, or subsistence users – documentation of past or present utilization can be shown through resource surveys, formal development of management plans, surveys, research documents, affidavits from users, public testimony, or testimony by department staff;

(12) "hatchery" has the meaning given in AS 16.40.199;

(13) "immediate vicinity of a site" means an area adjacent to an aquatic farm site within which fish, wildlife and their habitat may be directly affected by occupation and operation of an aquatic farm;

(14) "naturally occurring species" means pre-existing wild stocks and communities that are present on a site before an applicant obtains an aquatic farm operation permit for the site;

(15) "natural range of a species" means the area within which viable populations of wild stocks of the species are known to or can be shown to exist;

(16) "positive control" has the meaning given in AS 16.40.199;

(17) "predator exclusion device" means any structure or material installed at an aquatic farm site that physically prevents a predator from reaching or consuming aquatic farm products;

(18) "propagate or propagation" means to produce seed or otherwise increase the number of individuals of a species

(19) "seed stock" means larval, first settlement, or spat stages of invertebrates that require a period of culture, under controlled conditions, before reaching marketable size;

(20) "shellfish" has the meaning given in AS 16.40.199;

(21) "significantly alter" means to hinder the conduct, interfere with the opportunity or lower the efficiency of established means of accessing, harvesting, or otherwise using fish and wildlife resources;

(22) "species intended for culture" means the species of aquatic plant or animal that an applicant proposes to cultivate under positive control;

(23) "stock" has the meaning given in AS 16.40.199;

(24) "unreasonably disrupt" has the same meaning as significantly alter;

(25) "wild stock" means animals or plants which seed and occupy a site through natural processes, without any human intervention or assistance. (Eff. 4/10/88, Register 106; am 8/12/89, Register 111; am ____/____/2001; Register ____)

Authority: AS 16.05.020 AS 16.05.251 [AS 16.40.199]
AS 16.05.092 [AS 16.05.340 (b)]



CHRONOLOGY OF INDUSTRY EFFORTS TO ESTABLISH A POLICY FOR DEVELOPMENT OF "ON-BOTTOM" AQUACULTURE

- 1992** Tenass Pass Shellfish Company (TPS) discusses opportunities for expanding limited (5,200 lbs./person annually) littleneck clam harvesting opportunities with various officials within ADFG, including commissioner Carl Rosier. ADFG warns commercial harvest permits might be cut off in the near future; TPS determines aquatic farming is the only real opportunity.
- April 1993** TPS applies for clam permits for commercial test plots within bays where oyster permits already provided for aquatic farming activities and commercial harvesting had occurred under commercial fishing permits. Proposal essentially calls for existing clam beds to be managed as aquaculture plots with natural sets, applying aquaculture techniques of predator protection, maintenance at optimum densities, culling of competitors and rotating harvests.
- April-June 1994** Issuance of TPS clam farming permits delayed while DNR-ADFG work out policy issues. ADFG surveys TPS clams beds. Results shows abundant populations of littleneck clams, but slow growth and most existing stocks exceeding recommended stocking densities for clam culture. Drawings of beds reconfigured according to survey results.
- July 1994** TPS submits 4-page management plan for .5 acre of clam beach, including request to harvest one bed to 33 mm [Board of Fisheries minimum size for commercial harvests is 38 mm or 1.5 inches] to reduce densities from 83.7 to 48 clams/ft.² There was no departmental response to this request, despite much interaction with ADFG regional and headquarters managers.
- Aug. 16, 1994** Clam tideland permit (.5 acres) approved for TPS. Permits included requirements of a 38 mm minimum size, submit "fish tickets" for clam harvesting, and work beds using aquatic farming techniques, such as rotational harvesting (a schedule was required), control of predators and removal of competitors, improvement of beaches for digging, and stocking plots at optimum densities. ADFG and DNR advise that policy issues

(standing crops of clams, compensation to the state for loss of common property resources, enforcement, etc.) must be settled before additional permits are issued.

January 1995 Meeting with newly appointed ADFG commissioner Frank Rue to discuss the policy roadblocks against expansion of clam farming opportunities ends with agreement to appoint a working group to hammer out a policy.

February 1995 ADFG clam policy work group chaired by ADFG deputy commissioner Rob Bosworth begins work. TPS meets with task force at beginning of process. No results were made public, except closure of commercial harvesting of littleneck clams in Southeast, while allowing littleneck clam farming to proceed statewide. During the process, asst. attorney general Steve White apparently advises that the TPS operation fits the statutory definition of aquatic farming and meets other constitutional tests such as privatization of common property resources and the "public trust" doctrine.

April 1995 TPS submits applications for 2 acres of clam beaches.

March 1996 Clam conference in Anchorage organized by the Alaskan Shellfish Growers Association (ASGA) and the University of Alaska Marine Advisory Program at the request of ADFG and DNR. Agenda focused on clam management issues and involved officials and farmers from Alaska, Washington and B.C. Conference produces three page of issues involved in the development of a comprehensive clam policy and clam farming industry.

Jan. -Aug. 1996 ADFG-ADNR clam policy work group meets prior to the clam conference to explore policy issues and responses; some of these draft concepts were revealed at the clam conference. Many of these initial ideas (special taxes, expensive third party surveys, etc.) were strongly criticized by Alaska farmers, who were not consulted in the process, as unfair and overly restrictive. Follow-up focused upon clam conference recommendations and revised policies apparently submitted to the department of law for review, but no part of this proceeding was made public, and no policy developments revealed.

August 1996 TPS receives permits for an additional 1.3 acres of clam beaches. Two other farms, Canoe Lagoon Oysters and Blue Water Seafoods each receive 1-acre littleneck clam permits. Final permits included no direction to permit holders on how to "prove up" increases in productivity on clam beaches from aquaculture management.

- February 1997** ADNR informs applicants that no applications for littleneck clam beaches would be accepted until policy issues are resolved. 1997 applications for permits later returned when Alaska Supreme Court ruling cast all permits in doubt.
- April 1997** Legislature replaces three-year permits with ten-year leases. Remainder of year spent working on regulations to implement new law.
- March 1998** Pending legislative overview on aquatic farming results in commitment by commercial fisheries director Bob Clasby to work with ASGA on a clam farming policy.
- April 1998** Hearing before the House Resources Committee results in commitment to work with ASGA on policy issues over the interim and invitation to report back during 1999.
- October 1998** ASGA president Bob Hartley writes letter to commissioner Rue requesting changes to Kachemak Bay Critical Habitat Area Management plan and asking questions about on bottom aquatic farming. This letter was never answered, although ADF&G staff drafted several responses.
- December 1998** ASGA meets with commissioner Rue with outline of clam farming policy issues and obtained promise to deliver a department policy for on-bottom shellfish culture by the end of February.
- January 1999** First opening for new aquatic farm sites since 1996. Period open until April 30.
- February 1999** ASGA meets with ADFG directors and deputy commissioner Bosworth prior to Feb. 17, 1999, schedule for House Resources Committee meeting on aquatic farming. At the hearing, Kevin Duffy, deputy director of ADF&G's commercial fisheries, assured legislators the department would adopt a policy by the time the application period closed in April.
- February 1999** Members of ASGA and a representative of F&G met with Governor Knowles who directed ADF&G to respond to ASGA's written concerns within 10 days. Response came about a month later and still no policy, except for pledge to consider applications on a case-by-case.
- March 1999** Commissioner Rue confirms in a letter to ASGA that ADF&G will not accept clam farming applications for Kachemak Bay, as it is not allowed within the critical habitat area.

- April 1999** Rep. Gail Phillips received letter from Department of Law stating that clam farming in Kachemak Bay was not prohibited and applications must be accepted and considered on a case-by-case basis, but that ADF&G could probably deny permits under special area permit process.
- April 1999** Commissioner Rue proposes to ASGA that Kachemak Bay farmers be allowed to have small experimental farms near or adjacent to their farms to provide solid data on impacts. ASGA ask for longer duration and better legal standing for participants. ADF&G later backed away from this proposal.
- September 1999** ADF&G proposed to hold hearings on whether Kachemak Bay Critical habitat area management plan should be changed to address personal watercraft and clam farming.
- October 1999** ADF&G Habitat Director Ken Taylor reveals at ASGA annual meeting ADF&G policy on processing pending applications for on-bottom aquatic farming. The "policy" was handwritten on a notepad and was never formally adopted. The "policy" appears to have changed several times since.
- November 1999 – January 2000**
Despite assurances that on bottom aquaculture applications would be considered on a case-by-case basis, ADF&G initially recommends all be rejected and all suspended aquaculture applications be accepted. ADF&G requests numerous delays in process as they are struggling with policy issues. By early January, DGC grants ADF&G request to suspend ACMP consistency process for all on-bottom aquaculture applications. ADF&G recommended all littleneck clam applications be found inconsistent or refused to issue special area or operating permits. Geoduck applications will be on hold for development of regulations, a process that takes at least a year.
- December 1999** ADF&G holds hearings in Anchorage, Seldovia and Homer on clam farming and personal use watercraft in Kachemak Bay after several delays. Public opinion on clam farming was mixed.

Not shown in this chronology of events are numerous meetings between Rodger Painter, TPS managing partner and ASGA president, and ADF&G personnel, including Commissioners Rue and Rosier, commercial fisheries directors Jeff Koenigs, Bob Clasby and Doug Mecum, mariculture coordinators Cochran, Piorkowski and Imamura, and numerous commercial fisheries managers.

**Statement by the Alaskan Shellfish Growers Association
January 4, 2001 - Ketchikan Public Hearing**

The Alaskan Shellfish Growers Association regrets the decision by the Alaska Department of Fish and Game to re-write state law through the regulations under discussion tonight. ASGA believes these regulations, as written, would essentially result in an end to aquatic farming in Alaska.

We challenge the department's authority to implement numerous portions of the regulations, including a new definition for aquatic farming that current oyster farms can not meet. Problems are found throughout the new regulations that range from simple bureaucratic overkill to apparent misinterpretation of fundamental concepts of marine biology. The most significant flaws may be the lack of legal standing for many of the new regulations. Discussions with top officials in the Department of Natural Resources reveal that even other state agencies have significant concerns about ADF&G's authority for major sections of the proposed regulations.

These sweeping new rules clearly are designed to address issues raised in lawsuits pending against the department, and we wonder why sweeping new rules are proposed with a court decision imminent. It appears likely that the new regulations are going to have to be pulled back and rewritten once the court clarifies the policy issues involved.

ASGA strongly protests the department's schedule for implementing these sweeping changes. Originally, ADF&G proposed to provide the legal minimum of a 30-day public review period running through the Christmas and New Year holidays. Although the department granted our request for additional time, we have been told by key officials that the regulations will be implemented in fastest timeframe legally possible following the public hearings.

We believe these proposed regulations are so flawed that the only course of action is to discard them entirely and start all over again. We'd love to work constructively with the state in development of new regulations, as we did over nearly a year with the Alaska Department of Natural Resources in development of new leasing regulations. Indeed, ASGA has been actively lobbying the state for the past nine years to develop policies and regulations governing on-bottom aquaculture.

Unfortunately, the department has consistently rebuffed our efforts. Even after ASGA helped secure \$100,000 for ADF&G to develop new regulations last legislative session, the department refused to meet with us to develop a plan or discuss any issues related to the regulations.

We had requested that tonight's public hearing be teleconferenced to Juneau so an association officer and other stakeholders could offer comments on the proposed regulations, but even this small gesture was not offered.

The Alaskan Shellfish Growers Association (ASGA) will continue to work on our responses to the proposed regulations. We can only hope that before trying to implement these regulations the department will take the time to listen to what we and other stakeholders have to say.

DRAFT

5 AAC 41.200 APPLICABILITY OF REGULATIONS

The permit application from ADF&G should apply to aquatic farms only, excluding shellfish hatcheries. The application process is a long complicated affair involving multi-agency review. A hatchery would most likely be located on uplands not requiring review from ADNR. Broodstock used in the hatchery are a private resource. (Original broodstock acquisition would be permitted separately, under specific broodstock acquisition permits.) The primary source of public interest in a shellfish hatchery would involve the intake and effluent waters. These concerns are multi-agency concerns, not addressed under an aquatic farm permit.

Recommendation: Delete references to shellfish hatcheries.

5 AAC 41.220 AQUATIC FARM AND SHELLFISH HATCHERY OPERATION PERMIT APPLICATIONS.

Overview

Much of the draft regulation pertaining to applications is un-necessarily detailed. To include all application details in regulation will result in a long, difficult and costly process when even small changes are necessary. The extensive application requirements will create a tremendous burden not only on the applicant to produce the information, but also on the department to evaluate the information. This is a time when ADF&G should be streamlining in all areas, not creating huge amounts of paper to be passed between reviewers. If Alaska is to promote an aquatic farm industry, reasonable and workable regulations are needed. Most of this draft is neither.

Further, we recommend ADF&G draft a site plan with the information required in (c)(6)(A)-(P). The map would be so cluttered with detail that it would be incomprehensible. The requirements are so excessive that several site plans would be necessary to convey the information.

Finally, and most significant perhaps, where does ADF&G get the authority to promulgate regulations covering DNR, DEC and DGC responsibilities? If the other agencies wish to revise application forms, they will have to ask ADF&G to revise its regulations. In addition to exceeding its authority in drafting regulations for other agency responsibilities, this approach would effectively make ADF&G the lead regulatory agency in the siting process, replacing DNR.

Recommendation:

Delete the entire section and replace with the following: "Applicants shall submit a multiagency application and a coastal project questionnaire to the Department of Natural Resources during an application filing period under 11 AAC 63.020. Applications will be reviewed in accordance with 11 AAC 63.030-63.900, 6 AAC 50.010-50.190, and 5 AAC 41.200-41.400."

Subsection (c)(6)(B)

Subsection (B) is covered sufficiently on other sections. (N) and (M) cover species distribution and mapping of the area intended for use. (10) requires a photograph of the area to be used. ADF&G personnel have stated that photographs alone should be sufficient to judge the biological make up of a beach.

How does the exact location of barnacles or mussels on a beach aid in the consideration of an application? This is unnecessary detail that will add significantly to the amount of time involved in preparing and reviewing applications.

Recommendation: Delete

Subsection (c)(6)(D)

The applicant should disclose the location of the culture gear and what general type of gear is to be used: floating gear or on-bottom gear. Any information beyond this is more detail than ADF&G needs. ADF&G has no expertise to judge the various gear types available to the grower. Whether the farmers chose square nets or round lantern nets or wire mesh trays, is individual choice and nobody profits by ADF&G overview of this choice.

Recommendation:

Replace with the following: "(D) the type of culture gear (whether floating or on-bottom) and location, and configuration of culture gear and support structures proposed for use in the farming or hatchery operations;"

Subsection (c)(6)(E)

Any site in coastal Alaska water has potential for use in aquaculture. Even relatively open water such as Frederick Sound could be utilized if the proper gear and culture species is chosen. Who is better to make these decisions than the applicant? ADF&G has no expertise by which to judge a particular mariculture site base upon meteorological or sea conditions.

Recommendation: Delete

Subsection (c)(6)(G)

A requirement to fix the location to the nearest hundredth of a minute will require many applicants to purchase expensive GPS equipment or upgrade existing equipment. Since most of these parcels are located in very remote areas where there are few conflicts, it's difficult to justify this exact a location. Why does ADF&G require such specificity when DNR is willing to lease a parcel of tidelands with less?

Recommendation:

Make ADF&G site location requirements consistent with ADNR.

Subsection (c)(6)(H)

This is an excessive burden on the applicant. What other developments are required to determine legal ownership of all land within ½ mile on either side? That means land ownership along at least 1 mile of beach. Ownership of many miles of beach would have to be researched if the application was in an area with multiple islands. The

land ownership immediately adjacent to the proposed development must be determined. However, other landowners can protect their interests by joining in the public process.

Recommendation:

Delete and replace with the following: "(H) the names and addresses of upland property owners adjacent to the proposed site and the location of their property in relationship to the site;"

Subsection (c)(6)(I)

Any proposed mariculture use should not interfere with current uses. However, past uses are generally unknown and irrelevant. Current activities in the area should be identified, but not necessarily considered as being incompatible with aquatic farming.

Recommendation:

Delete and replace with: "(I) the location and type of all known present human uses of marine resources and adjacent uplands, and on the proposed site, including commercial fishing, personal and subsistence use, and recreation;"

Subsection (c)(6)(L)

The use of process and domestic water (sanitary purposes) is regulated by ADEC. This is outside of ADF&G jurisdiction, duplicate regulation is not needed.

Recommendation: Delete.

Subsection (c)(6)(M) and (N)

Sections (M), (N) and parts of (B) should be combined and simplified. What exactly does ADF&G need to know to protect habitat? The suggested detail in these three sections is overwhelming.

Recommendation:

Delete. Re-write, combining the elements of (B), (M) and (N) as follows:
"an overview of major marine biotic communities of the site, including:
(1) a general description of the area of interest with accompanying photographs labeling physical and biological features,
(2) a biomass estimate of the species of interest,
(3) description of the major "non-target" species, and
(4) an overhead map showing the culture area and identifying areas that cannot be used for culture purposes (mud/eelgrass, large rock etc.). Also note the relative area which will not be used for culture activities due to unsuitable habitat

Subsection (c)(7)(A)

This section may sound easy enough for a beach area. However, multiple cross sectional drawings for multiple sites within a lease would be repetitive without contributing new information. Cross sectional drawings should be limited to no more than a representative drawings.

Recommendation:

Delete and replace with the following: "support structures or facilities, such as suspended culture gear and anchoring systems necessary to conduct the proposed activities, limited to a representative drawing of each different system;"

Subsection (c)(7)(B)

Seabed mapping of the physical and biological features could be dauntingly expensive task for any lease. Limiting cross section views to no more than two will provide much detail into site development plans. One depth reading per acre and a general description of bottom type (rock, mud, sand) will adequately describe the area and provide insight into biological features.

Recommendation:

Delete and replace with the following: "not more than one water depth per acre, taken at MLW, and a description of the bottom type (rock, cobble, mud, sand)."

Subsection (c)(10)

Recommendation: Delete. This requirement is covered in section (6)(N), above.

Subsection (c)(12)

ADF&G must recognize the experimental nature of mariculture in Alaska. Even after years of oyster farming, most growers continue to change procedures to improve production. If the above development plan is required, it must be accepted as a goal, rather than as a blueprint. There should no threat of losing a permit if the goals of the plan are not achieved within five years. Perhaps the grower should be allowed to revise the development plan at the end of each year.

Recommendation:

This is a problem that needs further discussion. Allow plan revision at the end of each calendar year with no threat of loss of permit if conditions are not met.

Subsection (c)(12)

A business plan contains proprietary information to be used by the business owner and the investors. It is not public information. It is highly unusual for a government agency to have access to such information. Furthermore, the information within a business plan for an aquatic farm would contain specific aquaculture and financial information. At this time, ADF&G does not have the expertise to evaluate either type of information.

Recommendation: Delete.

Subsection (c)(14)

As discussed earlier, aquafarming in Alaska is highly experimental. This line alone could eliminate the farming of all species not currently cultured in Alaska. As new species are cultured, technical and operational problems will be discovered, so will solutions. Until have extensive aqua-farm activity with each species of interest, there is no possible way to "document" operational and technical feasibility of proposed aquafarms.

Recommendation: Delete.

Subsection (c)(15)B)

The definitions of productivity contained in 5 AAC 41.400 are not obtainable and do not meet the intent of the aquatic farm act. These shortcomings are addressed later in this document. References to this term must be removed.

Recommendation:

Delete and replace with the following: "a description of the culture practices to be utilized;"

Subsection (c)(15)(C)

This section is impractical. The rate of productivity of a particular area is an unknown quantity requiring extensive research to determine. Therefore, increased productivity cannot be determined without several years of growth studies under variable conditions. In addition, ADF&G lacks the statutory authority to impose requirements that a farmer demonstrate increases in productivity.

Recommendation: Delete.

Subsection (c)(16)

This section is ambiguous as to intent. If "wild stock" refers to individuals of the same species of those being cultured, no stock differentiation is needed. To operate an aquafarm in an efficient manner, any wild stock present or settling on the farmed site must become the property of the farm, as envisioned by AS 16.40.120.

To protect the public interest, a section could be added to require the aquatic farm operator to leave stock on the lease area at the end of the lease period, in the same number as was present at the beginning of the lease period. To attempt differentiation between wild and enhance stock is not only impossible, but makes no sense.

If the intent is to leave wild stock on a beach for public access, the concept is totally unworkable. The whole idea in selection of a farm site is to avoid areas used by the public for subsistence or personal use. If we wish to establish an aquatic farm industry, we need reasonable, workable regulations. This section is neither.

Recommendation: Delete.

Subsection (c)(17)

This line is too open ended, which allows the department to require applicants to submit large amounts of additional data, under the threat of closing the application process if the applicant does not immediately comply. In the past, this request for additional information has been very general in nature, at times indicating an ignorance of the original application. "Other information" must be limited to "rounding out" information requested on the original application. If possible, the requests should be simple enough to be requested and answered during a phone call.

Recommendation:

Delete and replace with the following: "(17) other information may be required by the department to provide details more fully explaining the information in the original application."

5 AAC 41.230 ADDITIONAL INFORMATION

Subsection (a)

Additional information requests need to be concise and intended only to complete originally requested information. Thirty days is often inadequate time for an applicant to respond for several reasons: (1) many aquatic farm applicants live in remote locations with weekly mail service, resulting in mail delays; (2) gathering site specific information may require waiting for particular tidal stages delaying information gathering by up to two weeks; and (3) the applicant may have to contact ADF&G staff for information and clarification. When ADF&G staffers are not available (on vacation, away or other business) contact with staff can take several weeks. This is a particular problem with aquatic farm applications, which are generally handled by only a few individuals.

Recommendation: Delete "30" and replace with "60."

Subsection (b)

This section allows ADF&G to terminate the application for insufficient information. The application process should remain open as long as the applicant is communicating with the department. Lack of sufficient information may be due to lack of concise, relevant questions. Also consider; this is a multi-agency permit. Will the other agencies be willing to ignore the work they have completed on an application, allowing ADF&G to unilaterally remove an application from consideration? The application process must remain open as long as the applicant is making a good faith effort to respond to ADF&G concerns.

Recommendation:

Delete and replace with the following: "(b) An aquatic farm application will remain under consideration as long as the applicant maintains a good faith effort to comply with agency requests. The application shall be terminated only with the compliance of all agencies involved in the application."

5 AAC 41.240. REVIEW AND DETERMINATION.

Overview

This is an extremely troubling section of the proposed regulations in which the department clearly violates the intent and letter of the aquatic farm act. This proposed regulation would have ADF&G assume the authority and duties of two other state agencies, impose restrictions on aquatic farmers that far exceed the scope of state law, would elevate a single use of state owned waters to a preferred status over all other activities, and impose siting restrictions which would ensure that no new aquatic farms could be permitted.

Subsection (a):

This sentence structures the entire following section of regulations to run directly contrary to the authorizing statute AS 16.40.105. The findings and policy section of the 1988 aquatic farm act established a state policy to "...encourage the establishment and responsible growth of an aquatic farming industry..." This positive approach was institutionalized by structuring the statutes in a positive manner directing ADF&G to issue permits rather looking for ways of denying them. For example, AS 16.40.105 says the commissioner "shall issue permits..." Section (a) violates the positive construction by saying the "commissioner shall not issue an aquatic farm or shellfish hatchery operation permit..."

Subsection (b) (1):

Who is the department possesses the expertise to determine whether a particular site is unsuitable for the proposed species or gear? [Subsections (A) & (B)] No one currently on staff and the fiscal note fails to identify funding for new, qualified personnel.

What section of law provides ADF&G authority to manage water quality related issues as contained in (C)? The appears to be a DEC function, and does not belong under ADF&G responsibilities.

What is a "high abundance of predators or competitors..."? If a farmer proposes to locate a farm in a bay with many starfish, shouldn't that be his or her decision? If they want to struggle with the higher cost of labor involved in defouling, that appears to be a business decision and not a legitimate agency concern.

Subsection (F) appears to cede state authority in favor of federal agencies. This runs contrary to the oft-stated positions of the State of Alaska.

What is meant by (G)? What about a farm covering a small bight? The current language does not provide much guidance for decision-making.

Subsection (b) (2):

The Department of Natural Resources (DNR) is responsible for the management of state lands and determining land use conflicts for aquatic farms. This entire section

would put ADF&G squarely in conflict with DNR's statutory role, and need to be stricken from the proposed regulations.

Additionally, (A) directly conflicts with AS 16.40.110 (2) which states that aquatic farms "may not require significant alterations in traditional fisheries" and (3) which says proposed farms "may not significantly affect fisheries..." The proposed wording in (A) clearly would prevent farms from being located in sites utilized by commercial fishing operations even if there are no conflicts or adverse impacts. Since farms could be located in areas supporting other uses of marine waters, as long as the operations don't "significantly alter" the use, the language would effectively elevate commercial fishing to a preferred user group.

(B) goes even further by providing a **potential future use** of a dive fisheries resource with a preference over aquatic farming. This concept clearly conflicts with AS 16.40.105 (2) which states, "the proposed farm or hatchery may not require significant alterations in **traditional fisheries or other existing uses** of fish and wildlife resources." [Emphasis added.]

Subsection (b) (3):

This section also would put ADF&G in the position of making land use management decisions in direct conflict with DNR's statutory authority.

In addition, (A) contains terms that would effectively prohibit aquatic farms from being located along nearly all of Alaska's long coastline. The clause "disrupt or adversely affect" could be interpreted to mean very small disruptions. If lantern nets in the water cause schools of herring to alter swimming patterns, the gear could be described as "disrupting" the "milling" patterns of the species. Certainly, a reviewer could find that the use of a skiff that causes a flock of ducks to fly away is a "disruption." We believe this section is the "killer clause" that will provide ADF&G reviewers with justification to reject all aquatic farming proposals and violates the spirit if not the letter of the aquatic farm act.

Subsection (b) (4):

(A) would effectively prohibit growers from experimenting with unproven species and restrict aquatic farming in Alaska to Pacific oysters. Indigenous Alaska shellfish species now under the initial stages of development in Alaska have no proven track record of success in aquaculture operations and farmers would not be able to "demonstrate or document the success..." of the proposed species. Our understanding of species such as littleneck clams, purple-hinged rock scallops, geoducks and cockles are sketchy at best.

(B) could prevent farmers from diversifying into new species, such as purple-hinged rock scallops or geoducks. What is the purpose of the restriction? The proposed language suggests a farmer might have to conduct expensive surveys to find indigenous populations of rock scallops if ADF&G knowledge of the resource is limited? What is the biological concern?

What is the purpose of (C)? Is it to determine how the farmer can comply with permit conditions imposed under 5 AAC 41.250(a)(1)? We believe it is impossible for a

suspended culture farm to meet the proposed requirement. While it is possible to extrapolate growth and survival rates from planting and harvest data, it is not practical to expect a commercial farming operation to provide the type of detailed scientific research that would be required to meet the terms of 5 AAC 41.250(a)(1).

Subsection (d):

What is the intended effect? What if an applicants believes the department erred and simply wants reconsideration of a denial? Can the commissioner's denial be appealed to an administrative hearing officer?

Recommendation

This section should be replaced with language simply referencing AS 16.40.105. The statutory language is clear, concise and requires very little clarification.

5 AAC 41.245 HARVEST OF WILD RESOURCES

Overview

The section is inconsistent with AS 16.40.120 which only restricts initial acquisition of wild stocks and does not provide ADF&G with authority to control stocks once they come under control of the farmer. Once the farmer assumes control of a site, the stocks become the private property of the farmer, as stated clearly in AS 16.40.120 (g).

Subsection (b)

This section is very unclear and appears in conflict with proposed language in 5 AAC 41.250 and 5 AAC 41.400. Enhancement is described in (b) as increases in the biomass, while 5 AAC 41.250 (a)(1) will require that a farmer "enhance the productivity of the cultured species." 5 AAC.400 (3) defines aquatic farming as utilizing methods that "increase the productivity of the species..." and (9) defines "enhancing the productivity" as expanding the biomass "by increasing its survival or growth rates." You can increase the biomass of a stock by simply allowing under-sized shellfish to reach market-size, but that would satisfy the requirements of the latter sections of the regulations.

In addition, how does a farmer demonstrate the increases came from the application of aquatic farming techniques as opposed to wild growth rates? Our knowledge of the biology of the animals currently under culture or proposed for on-bottom aquatic farming is very limited. For example, recent experience in growing littleneck clams in the EVOS study appears to contradict long-held notions of littleneck clam growth rates and aging methods.

The exception for "seed stock" also is confusing. 5 AAC 41.400 (19) describes seed stock as "larval, first settlement, or spat stages" of shellfish. For littleneck clams, this could mean 9 mm (considered the minimum size for outplanting) or 18 mm (the maximum size generally produced in FLUPSYs)? How about the clams between this "spat" size and the 38 mm legally harvestable under commercial fishing regulations?

The language clearly violates AS 16.40.120 (g): "Aquatic plants and shellfish acquired under a permit issued under this section become the property of the permit holder and are no longer a public or common resource." How can ADF&G continue to control the use of the shellfish obtained under a stock acquisition permit if it is private property?

Recommendation:

Subsection (b) violates AS 16.40.120 (g) and must be stricken in its entirety. It should be replaced with the clear statutory language clarifying ownership and control of resources obtained under a stock acquisition permit.

5 AAC 41.250. PERMIT CONDITIONS.

Overview

This section provides ADF&G with broad, intrusive authority over aquatic farm activities. Some of the provisions appear to provide the department with authority beyond the enabling statutes, and provide for a permit that is not in sync with DNR 10-year lease terms.

Many of the conditions listed in the section exceed the scope envisioned by the enabling statutes. AS 16.40.100 (c) states: "The commissioner may attach conditions to a permit issued under this section that are necessary to protect natural fish and wildlife resources."

Subsection (a)(1)

The language "enhance the productivity of the cultured species" creates a requirement that is impossible for any type of aquatic farm to meet, particularly suspended culture operations. The definitions section says "enhance the productivity" means "to increase the abundance or total biomass of a species, by increasing its survival or growth rates."

Does this mean the farmer would have to exceed oyster growth and survival rates over natural production or farmers located in other regions, such as Washington, British Columbia or Louisiana? In the case of littleneck clams or geoducks, does this mean increases over the natural production at that particular site? If so, does that mean the farmer would have to conduct long-term growth studies at the site prior to commencing farming operations?

We believe the commissioner lacks the authority to impose this new condition on aquatic farm permits. The condition does not comply with AS 16.40.100 (c), which states: "The commissioner may attach conditions to a permit issued under this section that are necessary to protect natural fish and wildlife resources."

Please provide citations of enabling statutes and explanations of the interpretation to impose these new measurements. Also we believe the conditions are not consistent with commonly understood biological principles. Please provide an explanation of the scientific basis for this measurement.

Recommendation:

Replace existing language with: (1) "utilize animal husbandry techniques designed to enhance the biomass of the cultured species on the farm site, including, but not limited to, planting of seedstock, predator controls, reduction of competitors, control of densities, and rotational harvesting;"

Subsection (a)(2)

Control of activities on land leased from the State of Alaska is a function of DNR. Please provide citations for ADF&G's authority to assume these responsibilities.

Recommendation: Delete.

Subsection (a)(3)

Does this mean that a farmer cannot purchase and process wild geoducks from licensed divers if he is growing a few hundred geoducks on a plot three miles away from the processing facility? Is this a disease concern? If so, please clarify by adding references to spatial separation.

Or, is it an enforcement concern? What is the rationale? If it is an enforcement concern, this language is discriminatory against aquatic farmers. Other processors commonly intermingle products from many different areas and sources.

Subsection (a)(4)

Signage requirements certainly will add to the visual impacts of aquatic farming and raises potential problems with upland owners. Has the section been discussed with the US Forest Service, Native Corporations, DNR and other upland owners? This seems to be more of a DNR concern. If the signs must be visible from outside site boundaries, multiple signs may be required, adding to adverse visual impacts.

Will the signage be required in the tidelands or uplands at a beach site? What about longline sites? Do we have to build floats just to support the signs?

Farmers already are required to post signs on their processing facilities.

Recommendation: Delete.

Subsections (a)(5)-(6)

This language conflicts with AS 16.40.105 which states aquatic farms "may not require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources..." 5 AAC 41.400 (1) defines "adversely affect" as meaning "that an activity will diminish the abundance, diversity, or productivity of fish and wildlife..." The language "diminish the abundance" is a much different measurement than "significant alterations," and would put farmers in jeopardy of minor impacts.

Recommendation:

Replace "adversely" with "significantly" affecting in both subsections.

Subsection (a)(7)

Does "disposition of incidental species" mean we have to report the disposal of mussels, barnacles, and staggering array of other incidental marine species hauled up in lantern nets?

Subsection (a)(8)

Does "prevent injury or death to predators or incidental species" mean the farmer will be held liable for killing barnacles, mussels and starfish?

Recommendation: Delete.

Subsection (a)(9)

The inclusion of "any" suggests ADF&G will not allow even the smallest impact from nets and other predator control devices.

Recommendation: Delete "any."

Subsection (b)

This puts the ADF&G operational permits out of synch with the 10-year leases, which could present significant conflicts. If ADF&G fails to issue a new operational permit halfway through the life of a ten-year lease, the farm put out of business might be inclined to sue ADF&G.

The proposed regulations will make the issuance of the operational permit much more difficult. ADF&G already is far behind on handling the permitting duties for existing farms. In fact, most existing farms do not have current operating permits and some of these have operated for years with lapsed permits. How is ADF&G going to handle the increased workload?

There is no biological, financial or operational rationale for the short life of the permits. The farm has to submit ten-year development and operational plans. It makes no sense to require the farmer to plan ten years ahead when ADF&G is going to require five-year "prove-up" tests.

Recommendation: Delete "five" and replace with "ten."

Subsection (c)

This provision could put every farm in jeopardy for relatively minor, site-specific impacts, and is in conflict with AS 16.40.105 which says aquatic farms "may not significantly affect fisheries, wildlife, or their habitats in an adverse manner..." This is a much different standard than "adversely affecting" which your proposed language in 5 AAC 41.400 defines as meaning "an activity will diminish the abundance, diversity or productivity of fish and wildlife..."

The provision would diminish the protections now provided by statute to the point of non-existence, effectively removing a fundamental protection granted by state law. If this new standard persists, despite the conflict with enabling statutes, farmers should at least be provided a formal hearing process where evidence is presented and contested.

Recommendation:

This section should be rewritten to conform with AS 16.40.105 by replacing "adversely" with "significantly," and provide the farmer with an administrative hearing on an ADF&G finding of significant adverse impacts. The finding should contain a factual basis and the farmer should be able to present evidence to counter the finding.

Subsection (d)

This provision does not provide the permit holder with any due process. ADF&G should be required to provide a factual basis for revocation, and provide the farmer with the chance to present a defense. Can the decision to revoke a permit be appealed under the APA? Or, is the farmer's only recourse the legal system? The revocation of a permit puts the farmer out of business, and there should be an appeals process available to those who cannot afford to hire an attorney.

Under these regulations, an oyster farm in business for ten years could be in jeopardy if commercial crab pots are stored on a hardening beach or set next to a longline. The clause "is not complying with conditions set forth in this regulation" implies a permit can be revoked for the smallest of infractions, while the statutes talk about "significant impacts..."

Recommendation: Delete.

5 AAC 41.280. PERMIT RENEWAL AND TRANSFER.

Overview

This section puts all existing aquatic farms in jeopardy by making them subject to the new regulations; few, if any, existing farms would be issued a permit under the new criteria contained in the proposed regulations. Every renewal or transfer would place the farmer in jeopardy because of new standards for project impacts. ASGA believes the new standards violate existing law. In addition, the transfer process envisioned here would be unnecessarily difficult and time-consuming.

There also appears to be some tension between the proposed language and AS 16.40.110 (b)-(c), which focuses upon disease issues and compliance with the development plan on-file in ADF&G. (c) specifies that the "person to whom the permit is transferred may use the permit only for the purposes for which the permit was authorized to be used by the transferor, and subject to the same conditions and limitations." Simply put, the enabling statute does not authorize the reconsideration of criteria imposed for the initial siting of an aquatic farm during renewals and transfers.

Recommendation:

This section will require significant revision. The best solution may be to revert to existing language with (d) rewritten as follows: "(d) In order to transfer an aquatic farm operation permit, the permittee must submit to the commissioner a letter of transfer and an application prescribed by the department. This submission must be accompanied by a letter from the proposed permittee agreeing to comply with the terms of conditions attached to the active operation permit."

Subsection (a)

Why should a farmer be required to submit a lengthy multiagency application for renewal or transfer of an operating permit? This will require unnecessary work on the part of the farmer, and presumably will trigger unnecessary paper-shuffling by ADF&G reviewers. Since the permit only has a five-year life, the farmer will in effect be subject to two application processes for every ten-year lease.

Why should the farmer be responsible for initiating the renewal process for the operational permit? This should be an ADF&G responsibility.

Three months is an extraordinarily long period of time to process a transfer of an operational permit. DNR completed the transfer of a lease this summer in one week. Why does ADF&G need three months to act upon an operational permit?

Subsection (b)

A permittee should not have to prepare one of the lengthy, detailed multi-agency applications for renewals or transfers. These are designed to facilitate initial siting decisions and are not appropriate for subsequent actions such as operation permit

renewals or transfers. Renewals should be initiated by ADF&G and should not require application by the farmer.

The information listed in this section is contained in ADF&G files. Annual reports are required of each permittee and ADF&G approval is necessary for all new species. This is redundant, unnecessary paperwork.

Recommendation: Delete.

Subsection (c)

Does this mean an operation permit will not be renewed if the farmer got his annual report in late? How about if SARDFFA wants to conduct sea cucumber surveys at a farmsite? What if a crab fishermen discovers crab are attracted by the defouling at a longline site and sets pots around the perimeter?

These might seem like pretty small issues, but they are large enough to cause loss of an operation permit under this language.

Will this section interfere with a permittee's ability to appoint an "acting agent" with authority to handle permitting issues? If so, the section should be amended to add a provision providing for an "acting agent."

Recommendation: Delete.

Subsection (d)

The language amounts to a reconsideration of initial siting criteria and conflicts with AS 16.40.110.

Recommendation: Delete.

Subsection (e)

This section will block renewals or transfers when ADF&G determines the operation of a farm is "adversely affecting fisheries, wildlife or their habitat..." As discussed earlier, this standard could include very minor impacts, contrary to the statutory standard (AS 16.40.105) of "significant alteration."

Recommendation: Delete "adversely" and insert "significantly."

5 AAC 41.290 AQUATIC STOCK ACQUISITION PERMIT.

Overview

The section appears in substantial conflict with AS 16.40.120. This section of law clearly was intended to provide aquatic farmers with access to "surplus" wild stocks for a broad range of uses in aquatic farming operations, but the proposed regulations severely limits access to these resources.

AS 16.40.120 (f) requires ADF&G to issue a stock acquisition permit if "(1) wild stock is necessary to meet the initial needs of farm or hatchery stock..." One of the most important needs of a clam farmer is to gain control over the plot of ground and stocks under cultivation. Every aquaculture or agriculture expert we've been able to query has strongly responded that it is virtually impossible for clam farmers to be successful unless they have complete control over the crop under cultivation. By retaining control over a portion of the stocks in the ground, the department will interfere with the farmer's need to gain control over the land leased from the state for aquatic farming.

Another way to view the dilemma facing aquatic farmers in these restrictions is to consider what similar conditions would do if imposed upon a grazing lease. Suppose the state told the lessee that they could plant new grass on the site, but they had to leave the native grass in place and their livestock could only eat the planted grass. How could the rancher distinguish between the native and planted grass? Would the planted seeds even produce if scattered among the well-established wild grass?

Subsection (a)

Writing the details of an application form in regulation is a bad idea as even minor changes to the form will require re-writing the regulations. This would be costly and time-consuming.

Recommendation:

Delete all language after: "An applicant shall apply for an aquatic stock acquisition permit on a form provided by the department."

Subsection (b)

This section restricts the farmer's ability to obtain control of all "standing stocks" on a farmsite, and would restrict the use of wild stocks to far more narrow purposes than envisioned by AS 16.40.120.

Recommendation: Delete.

Subsection (c)(5)

The proposed language in 5 AAC 41.245 violates AS 16.40.120 (g), which provides the farmer with property rights to all stocks acquired under a stock acquisition

permit. How can the department maintain control over a stock that is the private property of the farmer? Besides, the proposed conditions imposed by 5 AAC 41.245 are virtually impossible for farmers to meet.

Recommendation: Delete.

Subsection (f)

Availability of seed stock from a hatchery source is not a criteria articulated in AS 16.40.10. Where is the enabling language for this restriction? Likewise, the proposed restriction upon acquiring stocks to finance farming operations was not based upon the language contained in that section of law. Would this prohibit the farmer from selling "standing stocks" on a leased farmsite? Please provide citations and an explanation of enabling statutes.

Recommendation: Delete.

Subsection (g)(1)

Just because a regulatory management plan has been adopted doesn't mean the species is fully utilized. This should not be a part of the criteria.

Recommendation: Delete.

5 AAC 41.295. TRANSFER PERMITS.

Overview:

This section of the regulations largely institutionalizes long-standing practices regarding the movement of aquatic farm stocks, but codification does raise questions of fairness and equity.

When asked about the most significant disease problems facing Alaska's marine species, ADF&G's chief fish pathologist cited the lack of controls over resources harvested in the commercial fisheries. Specifically, Dr. Ted Meyer listed concerns about the holding of live fish in the marine environment by commercial fishermen. Dr. Meyers confirmed that the spread of bitter crab disease in Southeast was accelerated by unregulated practices in the crab fisheries. Dr. Meyers also said that a review of pathology records reveals that there have been very few disease problems identified in aquatic farm stocks.

This background begs the question of why isn't the commercial fishing industry subject to similar disease and genetics restrictions? Why are we being regulated when the risk appears to be negligible, and why are the higher risk commercial fisheries unregulated?

Subsection (a)

Transfers between adjoining farms would be affected by this language. Why should a transfer of 100 feet from one farm to an adjoining farm fall under these restrictions? We believe that spatial separation should be included.

Recommendation:

Insert the following language: "Shell or aquatic plant transport permits are not required for transfers between locations of less than five miles apart."

Subsection (f)(2)

While quarantine is SOP in hatcheries, this provision is impossible for aquatic farmers to meet. No stocks can be "cultured under total quarantine" in an unenclosed farming environment. This is possible only in upland tank operations.

Recommendation: Delete.

LEGISLATIVE INFORMATION OFFICE

Email: Ketchikan_LIO@legis.state.ak.us

50 Front St., Suite 203
Ketchikan, Alaska 99901

Phone: (907) 225-9675
Fax: (907) 225-8546

Senator Robin Taylor
State Capitol
Juneau, AK 99801

Re: ADF&G Mariculture Meeting, 01/08/01.

SenatorTaylor,

I am writing this letter in response to your request for information regarding the Fish and Game Mariculture meeting which took place on January 8th, 2001 at 6:30pm. Please be advised that my recall of these events is not clear enough to provide you with exact quotes from individuals, or even the exact sequence of the events.

I received a telephone call on the morning of January 8th from a constituent requesting that Ketchikan be added as a site for the ADF&G Mariculture Regulation Review hearing. Pursuant to this call, I contacted the Legislative Information Office in Juneau and our site was added.

As the meeting began that evening there were 4 people in the Ketchikan LIO to attend the meeting. There were three individuals with ties to the Mariculture industry, and the fourth was a reporter from the Ketchikan Daily News. The meeting was held at the Fish & Game office in Anchorage and chaired by Ken Imamura.

Mr. Imamura started off by welcoming the audience and stating the purpose of the meeting. He followed by noting that they (ADF&G) would be taking testimony via teleconference from Seward and Cordova. Since he had not mentioned Ketchikan as a site, I waited for a pause, introduced myself and informed the chair that I had 3 people that would like to testify in the meeting. At this point Ms. Shannon O'Fallon broke in and told me that the Department would not be taking testimony from our site because the meeting had not been 'noticed' in our community. In the pause that followed her response the Information Officer from Homer came online and said that she had people from Halibut Cove that called and wanted to dial in and wanted to testify as well. Ms. O'Fallon denied her request.

A short time passed during which the people at my office looked to me for a solution to the problem. They felt that they were being denied the opportunity to testify in a public hearing. Eventually, Mr. Imamura came online and announced that all testimony would be heard from all locations as time allowed.

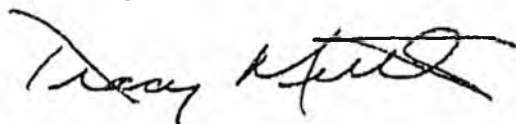
The participants from Ketchikan were allowed to testify at approximately 9:15 pm, and were the final testifiers.

As the meeting wrapped up, the constituents told me flatly that they were shocked by the behavior and attitude of Ms. O'Fallon and that they had never heard an official of the state address the public with such disrespect.

They were referring to statements made by Ms. O'Fallon as the meeting began, statements she made during a break when they (the Anchorage site) failed to mute their microphone, and statements she made during their testimony.

During the break I heard Ms. O'Fallon make derisive statements about the constituents in Ketchikan and the Legislative Information Offices. She managed to do this in one sentence. As noted above, she made some of these statements during a break when their site failed to mute their microphone.

Sincerely,

A handwritten signature in black ink, appearing to read "Tracy Mettler". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Tracy Mettler
Ketchikan LIO

DRAFT

Overall Themes of Proposed Regulations

Shift from Positive Structure to Negative

These regulations are antagonistic and appear designed to prevent the development of the aquatic farm industry. They certainly appear to violate the spirit of the aquatic farm act, which includes the following finding:

"It is the policy of the state to encourage the establishment and responsible growth of an aquatic farming industry in the state..."

This shift from positive to negative is apparent by examining the following sections of the regulations and the state law they are designed to implement.

5 AAC 41.240. REVIEW AND DETERMINATION:

"The commissioner shall not issue...an operational permit unless..."

"The commissioner will deny a permit if it is determined..."

Authorizing statute AS16.40.105:

"The commissioner shall issue permits..."

Imposition of New Standards

New methods of measuring the impacts of aquatic farming operations would be imposed.

5 AAC 41.280. PERMIT RENEWAL AND TRANSFER (e)

"If the commissioner determines that the operation...is adversely affecting fisheries, wildlife, or habitat and the adverse effects cannot be mitigated, its operation permit will not be renewed..."

5 AAC 41.400. DEFINITIONS.

"(1) 'adversely affect' means that an activity will diminish the abundance, diversity or productivity of fish and wildlife that permanently or seasonally occupy a site, or occur in its immediate vicinity..."

Authorizing statutes:

AS 16.40.110. Permit application, renewal and transfer. (b)

"An application for renewal or transfer must be accompanied by fees..., a report of disease history..., and evidence that satisfies the commissioner that the applicant has complied with the development plan..."

AS 16.40.105 (3):

"the proposed farm or hatchery may not significantly affect fisheries, wildlife, or their habitats in an adverse manner."

Significant to note is that the term "adversely affect" can mean a very minor impact, while the statute uses the modifier "significantly," which would set a higher threshold for measuring impacts.

ADF&G Lacks Statutory Authority

ASGA believes ADF&G lacks the authority to promulgate many sections of the regulations. For example:

5 AAC 41.240. REVIEW AND DETERMINATION. (b) "The commissioner will deny a permit if it is determined that

(2) the proposed site is

(A) used for the conduct or support of any traditional fishing operations, including the setting, operation, and retrieval of fishing gear, for anchoring, staging, or storage of vessels or other fishing gear, or for storage of a harvested product or gear;"

Authorizing statute: AS 16.40.105. Criteria for issuance of permits. (2)(A)

"the proposed farm or hatchery may not require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources;"

And, how about (B) which would veto any site in an area identified by SARDFa for surveys of geoducks, urchins or sea cucumbers? How can the site of a potential new, future fishery be considered a "traditional fishery or other existing use?"

Unreasonable, Unobtainable Standards Set

The farmer would be required to become scientists and conduct research projects, rather than running businesses to comply with portions of the proposed regulations. Consider this examples:

5AAC41.250. PERMIT CONDITIONS. (a)

"The commissioner may attach conditions to an aquatic farm...permit, including, but not limited to, requirements that a permit holder

(1) demonstrate that culture activities enhance the productivity of the cultured species on the farm or shellfish hatchery site by application of farming methods and practices..."

5AAC41.400. (9)

"enhance the productivity' means to increase the abundance or total biomass of a species, by increasing its survival or growth rates;"

How can a suspended culture farm meet such a condition? What are we going to measure the success of growing Pacific oysters against? Aquaculture practices in Australia? China? Great Britain? Or, do we need to go back to "natural" beaches in Japan? What are the growth and survival rates for littleneck clams? How about geoducks? Do we need to investigate a site for years to develop site-specific benchmark growth and survival rates?

Existing Operations Jeopardized

Unlike all past regulations imposed upon aquatic farmers in Alaska, these regulations fail to include provisions that ensure existing operations would not be affected. These sweeping new regulations apply to all farming operations as operational permits are renewed. This means farms developed prior to the new rules must reactively meet the new conditions.

In addition to the lack of so-called "grandfather rights," the proposed regulations would put every farm in jeopardy each time a permit is renewed or transferred. AS 16.40.105 sets out the criteria for initial selection of aquatic farming and hatchery sites, and it is not designed as a continuing gauntlet down which every farm must run each time an operation permit is renewed.

Jurisdictional Issues

The regulations would put ADF&G in the position of assuming authority vested in other agencies, specifically DNR, DEC and DGC. What provides ADF&G with the authority to require these other agencies to comply with the terms of a multi-agency application published in ADF&G regulations? What happens when the other agencies wish to change questions asked in the aquatic farm site application? Why should DNR have to request that ADF&G amend its regulations when DNR, which has the statutory responsibility of managing state lands, needs to change its section of the application? When did ADF&G get the authority to make land-use management or water quality decisions, such as those contained in 5AAC41.240?

Private Property Rights Nullified

The proposed language would have the effect of nullifying property rights granted by state law.

5AAC41.245. HARVEST OF WILD RESOURCES.

Subsection (a) says the farmer must obtain a stock acquisition permit for naturally occurring wild stocks. (b) says:

"An aquatic farm operator who has obtained a stock acquisition permit for the purposes of cultivating wild stock for harvest, must demonstrate that the rates of reproduction, recruitment of spat, survival, or growth of the wild stock has been enhanced by the application of farming practices. Wild stock that has been enhanced may only be harvested at a rate equivalent to the increase in abundance or biomass that can be directly attributed to the use of aquatic farming practices."

AS 16.40.120. Aquatic stock acquisition permits. (g)

"Aquatic plants and shellfish acquired under a permit issued under this section become the property of the permit holder and are no longer a public or common resource."

How can ADF&G continue to exert control over the stocks if they are the private property of the farmer? The proposed language is clearly in conflict with the authorizing statute and has the effect of nullifying property rights.

Cumbersome, Expensive Management System Created

The regulations are extremely cumbersome and detailed and may require frequent amendment. For example, 5 AAC 41.220 incorporates the minutiae of the multi-agency application spread over six pages of the proposed regulations. Other agencies we contacted say generally regulations simply state applications will be submitted on a form prescribed by the department, and that putting the details in regulation will require frequent and costly amendments.

ADF&G lacks the expertise and staffing to carry out the requirements of these regulations. The review and oversight requirements of these regulations will overwhelm the existing staff of ADF&G and the fiscal note is grossly inadequate. ADF&G's mariculture staff is overwhelmed with its current responsibilities, and couldn't begin to assume the additional responsibilities created by the regulations. For example, very few, if any, existing farms now have current operation permits, and the department appears to be falling farther behind in its ongoing responsibilities. The fiscal note is too small to provide any relief to the current one-person staff.

Hatcheries Treated as Farms

The regulations would have hatcheries applying under the same application as aquatic farms even though most would be land-based facilities and the impacts are vastly different than farming operations. In addition hatcheries would be managed under virtually the same rules as farms despite the major differences between the activities. Land-based hatcheries should be utilizing separate application forms and should be managed under rules applicable to their operations.

Regulations Fail to Even Mention Aquatic Plants

While the statutes clearly authorize the farming of aquatic plants, the regulations fail to even address kelp farming. While the regulations may be broad enough to encompass the farming of plants, the language addressing hatcheries all say very specifically "shellfish hatcheries." The apparent oversight may lead to new problems down the road.



Letter To The Editor

January 19, 2001

The issue of aquatic farming as recently presented by Alaska Department of Fish & Game Commissioner, Frank Rue, deserves some reasonable clarification.

Aquatic farmers statewide were offended by Mr. Rue's insinuating statement that farmers for clams were proposing to operate fisheries under the guise of aquatic farms, simply to harvest wild stocks. The members of our company, Alaska Trademark Shellfish, have made a huge personal investment, both in terms of time and money, by developing a comprehensive plan for clam culture in Southeast Alaska. We have studied husbandry techniques in Canada and Washington State, visited hatcheries and active farms in both places in our pursuit to bring this exciting opportunity to Alaska.

Our company secured a five year Alaska Science and Technology Foundation Grant in a sincere effort to develop geoduck aquaculture. The grant provided for the development of a husbandry manual for "SubTidal Geoduck Aquaculture in Southeast Alaska, and provided for a long term supply of brood stock to the state's new shellfish hatchery. The goal of the grant was to develop a commercial supply of geoduck seed stock and a husbandry manual that could be used by all Alaskans. Despite the fact our grant has been suspended for over a year, due to ADF&G's refusal to issue our operational permits, we continue to supply brood stock to the hatchery Pro Bono. When Mr. Rue implies that, we and others, have no intention of farming, we are truly offended.

At the state's new shellfish hatchery in Seward, staff are preparing to dump millions of valuable clam seed, due to ADF&G's refusal to issue aquatic farm operational permits.

Mr. Rue states that the Aquatic Farm Act did not contemplate "On Bottom" clam farming. This statement is simply not true, clam farming was and "is" a major part of the Aquatic Farm Act. I would suggest that Mr. Rue go back and get a historical perspective from former ADF&G staff and others who developed the law. The truth is clam farming has been going on in Alaska for years, as it does today. Many of us have enjoyed native little neck clam at several of our local restaurants provided by Alaskan clam farms for many years.

Mr. Rue claims that several geoduck farmers who have filed suit against the state have over \$5 million worth of natural stock on there sites. Again the state is contradicting it's own information. When ADF&G did their site evaluations of all the geoduck sites they

came up an estimated total bio-mass of 800,000lbs. The ex-vessel price in Alaska for geoducks during the 2000-2001 season was \$1.10 per lb. There is currently a 20 million pounds bio-mass of geoduck clams allocated to the current capture fishery, yet Alaskans receive very little benefit from this fishery.

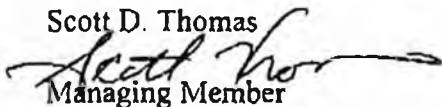
Its been more then 12 years since the Aquatic Farm Act was passed, and now ADF&G has convinced the Department of Law to challenge our own state law constitutionally. We believe the Attorney General's job is to enforce, and uphold the law despite the personal feeling of a few bureaucrats in one State agency.

What's really going on here is that the Alaska Department of Fish & Game is scrambling to pass regulation that will effectively put an end to shellfish farming in the state. This is being done in retaliation to law suits being brought against ADF&G by aquatic farmers, and a legislative audit that was conducted on ADF&G over their recent handling of aquatic farm applications. As one state mariculture expert recently said, "The proposed regulations essentially put a ban on shellfish farming in the state".

I do agree with Commissioner Rude, when he urges all Alaskans who have an interest in these issues to look past the rhetoric, and I agree we should all assist the "Industry" in continuing to develop the aquatic farming industry in a manner consistent with state law and good public policy.

For anyone looking for a fair and balanced perspective of the current aquatic farming issue in Alaska, the "Mariculture Audit" ~~that~~ will be released for public review on January 24, 2001. E-mail your request for a copy of the "Mariculture Audit" to the Alaska Division Of Legislative Audit: legaudit@legis.state.ak.us

Scott D. Thomas



Managing Member

Alaska Trademark Shellfish, LLC

Ketchikan, AK

Subject: [Fwd: aquaculture]

Date: Fri, 19 Jan 2001 17:22:30 -0900

From: Representative Lesil McGuire <Representative_Lesil_McGuire@legis.state.ak.us>

Organization: Alaska State Legislature

To: Jim_Pound@legis.state.ak.us, Sue_Stancliff@legis.state.ak.us

Subject: Re: aquaculture

Date: Fri, 19 Jan 2001 08:48:21 -0900

From: "Miof" <miof@gci.net>

To: <Representative_Lesil_McGuire@legis.state.ak.us>

----- Original Message -----

From: Miof

To: representative_lesil_mcguire@leg.state.ak.us

Cc: hartley@xyz.net ; rodger.painter

Sent: Thursday, January 18, 2001 3:48 PM

Subject: aquaculture

Dear Representative McGuire--

First off, I want to congratulate you on your election--although I am not one of your constituents, I was hoping that you would win the election--as you are a former student of mine. I am Marie Bader--when you had me for 8th grade PACT English I was Mrs. Richardson. Your class and you in particular were on of the high-lites of my 21-year teaching career. I am now "retired" although I truly have three full-time self-employed businesses going on. . . One of those is mariculture--specifically raising oysters and mussels in Kachemak Bay and being actively involved with the perennial problems of our regulatory agencies. This afternoon I am writing a letter which reflects the feelings of the other growers in Kachemak regarding the ADF&G's new draft regulation proposals. I will make sure that that letter is sent to you--Gary Seims, the president of our organization will sign it. However, right now I was prompted by others in our state organization to relay an incident regarding the Anchorage Hearing on those regulation proposals. The hearing was held at the F&G building on Raspberry Road, 6:30, on January 8th. It was a snowy, blowy night and my husband and I were a bit delayed by the road (5-8minutes max). When we arrived, the building was dark, and the door was locked. We questioned each other whether or not we had the right place, and were getting ready to leave and go to the Loussac. Then Ellen Simpson came down from the second floor--we banged on the door, she saw us, and let us in. . .apologizing for not having an attendant at the door as it was "after hours". During the meeting we learned that others, too, had been locked out--There was no sign on the door, nor any ADF&G person there to insure the door remained locked, but granting access for those attending the hearing. Ms. Simpson said the door-keeper had not arrived, but there were four--if not more--regulators there that certainly could have minded the door in ten-minute segments. I do NOT want to make a big deal out of this "over-sight"; however, this multi-year process of dealing with ADF&G has been continually peppered with this very attitude. I hope you will read the objections that our growers have voiced over these new regulatory proposals, and if EVER you want a historical perspective on this long saga, please do not hesitate to contact me. I would love to tutor to you once again!!! The mariculture industry is presently a tiny bright spot in environmentally-sound, coastal economic development. Please help us to move forward.

Sincerely,
Marie Bader
miof@gci.net
907-345-1864

MARIE BADER E-MAIL

Alaskan Shellfish Growers ASSOCIATION



January 18, 2001

Dear Aquatic Farmer or Supporter:

Regulations recently proposed by the Alaska Department of Fish and Game (ADF&G) essentially would mean an end to aquatic farming in Alaska. We are fighting these with everything in our arsenal, but we can't get any where without your active involvement and support.

We urge you to carefully read the proposed regulations and consider how they will affect your farming operation or ability to obtain new permits. Important to consider is that these new rules will apply to every farming operation, suspended culture oyster farms as well as on-bottom operations. Even existing oyster farms will have to meet the new definitions, siting criteria and other troubling provisions of the proposed regulations. We believe you will lose your farms if these regulations are adopted as proposed.

We need you to do the following:

- Send comments to ADF&G strongly opposing the regulations prior to the February 12, 2001, deadline. If you need help in identifying why the proposed regulations are so bad, please contact one of the following members of the ASGA board: Jon Agosti (224-5181 or qshatch@arctic.net); Jeff Hetrick (288-3667 or jjh@seward.net); Dave Chipman (424-5733 or hotelak@ptialaska.net); Tom Henderson (239-2222 or oysters57@aol.net); or myself (463-3600 or rodgerpainter@hotmail.com).
- Contact your local legislators to enlist their support in opposing the regulations.
- Send a contribution to ASGA to help fund our efforts to oppose the regulations, including support of existing lawsuits challenging ADF&G's authority to enact the primary thrust of the proposed regulations.

The latter may prove to be the most effective option at our disposal. The ASGA board of directors has come to the conclusion that ADF&G and the Department of Law, plan to push the regulations through the process with a minimum of change over any objections we may raise.

We have by no means pulled back in our efforts to fight through the regulatory and political process. We are seeking legislative support and involvement and a meeting with Governor Knowles, and the City of Seward is pressing Lt. Gov. Fran Ulmer. We also have requested a hearing by the Legislature's Regulation Review Committee to examine problems with the lack of adequate public involvement and review.

Next week, the Legislative Budget and Audit Committee is scheduled to release an audit of ADF&G's handling of the 1999 aquatic farm application process. The audit is expected to be critical

**AK SHELLFISH GROWERS ASSOC
LETTER - MEMBERS & SUPPORTERS**

of the agency, and the Department of Law had tried to delay the release. An unfavorable audit may be a useful tool in attracting additional media coverage and to attract the attention of Governor Knowles.

Despite some positive signs, we are not confident of our ability to stop what appears to be a freight train screaming out of control through politics and a thorough critique of the proposed regulations. Legal actions challenging ADF&G's authority may well prove to be the only effective option.

One lawsuit is at a critical juncture is an appeal of ADF&G's rejection of applications for geoduck sites. The case in Ketchikan Superior Court consolidates separate lawsuits filed by two groups of geoduck applicants and is moving toward judgment. The outcome of the two cases will determine whether ADF&G has misinterpreted state law and exceeded its authority in enacting policies effectively denying the use of standing stocks in on-bottom aquatic farming operations.

If the challenge is unsuccessful or collapses for lack of funds, major portions of ADF&G's proposed regulations will be validated. There will be nothing we can do to change that outcome short of filing a new lawsuit and duplicating an enormous amount of legal groundwork that already has been laid.

Scott Thomas approached ASGA board of directors representing the plaintiffs in the consolidated lawsuits to appeal for support. Without industry contributions, it is clear the lawsuit may falter at the altar of justice, short of a final judgment, and ADF&G will prevail through default.

The ASGA board of directors feels so strongly about the need to continue forward with the challenge that we each donated \$500 from our own pockets. In addition, past ASGA president Bob Hartley and Ron Long, Qutekcak Shellfish Hatchery operations manager, each contributed \$500. The \$3,500 is being provided to the plaintiffs to help keep the lawsuit moving forward.


Thomas and other plaintiffs have promised to repay ASGA for the contributions if they prevail and attorney's fees or damages are awarded. If this occurs, ASGA, in turn, will ask each contributor if they want a refund or prefer to leave it in the Mariculture Support Fund to finance future legal battles.

We are appealing to the industry for additional contributions and will approach municipalities and other groups for support. The level of response from the industry will have a great deal of influence over our ability to attract other donors. The ASGA board will decide how to allocate the additional funds as the rest of the battle unfolds. The fund-raising is necessary because our investments and the future of the industry are at stake.

These "Mariculture Support Fund" contributions will not be mingled with ASGA's general funds, and will be used solely for challenging ADF&G's authority to enact the proposed regulations. We will keep close track of all contributions and provide full accounting of all expenditures to the full membership.

We encourage you to do everything you can to oppose the regulations, including making a contribution. We hope your level of commitment matches ours.

Sincerely,



Rodger Painter
Vice President

Alaskan Shellfish Growers ASSOCIATION



Bob Hartley

January 18, 2001

Representative Lesil McGuire
Chair, Regulation Review Committee
Room 418, State Capitol
Juneau, AK 99801-1182

Dear Rep. McGuire:

The Alaskan Shellfish Growers Association (ASGA), which represents shellfish growers throughout Alaska, requests the assistance of the Regulation Review Committee in examining whether the Alaska Department of Fish and Game and the Alaska Department of Law has short-circuited the public involvement process in the development of proposed aquatic farming regulations.

We request you consider the following:

- The director, deputy director and mariculture coordinator of ADF&G's Division of Commercial Fisheries Management and Development refused ASGA's repeated calls to discuss concepts to include in draft regulations in the six months prior to their release. The denials came despite language in a \$100,000 capital budget appropriation saying they would work with stakeholders throughout the process. ADF&G and ASGA jointly developed the CIP language.
- ADF&G published the regulations just prior to the holidays with the shortest comment period allowed by law. The 30-day comment period was to end January 18. The 25-pages of proposed regulations would replace about two pages of regulations, and would completely change the nature of the current aquatic farm regulatory structure.
- ADF&G mailed aquatic farmers copies of the proposed regulations. These were put into the U.S. postal system, which historically is backlogged with mail during the holiday season. Many farmers did not receive the notices until after the first of the year. Some failed to receive the notices prior to public hearings scheduled for Jan. 4 and Jan. 8.
- ASGA requested that Juneau be added as a teleconference site for the Jan. 4 hearing in Juneau and Jan. 8 hearing in Anchorage. The requests were denied.
- A group of interested Ketchikan citizens requested the local LJO provide a teleconference link to the Anchorage hearing. When the Ketchikan LJO called

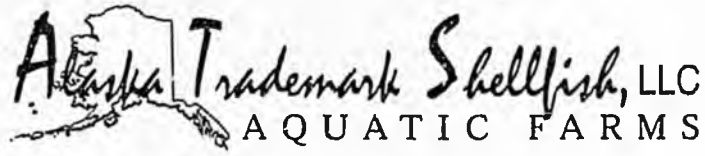
- into the hearing, assistant attorney general Shannon O'Fallon objected and attempted to exclude the site. When the LIO operator persisted and the public in Anchorage objected to the exclusion, Ms. O'Fallon relented. [See attached letter from Scott Thomas.]
- Several persons attending the Anchorage hearing found the doors locked shortly after the opening minutes of the hearing. No one responded to their knocks and calls. One couple was getting into their car when someone finally answered, and the other was turning away to leave when the doors were opened. {See attached letter from Marie Bader.}
 - ADF&G granted our request for additional time for public comments and added a hearing site in Juneau for Jan. 30. However, ADF&G and Department of Law officials refused to discuss any issues of substance related to the regulations, saying they were restrained from doing so by the Administrative Procedures Act. Since most other agencies generally are willing to discuss all issues related to proposed regulations throughout the process, ASGA has requested that the Department of Law provide specific citations of the APA supporting this position. We have yet to be provided an explanation.
 - Despite the additional comment period and the overwhelmingly negative public comments received to date, ADF&G has made it clear that it does not intend to revise the regulations. As verified in the attached email from Ken Imamura, ADF&G mariculture coordinator, ADF&G intends to deliver finished regulations to the Department of Law within seven calendar days of the close of the public comment period. This schedule will barely accommodate ADF&G's responsibility under the APA to summarize and respond to public comments in writing, let alone revise the proposed regulations.

As you can see from our comments, ADF&G and the Department of Law have given every indication that they are not interested in accommodating public involvement in the development of the regulations. I respectfully request you investigate the flawed process and hold committee hearings on the issue prior to the close of the public comment period on February 12, 2001. Thank you for considering this request.

Sincerely,



Rodger Painter



January 17, 2001

The Honorable Lesil McGuire
Alaska House of Representatives
State Capitol Building
Juneau, Alaska 99801-1182

Dear Representative McGuire:

My name is Scott Thomas, I am a life long resident of Ketchikan and an aquatic farmer. We are writing you to address concerns that I and other farmers have over Draft Regulations being proposed by the Alaska Department of Fish & Game against the aquatic farming industry.

Our greatest concern is over the entire body and spirit of the draft regulations. Here we have a complete redraft of a few pages of aquatic farm regulations that now consisted of 25 pages. The regulations are poorly written, antagonistic, confusing and contradictory to the aquatic farm act. We believe the real purpose of these regulations is shut down the shellfish farming industry. As one state mariculture expert recently said, "The draft regulations essentially put a ban on shellfish farming in the state".

We believe the regulations are also in retaliation to law suits filed against the Alaska Department of Fish & Game by aquatic farmers, and a legislative audit that was conducted on the ADF&G over their recent handling of aquatic farm applications.

ADF&G is attempting to fast track these regulations with help from the Department of Law, all with minimal public input and no legislative oversight. The DOL has actually discouraging public input. At a recent public hearing on January 8, 2001, I and several other farmers were at our local LIO in Ketchikan to present public testimony. At that hearing the state's attorney, Shannon O'Fallon, said we could not participate or testify because we were not in compliance with the state's public hearing act. After some debate Mr. O'Fallon finally granted us the privilege to participate and testify. In Anchorage, farmers who wanted to testify at this hearing were met with locked doors at the building where the meeting was taking place.

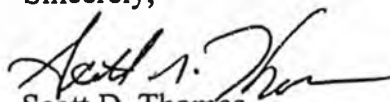
We also know that Shannon O'Fallon has recently met with staff from Legislative Budget and Audit and requested that they not release the mariculture audit for public review.

Office: 907-225-1171 • Fax: 907-225-1176 • e-mail: atsduc@ptialaska.net
945 Lincoln Street • Ketchikan, Alaska 99901

**SCOTT THOMAS LETTER
FAXED 1/14 MAILED 1/17**

The state is fast tracking what we believe to be illegal regulation, discouraging public testimony and attempting to suppress public information. At this time we are requesting that your committee review the regulations and hold hearings for the benefit of the people of the state and the legislature.

Sincerely,



Scott D. Thomas

Managing Member
Alaska Trademark Shellfish, LLC.

Cc: Rep. Joe Green
Rep. John Harris
Rep. Bill Williams
Rep. Reggie Joule
Rep. Mary Kapsner
Rep. Beth Kerttula
Rep. Norman Rokenberg
Rep. Drew Scalzi
Rep. Gary Stevens
Sen. Dave Donley
Sen. Lyman Hoffman
Sen. Randy Phillips
Sen. Gene Therriault
Sen. John Torgerson
Sen. Jerry Ward
Sen. Gary Wilkens
Sen. Robin Taylor
Sen. Kim Elton
Sen. Drue Pearce

rodger painter

From: Ken Imamura [Ken_imamura@fishgame.state.ak.us]
Sent: Thursday, January 11, 2001 3:42 PM
To: Geron Bruce; Steven G Mcgee; Ray RaLonde; Jcn Agosti; Rodger Painter; Jackie Timothy; Guyla L Mcgrady; Michael J Ostasz
Subject: Aquatic farm application workshops

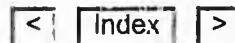
I realize that time is growing short, so I thought it might be better to suggest this now, rather than later. Comments on the draft regulations should be submitted by February 12 and the final proposed wording forwarded to the Dept of Law by the following Monday, February 19. At that time, everyone will have a better picture of what the submitted draft will include.

Would you be interested in participating in a workshop for prospective applicants to help them through the application forms, give them some perspectives on the available technology, and provide answers to questions applicants might have regarding any aspect of setting up an aquatic farm? We could schedule two-day seminars in late February or early March in Anchorage and in Juneau for presentations by DGC, ADEC, ADNR, and ADF&G on the specifics of the application form and the review process. Quetekcak Hatchery could provide insights into availability of seed stock of various species. ASGA could demonstrate what a farm needs in the way of gear, facilities, infrastructure, and logistics. Marine Advisory could provide technical or operations information. My hope is that we might be able to avoid some of the problems with applications we had in the last opening. I would propose using some of the Mariculture CIP provided by the Legislature last year to fund most of the costs of holding these workshops.

If you feel the agenda is too broad or cannot be brought together in about a month, please provide some input on when it might be best to hold such workshops. Please get back to me, even if it is to indicate that you are not interested.



Article last updated:
Friday, January 12, 2001 6:16 AM MST



Print this Article E-Mail to a Friend Link to this Article

Aquatic farm applicants sue state

The Associated Press

ANCHORAGE--A group of aquatic farm applicants has filed a lawsuit against the state charging that the Department of Fish and Game changed its policies preventing them from obtaining permits.

The lawsuit was filed in Ketchikan District Court by seven aquatic famers who claim that Fish and Game is preventing them from operating geoduck clam farms in southern Southeast Alaska. At issue is whether farm applicants are entitled to harvest geoducks already on their farm sites, Amy Miller of Coastalaska radio reported.

Scott Thomas, one of the plaintiffs, said some of the farmers intentionally chose sites that had populations of geoducks because the law requires it.

"What the Department of Fish and Game did, is after we applied for these permits, they went out and did surveys," Thomas said. "They wanted to see what was there. And they found that there was lots of Geoduck clams in some of these areas. And they said, 'this is a bunch of clams, and you guys are going to make a bunch of money, and we don't think that you guys should be able to do that.' And we said, 'well this is exactly what the law says we have to do.' We have to apply for areas that are suitable for the species that we are intending to cultivate."

What's more, Thomas said, Southeast has limited farming areas because for productive habitat a farm needs to be adjacent to a sandy beach. And much of the Alaska coastline is rocky.

According to the state attorney general's office, state law doesn't require that a proposed site have an existing stock.

"One of the criteria for reviewing applications is that you need to show that the site is suitable for farming, said Shannon O'Fallon, assistant attorney general. "Its true that if you've got geoducks that are growing there already its a pretty good indication that you might be able to grow geoducks there. However, we've had conversations with all the farmers and many if not all of them have said that having geoducks at a particular site is not the only indication of a successful site."

© 2000 MediaNews Group, Inc. and Fairbanks Publishing Company, Inc.



MARINE ADVISORY PROGRAM

UNIVERSITY OF ALASKA FAIRBANKS

SCHOOL OF FISHERIES AND OCEAN SCIENCES

2221 E. NORTHERN LIGHTS BLVD., #110
ANCHORAGE, ALASKA 99508-4140
PHONE: 907-274-9691
FAX: 907-277-5242

January 12, 2001

Representative Lesil McGuire, Chair
House Administrative Regulation Review
Alaska House of Representatives
State Capitol, Room 418
Juneau, AK 99801-1182

Raymond RaLonde, Aquaculture Specialist
Marine Advisory Program
University of Alaska
2221 E. Northern Lights Blvd. #110
Anchorage, Alaska 99508

Subject: Aquatic Farm Regulations public hearing process

Dear Representative McGuire:

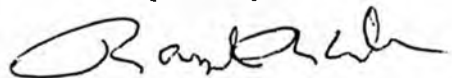
On January 8, 2001 I had the opportunity to testify at a public hearing regarding the recent draft Aquatic Farming regulations being proposed by the Alaska Department of Fish and Game. In attendance were citizens from Anchorage and scheduled teleconference sites at Homer, Seward, and Cordova. Ketchikan was patched in during the conference and was originally unscheduled to participate.

I have some concerns about irregularities of the hearing process and the requirements of hearing officers, Ken Imamura and Shannon O'Fallon to provide equal access in taking public testimony. Two specific points are:

1. Ketchikan was not scheduled to attend the teleconference. While I agree with the audience that attended the hearing in Anchorage, that Ketchikan should be able to make comments, I discovered the following day that citizens in Juneau were denied a request to participate. This process seems particularly unfair to allow one community to testify while disallowing another.
2. One participant, whose comments will be recorded in the hearing record, complained that the front door to the ADF&G office was locked at 6:35 while the hearing started at 6:30. As a result, we have no way of knowing if the locked door prevented people from testifying.

In the interest of obtaining adequate public testimony on this important topic, I request that this matter be investigated.

Respectfully,

A handwritten signature in black ink, appearing to read "Raymond RaLonde". The signature is fluid and cursive, with a large initial "R" and a long, sweeping tail.

Raymond RaLonde
Aquaculture Specialist



United States Department of Agriculture

**Farm
Service
Agency**

Alaska State FSA Office

800 West Evergreen, Suite 216, Palmer, Alaska 99645-6539

Telephone: 907-761-7700 FAX: 907-761-7789

January 9, 2001

Representative John Harris
State Capitol
Juneau, Alaska 99801

SUBJECT: Proposed Alaska Department of Fish and Game (ADF&G) regulations on
Mariculture

Dear Senator:

We have become aware of proposed regulations by the ADF&G that would make it extremely difficult for the farmers in the mariculture industry to continue operations. The regulatory jungle that these farmers have to negotiate presently is making the business difficult enough without adding more regulations. This creates unnecessary obstacles to a viable and growing industry. We have reviewed the proposed regulations, and feel that the requirements contained therein impose almost impossible demands upon new and existing producers. Also, the reasons for which a permit may be denied or terminated are so broad and vague that the commissioner could conceivably terminate all permits.

As you know, the farm loan program of the Farm Service Agency is designed to assist beginning farmers and other farmers in becoming successful owner operators of family sized farms. We believe mariculture farms fit very well into this program. We are supporting oyster operations located in Kachemak Bay, Prince William Sound, and Southeast Alaska. Therefore, we have a financial interest in this industry as well as a program interest.

We have observed mariculture operations grow from a novelty business, to a serious food production industry. The quality of the products, oysters, clams, scallops, and others that are grown in Alaska are unequaled anywhere else in the world. This is not just our claim, or the claim of the Alaska growers. Food industry distributors around the world are demanding these products. The lack of export presently is a function of the small size of the industry. Local demand is able to absorb the entire production. Expansion of present operations is very difficult due to the constraints placed upon the growers by existing regulations. Worldwide, shellfish production is expanding very rapidly and is hardly keeping up with the demand. Alaska has a tremendous opportunity to create a multimillion dollar industry that is not consumptive of resources and can coexist very well with all other used and the environment.

An Equal Opportunity Employer

USDA LETTER

It is our opinion that additional regulations are unneeded if the goal of state government is to insure that resources are protected and that all users have equal access. For example, if the ADF&G is concerned that the presence of a mariculture farm will detract from the natural beauty of the Alaska shoreline, they should consider the effect caused by one oyster/clam farm in Prince William Sound. This farm is a regular stop, and one of the most popular, for one of the ship cruise lines. The cruise line has indicated that this one stop is one of the more important selling points for the cruise, and the passengers do not feel that the existence of the farm detracts in any way from their experience. It is also our opinion that mariculture operations, where they are presently located and where they may potentially be located, have very little impact, if any, on commercial fishing, cultural practices, or wildlife including wild salmon and shorebirds.

We do not disagree that consultation with ADF&G should occur when regulation of the mariculture industry is considered. However, this significant expansion of regulation would seem to convey the attitude that the Alaska State Government does not want this industry. I do not believe, based on the governor's stated commitment to agricultural production, that this is the direction we want to go.

We would recommend that a mariculture board be established, similar to the fisheries board and the game board, that would have the authority to regulate this new and growing industry. The board should be comprised of members of the various agencies and growers. With this body established, regulations can be developed that will be based on sound information, discussed in an open forum, and implemented for the benefit of both the industry and the interests of other users.

We appreciate your efforts on behalf of the citizens of this great state and look forward to working with you and the appropriate agency personnel on this issue.

Sincerely,



Charles W. Thompson
Farm Loan Chief

cc: Rep. Scott Ogan
Rep. John Harris
Governor Tony Knowles

Online Public Notice

State of Alaska Online

Home Page	Go Back			
Submitted by	Date Modified	Ak Admin Journal	Attachments	Public (Web edit)
Mary Stone/OOC/ADFG on 12/19/2000 at 08:53 AM	12/19/2000 08:54:39 AM	[not printed]	No files attached	

Title 5 Of The Alaska Administrative Code, Aquatic Farming

Category: Notices of Proposed Regulations
Publish Date: 12/19/2000

Department: Fish & Game
Location: Statewide
Region: Statewide

Body of Notice:

The Commissioner of the Alaska Department of Fish and Game proposes to adopt regulation changes in Title 5 of the Alaska Administrative Code, dealing with aquatic farming, including the following:

The following regulations in chapter 41 are proposed to be changed to

- (1) 5 AAC 41.200. clarify the applicability of the regulations;
- (2) 5 AAC 41.220. clarify and make specific the requirements for applying for an aquatic farm operating permit;
- (3) 5 AAC 41.230. clarify and make specific when the department can request additional information from an applicant, and the consequences of an applicant's failure to provide the additional information;
- (4) 5 AAC 41.240. clarify and make specific the department's process for the review of applications, the criteria that will be applied when reviewing applications, decision deadlines, and requests for reconsideration;
- (5) 5 AAC 41.250. clarify and make specific the conditions that may be imposed in an aquatic farm operating permit;
- (6) 5 AAC 41.260. clarify the rules that govern inspection of an aquatic farm;
- (7) 5 AAC 41.270. clarify the annual reporting duties of an aquatic farm permit holder;
- (8) 5 AAC 41.280. clarify and make specific the rules that govern permit renewal and permit transfer;
- (9) 5 AAC 41.290, 5 AAC 41.300, and 5 AAC 41.400. clarify and make specific the process for applying for a stock acquisition permit, the criteria for issuing a stock acquisition permit, the purposes for which a stock acquisition permit will be issued, and the permit conditions that may be placed on a stock acquisition permit; and define needed terms.

Chapter 41 is proposed to be changed by adding the following new sections that would

ORIGINAL NOTICE

(10) 5 AAC 41.245. govern when and under what circumstances an aquatic farmer can have access to wild resources on the farm site;

(11) 5 AAC 41.295. govern the transfer of aquatic plants and shellfish from or between an aquatic farm or shellfish hatchery.

(12) 5 AAC 41.210 and 5 AAC 41.300. are proposed to be repealed. The intended effect of the repeal of 5 AAC 41.210 is to do away with an unnecessary regulation. The repeal of 5 AAC 41.300 is being proposed because the substance of the regulation has been incorporated into another section which is intended to make the process of the transfer of stock clearer

You may comment on the proposed regulation changes, including the potential costs to private persons of complying with the proposed changes, by submitting written comments to Kenneth Imamura, Mariculture Coordinator for the Alaska Department of Fish and Game at ADF&G, Division of Commercial Fisheries, Capital Office Park, 1255 W. 8th St., P.O. Box 25526, Juneau, Alaska 99802-5526; or by email to ken_imamura@fishgame.state.ak.us; or by fax to (907) 465-4168. The comments must be received no later than 5:00 p.m. on January 18, 2001.

Oral or written comments also may be submitted at hearings to be held on January 4, 2001 in Ketchikan, Alaska at the Alaska Department of Fish and Game conference room, at 2050 Sea Level Drive, from 6:30 p.m. to 10:00 p.m. and on January 8, 2001 in Anchorage, Alaska at the Alaska Department of Fish and Game Aerie conference room at 333 Raspberry Road from 6:30 p.m. to 10:00 p.m.

If you are a person with a disability who needs a special accommodation in order to participate in this process, please contact Kenneth Imamura at the above mailing or e-mail address, or fax number, or by calling (907) 465-6150 no later than December 28, 2000 ensure that any necessary accommodations can be provided.

For a copy of the proposed regulation changes, contact Kenneth Imamura at the above mail or e-mail address, or by fax number, or by calling (907) 465-6150, or go to the department's website at www.state.ak.us/local/akpages/FISH.GAME/adfghome.htm.

After the public comment period ends, the Alaska Department of Fish and Game will either adopt these or other provisions dealing with the same subject, without further notice, or decide to take no action on them. The language of the final regulations may be different from that of the proposed regulations. **YOU SHOULD COMMENT DURING THE TIME ALLOWED IF YOUR INTERESTS COULD BE AFFECTED.**

Statutory Authority: AS 16.05.050; AS 16.05.092; AS 16.40.100; AS 16.05.340; AS 16.05.160.

Statutes Being Implemented, Interpreted, or Made Specific: AS 16.40.100 - 16.40.199.

Fiscal Information: It is estimated that the proposed regulation changes will require increased appropriations as follows: FY 01, \$25K; FY 02, \$10K; FY 03, \$50K; FY 04, \$-0-.

DATE: _____ Ken Imamura
Mariculture Coordinator

For more information contact Kerri Tonkin, phone (907)465-6124, fax (907) 465-2604, e-mail kerri_tonkin@fishgame.state.ak.us.

ADDITIONAL REGULATIONS NOTICE INFORMATION (AS 44.62.190(d):

1. Adopting agency: Alaska Department of Fish and Game.

2. General subject of regulation: Aquatic Farming.

3. Citation of regulation: 5 AAC 41.200 - 5 AAC 41.400.

4. Reason for the proposed action:

compliance with federal law

compliance with new or changed state statute

compliance with court order

development of program standards

other: Re-write of regulations.

5. Program category and BRU affected: Department Programs

6. Cost of implementation to the state agency and available funding (in thousands of dollars)

Initial Year Subsequent

FY -01 Years 02

Cost \$ 50 \$ 10

General fund \$ 50 \$ 10

Federal funds \$ \$

Other funds

Permit Fees \$ 25 \$ -0-

7. The name of the contact person for the regulations:

Name Ken Imamura

Title Mariculture Coordinator

Alaska Department of Fish and Game

Address 1255 West 8th Street

Juneau, Alaska 99802

Telephone 907-465-6150

8. The origin of the proposed action:

staff of state agency

federal government

general public

petition for regulation change

other Commissioner of Alaska Department of Fish and Game

9. Date: December 15, 2000 Prepared by: _____

Name (typed) Ken Imamura

Title (typed) Mariculture Coordinator

Telephone: 907-465-6150

FISCAL NOTE

1. Regulation-adopting agency: Alaska Department of Fish and Game.
2. General subject of regulation: Aquatic Farming
3. Citation of regulation: 5 AAC 41.200 - 5 AAC 41.400.
4. Program category and BRU requiring appropriations: Mariculture/Aquatic Farming.
5. Estimated appropriations required (in thousands of dollars): Fifty.

Current FY_01__ Next FY_02__ Next FY _03__ Next FY _04__

100 PERSONAL SERVICES
200 TRAVEL 37 2 30
300 CONTRACTUAL 5 5
400 COMMODITIES 4 8 4
500 EQUIPMENT 11 11
600 LAND AND STRUCTURES
700 GRANTS, CLAIMS, ETC.
TOTAL 50 10 50 -0-

6. Funding (in thousands of dollars): Fifty.

GENERAL FUND 25 10 50 -0-
FEDERAL FUNDS
OTHER (specific source) Permitting Fees 25 25
TOTAL 50 10 50 25

7. Positions:

PERMANENT FULL-TIME
PART-TIME/SEASONAL
TOTAL NO. OF STAFF MONTHS

8. Description: Estimated operating costs for Mariculture Program that will be incurred applying new regulations.

9. Date: _____ Prepared by: _____

Ken Imamura
Telephone: (907) 465-6150

Revision History:

12/19/2000 08:53:17 AM by Mary Stone/OOC/ADFG/State/Alaska/US
12/19/2000 08:54:40 AM by Mary Stone/OOC/ADFG/State/Alaska/US

Online Public Notice

State of Alaska Online

Home Page	Go Back			
Submitted by	Date Modified	AK Admin Journal	Attachments	Public (Web edit)
Mary Stone/OOC/ADFG on 01/04/2001 at 10:35 AM		[not printed]	No files attached	

Aquatic Farming And Shellfish Hatcheries

Category: Notices of Proposed Regulations
Publish Date: 01/04/2001

Department: Fish & Game
Location: Statewide
Region: Statewide

Body of Notice:

Supplemental notice of Proposed Changes in the Regulations of the Alaska Department of Fish and Game

The Commissioner of the Alaska Department of Fish and Game proposes to adopt regulation changes in Title 5 of the Alaska Administrative Code, dealing with aquatic farming and shellfish hatcheries, including the following:

The following regulations in chapter 41 are proposed to be changed:

- (1) 5 AAC 41.200 - clarifies the applicability of the regulations;
- (2) 5 AAC 41.220 - clarifies and makes specific the requirements for applying for an aquatic farm or shellfish hatchery operating permit;
- (3) 5 AAC 41.230 - clarifies and makes specific when the department can request additional information from an applicant, and the consequences of an applicant's failure to provide the additional information;
- (4) 5 AAC 41.240 - clarifies and makes specific the department's process for the review of applications, the criteria that will be applied when reviewing applications, decision deadlines, and requests for reconsideration;
- (5) 5 AAC 41.250 - clarifies and makes specific the conditions that may be imposed in an aquatic farm or shellfish hatchery operating permit;
- (6) 5 AAC 41.260 - clarifies the rules that govern inspection of an aquatic farm or shellfish hatchery;
- (7) 5 AAC 41.270 - clarifies the annual reporting duties of an aquatic farm or shellfish hatchery permit holder;
- (8) 5 AAC 41.280 - clarifies and makes specific the rules that govern permit renewal and permit transfer;
- (9) 5 AAC 41.290 - clarifies and makes specific the process for applying for a stock acquisition permit, the criteria for issuing a stock acquisition permit, the purposes for which a stock acquisition permit will be issued, and the permit conditions that may be placed on a stock acquisition permit;

NOTICE EXTENSION

(10) 5 AAC 41.400 - defines needed terms.

Chapter 41 is proposed to be changed by adding the following new sections:

(11) 5 AAC 41.245 - governs when and under what circumstances an aquatic farmer can have access to wild resources on the farm site;

(12) 5 AAC 41.275 - governs an annual shellfish hatchery management plan;

(13) 5 AAC 41.295 - governs the transfer of aquatic plants and shellfish from or between an aquatic farm or shellfish hatchery.

(14) 5 AAC 41.210 and 5 AAC 41.300 are proposed to be repealed. The intended effect of the repeal of 5 AAC 41.210 is to do away with an unnecessary regulation. The repeal of 5 AAC 41.300 is being proposed because the substance of the regulation has been incorporated into another section which is intended to make the process of the transfer of stock clearer

This is a SUPPLEMENTAL NOTICE adding to the NOTICE OF PROPOSED CHANGES that was issued on December 15, 2000 concerning these proposed regulation changes. This SUPPLEMENTAL NOTICE is being issued to extend the comment period to February 12, 2001 and to announce another public hearing in Juneau, Alaska on January 30, 2001 in the Commissioner's conference room at the Alaska Department of Fish and Game Headquarters building at 1255 West 8th Street, from 2:00 p.m. to 6:00 p.m.

You may comment on the proposed regulation changes, including the potential costs to private persons of complying with the proposed changes, by submitting written comments to Kenneth Imamura, Mariculture Coordinator for the Alaska Department of Fish and Game at ADF&G, Division of Commercial Fisheries, Capital Office Park, 1255 W. 8th St., P.O. Box 25526, Juneau, Alaska 99802-5526; or by email to ken_imamura@fishgame.state.ak.us; or by fax to (907) 465-4168. The comments must be received no later than 5:00 p.m. on February 12, 2001.

Oral or written comments also may be submitted at hearings to be held in the following locations:

On January 4, 2001 in Ketchikan, Alaska at the Alaska Department of Fish and Game conference room, at 2030 Sea Level Drive, from 6:30 p.m. to 10:00 p.m.

On January 8, 2001 in Anchorage, Alaska at the Alaska Department of Fish and Game Aerie conference room at 333 Raspberry Road from 6:30 p.m. to 10:00 p.m. either in person or through a teleconference by calling one of the following Legislative Information Offices: Homer (907) 235-7878; Seward (907) 224-5066; and Cordova (907) 424-5461.

On January 30, 2001 in Juneau, Alaska at the Alaska Department of Fish and Game Headquarters building in the Commissioner's conference room from 2:00 p.m. to 6:00 p.m. in person or through a teleconference by calling one of the following Legislative Information Offices: Homer (907) 235-7878; Seward (907) 224-5066; Cordova (907) 424-5461; Kodiak (907) 486-8116, Ketchikan (907) 225-9675; Wrangell (907) 874-3013; Petersburg (907) 772-3741; or Sitka (907) 747-6276.

If you are a person with a disability who needs a special accommodation in order to participate in this process, please contact Kenneth Imamura at the above mailing or e-mail address, or fax number, or by calling (907) 465-6150 no later than January 15, 2001 to ensure that any necessary accommodations can be

provided.

For a copy of the proposed regulation changes, contact Kenneth Imamura at the above mail or e-mail address, or by fax number, or by calling (907) 465-6150, or go to the department's website at www.state.ak.us/local/akpages/FISH.GAME/adfghome.htm.

After the public comment period ends, the Alaska Department of Fish and Game will either adopt these or other provisions dealing with the same subject, without further notice, or decide to take no action on them. The language of the final regulations may be different from that of the proposed regulations. **YOU SHOULD COMMENT DURING THE TIME ALLOWED IF YOUR INTERESTS COULD BE AFFECTED.**

Statutory Authority: AS 16.05.050; AS 16.05.092; AS 16.40.100; AS 16.05.340; AS 16.05.160.

Statutes Being Implemented, Interpreted, or Made Specific: AS 16.40.100 - 16.40.199.

Fiscal Information: It is estimated that the proposed regulation changes will require increased appropriations as follows: FY 01, \$25K; FY 02, \$10K; FY 03, \$50K; FY 04, \$-0-.

If you have any questions please call Kerri Tonkin, Regulation Specialist at 465-6124 or e-mail kerri_tonkin@fishgame.state.ak.us.

Additional Regulations Notice Information (AS 44.62.190(d))

1. Adopting agency: Alaska Department of Fish and Game.
2. General subject of regulation: Aquatic Farming.
3. Citation of regulation: 5 AAC 41.200 - 5 AAC 41.400.
4. Reason for the proposed action:
 - compliance with federal law
 - compliance with new or changed state statute
 - compliance with court order
 - development of program standards
 - other: Re-write of regulations.
5. Program category and BRU affected: Department Programs
6. Cost of implementation to the state agency and available funding (in thousands of dollars)
 - Initial Year Subsequent
 - FY -01 Years 02
 - Cost \$ 50 \$ 10
 - General fund \$ 50 \$ 10
 - Federal funds \$ \$
 - Other funds
 - Permit Fees \$ 25 \$ -0-
7. The name of the contact person for the regulations:

Name Ken Imamura
Title Mariculture Coordinator, Alaska Department of Fish and Game

Address 1255 West 8th Street
Juneau, Alaska 99802
Telephone 907-465-6150

8. The origin of the proposed action:

- staff of state agency
- federal government
- general public
- petition for regulation change
- other Commissioner of Alaska Department of Fish and Game

9. Date: January 3, 2001

Prepared by: _____

Name (typed) Kerri Tonkin
Title (typed) Regulation Specialist
Telephone: 907-465-6124

Revision History:

01/04/2001 10:35:26 AM by Mary Stone/OOC/ADFG/State/Alaska/US

Home Page Notices by: Department | Location | Category | Title | Publish Date

ADF&G — Commercial Fisheries

STATEWIDE :

[Home](#) - [FAQ](#) - [Site Index](#) - [Search](#) - [Contact Us](#)

Statewide Aquatic Farming Production and Value at Point of Sale

Accounting Years 1996–1997, preliminary data for 1998

ALASKA STATEWIDE								Total
Year	Farms	Oysters (ea)	Sales	Clams (lb)	Sales	Mussels (lb)	Sales	Sales
1996	34	869,816	\$357,540	35,197	\$87,993	6,935	\$13,870	\$459,402
1997	38	860,773	\$357,100	35,014	\$87,535	2,098	\$4,196	\$448,831
1998**	39	892,366	\$367,261	26,006	\$83,321	4,989	\$13,193	\$463,776

SOUTHEAST ALASKA						Total
Year	Farms	Oysters (ea)	Sales	Clams (lb)	Sales	Sales
1996	10	616,781	\$250,000	35,197	\$87,993	\$337,993
1997	10	608,773	\$250,000	35,014	\$87,535	\$337,535
1998**	11	543,930	\$212,842	26,006	\$83,321	\$296,163

SOUTHCENTRAL ALASKA						Total
Year	Farms	Oysters (ea)	Sales	Mussels (lb)	Sales	Sales
1996	24	253,035	\$107,540	6,935	\$13,870	\$121,410
1997	28	252,000	\$107,100	2,098	\$4,196	\$111,296
1998**	28	340,436	\$154,420	4,989	\$13,193	\$167,613

STATEWIDE VALUE				Overall
Year	Oysters	Clams	Mussels	Total
1996	\$357,540	\$87,993	\$13,870	\$459,402
1997	\$357,100	\$87,535	\$4,196	\$448,831
1998**	\$367,261	\$83,321	\$13,193	\$463,776

DATA NOT FOR LEGAL INTERPRETATIONS

This page is also available as a PDF file* — [here](#).



* Adobe Acrobat PDF files require a free viewer available directly from [Adobe](#) (various platform versions available) or [from us](#) (Windows 95/98/NT version only). Need a hard copy of a publication? Contact [CF Publications](#).



[CF Home](#) | [Mariculture home](#) | [Shellfish Home Page](#) | [Top of Document](#)

Contact: Ken Imamura (ken_imamura@fishgame.state.ak.us)

Webmaster: (cfweb@fishgame.state.ak.us)

Copyright ©1999 Alaska Department of Fish and Game. All Rights Reserved.

Last updated: Friday, December 15, 2000 11:23:48

ADF&G — Commercial Fisheries

STATEWIDE :

[Home](#) - [FAQ](#) - [Site Index](#) - [Search](#) - [Contact Us](#)

Mariculture FAQ

Why is Alaska a good place to grow oysters?

Oysters can grow very well in cold water if there is abundant, high-quality plankton. Many estuaries in Alaska produce so much high-quality plankton during certain times of the year that Alaskan shellfish can match growth achieved by shellfish raised in warmer waters of the Pacific Northwest. Cold, clean water also reduces bacterial contamination, extending shelflife and assuring safety when eating cultured oysters, especially when eaten raw.

Why are Alaskan oysters so remarkable?

Pacific oysters, grown in warm waters, reach sexual maturation during their second summer of life, causing them to become soft and a milky color. These characteristics make the oysters unmarketable. In Alaska, because cold water retards maturation, high-quality oysters are available year round. Because they cannot reproduce, wild or naturally occurring, oysters are very uncommon in Alaska. All farmed Alaskan oysters are imported as spat (juvenile oysters) from Pacific Coast hatcheries.

What about Paralytic Shellfish Poisoning?

Paralytic Shellfish Poisoning (PSP) results from a specific type of plankton that filter feeders, like clams, oysters and mussels, sometimes ingest. These plankton can produce a toxin that is poisonous to humans. Each shellfish farm's product is closely monitored for PSP. All shellfish from a farm is lot tested using the Department of Environmental Conservation's Uniform Shellfish Sampling Plan for Paralytic Shellfish Poisoning. If PSP is found, the grower cannot ship/sell his product. There has never been a case of Paralytic Shellfish Poisoning in Alaskan-farmed shellfish.

How do you raise shellfish?

Generally, a shellfish farmer buys or collects juvenile shellfish, called "spat." He then puts them in special nets or lines (oysters and mussels) that are anchored in the ocean, or plants them on a beach (clams). The animals feed by filtering the abundant, high-quality plankton that naturally occur in the water. The farmer must keep the animals clean from algae and protect them from predators. He then harvests the animals when they grow to a marketable size.

How long does it take the shellfish to grow to market size?

- Oysters: 18-36 months
- Mussels: 18 months

What is a good farm site like?

A potential farm site should have good tidal flushing so that food (plankton) is readily carried to the site and waste is carried out to sea. The site must be protected from storms. The site must be reasonably close to the markets that will buy the shellfish. Staff should be able to live near the site.

Can I get rich from this?

The industry is fairly new to Alaska and start-up costs are high. So far, most farms are providing some income, but not enough to support a family. Of the 56 farms in Alaska, only 2 provide enough income to solely support the owners. Farms are usually in remote areas and have high transportation costs. Shellfish farming is also hard work; to be successful farms should be operated on a daily basis and worked year

round.

How long does the permitting process usually take?

You can apply for an Aquatic Farm Permit only during a 120-day opening established by the Department of Natural Resources. In the past this opening has occurred during January through April. The application is a consolidated packet combining all required state and federal permits. There is a \$100 application fee. It normally takes 10 months to go through the regulatory process. Permit applications are obtained from either:

Mariculture Officer
Alaska Dept of Natural Resources
Division of Mining, Land and Water
550 W. 7th Avenue, Suite 900C
Anchorage, AK 99501-3577
(907)269-8543 (907)269-8913 FAX

Mariculture Coordinator
Alaska Dept of Fish and Game
Div. of Commercial Fisheries Management and Development
P.O. Box 25526
Juneau, AK 99802-5526
(907)465-6150 (907)465-4168 FAX

What is required by the Department of Environmental Conservation?

A growing area classification must be completed before shellfish may be harvested for sale. This may start anytime after the permits/leases have been obtained from the Department of Fish and Game and Natural Resources. Classification is a two-part process, the water quality survey and shoreline survey. The water quality survey consists of the collection of water samples that are taken from designated stations. The number of water samples can vary from 15 to 30 depending on the area classification. Fifteen samples are required for a remote area with no human habitation, whereas thirty remote area with no human habitation, whereas 30 samples are required for an approved area where human habitation is present.

The shoreline sanitary survey is a physical onsite evaluation of all actual and potential sources of pollution that may affect the growing area. Water samples may be taken during the shoreline survey. Water samples can be taken by a trained individual or by ADEC personnel. ADEC personnel must perform all shoreline work. Both the water quality and shoreline survey results must be satisfactory in order for the area to be classified.

Are there any oyster hatcheries in Alaska?

Yes, one hatchery and two nurseries. Hatcheries spawn adult oysters and produce microscopic oyster spat. Nurseries grow these spat to a large enough size for shellfish farmers to place in nets or hang on lines.

What kind of shellfish/aquatic plants are being raised in Alaska?

In order of importance to the shellfish farming industry: Pacific oysters (*Crassostrea gigas*), blue mussels (*Mytilus edulis*), littleneck clams (*Protothaca staminea*), scallops (*Chlamys rubida*, *Chlamys hastata*, *Crassidoma giganteum*, *Patinopecten caurinus*), bull kelp (*Nereocystis leutkeana*), and *Porphyra* species.

Can I raise fish?

No. Alaska statute 16.40.210 prohibits finfish farming. However, Alaska does allow nonprofit ocean ranching. Finfish farming is defined as growing or cultivating finfish in captivity. Ocean ranching, on the other hand, involves releasing young fish into public waters and being available for harvest by fishermen upon their return to Alaskan waters as adults.